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2022 WL 1132317
Supreme Court of Nevada.

Keith Junior BARLOW, Appellant,
v.
The STATE of Nevada, Respondent.

No. 77055
|
FILED APRIL 14, 2022

Appeal from a judgment of conviction, pursuant to a jury verdict, of home invasion while in possession of a firearm, burglary while in possession of a firearm, assault with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Attorneys and Law Firms

JoNell Thomas, Special Public Defender, Alzora B. Jackson and Monica R. Trujillo, Chief Deputy Special Public Defenders, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Marc P. DiGiacomo, Chief Deputy District Attorney, and John Niman, Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, EN BANC.[1]

[1] The Honorable Douglas W. Herndon, Justice, did not participate in the decision of this matter.

OPINION

By the Court, SILVER, J.:

***1** A jury found appellant Keith Barlow guilty of multiple charges and sentenced him to death for murdering two people. During the guilt phase of Barlow's trial, the State presented overwhelming evidence that he broke into the victims' apartment and shot each of them multiple times. Before penalty phase closing arguments, the district court prohibited Barlow from arguing that if a single juror determines that there are mitigating circumstances sufficient to outweigh the aggravating circumstances, the death penalty is no longer an option and the jury must then consider imposing a sentence other than death. The district court reasoned that if the jury cannot reach a unanimous decision as to the weighing of aggravating and mitigating circumstances, the result is a hung jury. We take this opportunity to clarify that when a jury cannot reach a unanimous decision as to the weighing of aggravating and mitigating circumstances, the jury cannot impose a death sentence but must consider the other sentences that may be imposed. The jury is hung in the penalty phase of a capital trial only when it cannot unanimously agree on the sentence to be imposed. Thus, we conclude that the district court abused its discretion by prohibiting Barlow's argument. This error, in conjunction with others that occurred in the penalty phase, worked cumulatively to deprive Barlow of a fair penalty hearing. But we conclude that no relief is warranted on Barlow's claims regarding the guilt phase. Accordingly, we affirm the judgment of conviction in part, reverse it in part, and remand for a new penalty hearing.

FACTS AND PROCEDURAL HISTORY

Barlow and the female victim Danielle Woods maintained a tumultuous, off-and-on romantic relationship. Woods also had a romantic relationship with the male victim Donnie Cobb and lived in his apartment. On February 1, 2013, Woods' niece Tamara Herron encountered Barlow, who asked her about Woods' whereabouts. Herron testified that Barlow appeared angry and agitated and told her that he was tired of the "games" Woods was playing. When Herron told Barlow she did not know Woods' whereabouts, he stated that he knew Woods was with Cobb.

Two days later, in the early morning hours, Barlow accosted Woods outside of a convenience store near Cobb's apartment. Barlow screamed at Woods, threatened her with an electronic stun device, and attempted to force her into his vehicle. When Cobb intervened, Barlow drew a firearm and aimed it at Cobb. Barlow told Woods and Cobb that he would "be back" and then he left the scene. Law enforcement responded to the incident and attempted to contact Barlow but could not locate him. About two hours after the incident, Barlow went to Cobb's apartment, broke in the door, and shot Woods and Cobb to death.

Responding to a report of gunshots, police officers discovered the dead bodies of Woods and Cobb. Law enforcement recovered a total of eight spent bullet casings from Cobb's apartment, including casings found in Woods' hair and on her chest. The ammunition was branded as Blazer .40 caliber Smith & Wesson casings. A Ruger .40 caliber semiautomatic handgun was found in Barlow's vehicle. The gun's magazine contained Blazer .40 caliber Smith & Wesson ammunition. A forensic examiner identified Barlow's thumbprint on the magazine loaded in the firearm. Additional testing also matched DNA found on the magazine to Barlow. A forensic examiner conducted a microscopic comparison of the casings found at the scene and the test-fired casings from the Ruger handgun. That analysis showed that the casings recovered from the scene were fired by the handgun found in Barlow's vehicle.

***2** The State charged Barlow with home invasion while in possession of a firearm, burglary while in possession of a firearm, assault with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon and filed a notice of intent to seek the death penalty for both murders.[2] The jury returned guilty verdicts on all counts. Following the penalty hearing, the jury sentenced Barlow to death for both murders. This appeal followed.

[2] The State also charged Barlow with possession of a firearm by a prohibited person and unlawful possession of an electronic stun device but later dismissed those charges.

DISCUSSION

Penalty phase claims

Because the primary issues addressed in this opinion—the limitations placed on Barlow's penalty phase argument, prosecutorial misconduct, the great-risk-of-death aggravating circumstance, and cumulative error—concern the penalty phase of the trial, we focus on that phase of trial first. We then address the guilt-phase claims.

Limitation of Barlow's penalty-phase argument

Barlow argues that the district court erred in prohibiting him from making an argument based on a portion of the capital instruction this court provided in *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), *overruled on other grounds by Lisle v. State*, 131 Nev. 356, 366 n.5, 351 P.3d 725, 732 n.5 (2015). We review a district court's determination about "the latitude allowed counsel in closing argument for abuse of discretion." *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 704, 220 P.3d 684, 693 (2009) (internal citation omitted).

Barlow, relying upon *Evans*, argues that he should have been allowed to argue that if at least one juror decides that there are mitigating circumstances sufficient to outweigh the aggravating circumstances, he could not be sentenced to death and the jury must then consider imposing a punishment other than death. The State contends that despite the *Evans* instruction saying just that, the district court properly prohibited the argument because a disagreement as to the weighing of aggravating and mitigating circumstances results in a hung jury such that the jury could not consider any other punishment. We hold that if at least one juror finds there are mitigating circumstances sufficient to outweigh the aggravating circumstances, the jury cannot impose a death sentence but nonetheless must consider the other sentences. Therefore, we conclude that the district court abused its discretion in prohibiting Barlow from making that argument to the jury. *See Collier v. State*, 101 Nev. 473, 481-82, 705 P.2d 1126, 1131-32 (1985) (explaining that the district court abused its discretion by placing undue limits on the argument of counsel); *cf. Lloyd v. State*, 94 Nev. 167, 169, 576 P.2d 740, 742 (1978) ("[I]t is improper for an attorney to argue legal theories to a jury when the jury has not been instructed on those theories.").

In *Evans*, this court set forth a jury instruction for use in capital penalty hearings. 117 Nev. at 635-36, 28 P.3d at 516-17. That instruction provides, in part: "if at least one of you determines that the mitigating circumstances outweigh the aggravating, the defendant is not eligible for a death sentence," and, if the jury makes that determination, they must then "consider all three types of evidence in determining a sentence other than death." *Id.* at 636, 28 P.3d at 517. While the *Evans* instruction primarily addresses the jury's consideration of evidence during deliberations, it also provides guidance about the steps the jury must follow before imposing a sentence. *Id.* at 635-36, 28 P.3d at 516-17.

***3** The *Evans* instruction accurately reflects the statutory scheme for capital penalty hearings. Under

NRS 175.554(1), the district court must instruct the jury on the aggravating and mitigating circumstances alleged by the parties. The jury is charged to first determine unanimously if the State has proved at least one aggravating circumstance beyond a reasonable doubt. NRS 175.554(2)(a), (4). Next, each juror must individually determine whether any mitigating circumstances exist. NRS 175.554(2)(b); *see also* *Jimenez v. State*, 112 Nev. 610, 624, 918 P.2d 687, 696 (1996) ("There [is] no constraint on the right of individual jurors to find mitigators, such as a requirement of unanimity or proof by a preponderance of the evidence or any other standard."). The jurors then weigh the aggravating and mitigating circumstances on their individual moral scales as part of "the selection phase of the capital sentencing process ... to determine what penalty shall be imposed." *Lisle*, 131 Nev. at 366, 351 P.3d at 732 (internal quotation marks omitted); *see also* *Jeremias v. State*, 134 Nev. 46, 58-59, 412 P.3d 43, 54 (2018) (reaffirming that weighing the aggravating and mitigating circumstances is part of the selection phase, which does not require proof beyond a reasonable doubt). If the jurors unanimously agree that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they may impose a death sentence, NRS 175.554(4), but they are not obligated to do so, *Bennett v. State*, 111 Nev. 1099, 1110, 901 P.2d 676, 683 (1995) (observing that even if jurors unanimously find there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they "still ha[ve] the discretion to return a penalty other than death"). In contrast, if the jurors do not unanimously agree that there are no mitigating circumstances sufficient to outweigh the aggravating circumstances, they cannot impose a death sentence. NRS 200.030(4)(a). In other words, if even one juror determines there are mitigating circumstances sufficient to outweigh the aggravating circumstances, the death penalty is no longer an option. *See* *Bennett*, 111 Nev. at 1110, 901 P.2d at 683 ("[T]he death penalty is only a sentencing *option* if, after balancing and evaluating the aggravating and mitigating circumstances, the former are found to outweigh the latter.") *see also* *Rippo v. State*, 122 Nev. 1086, 1095, 146 P.3d 279, 285 (2006) (disapproving of a jury instruction that "implied that jurors had to agree unanimously that mitigating circumstances outweigh aggravating circumstances, when actually a jury's finding of mitigating circumstances in a capital penalty hearing does not have to be unanimous" (internal quotation marks omitted)); *Servin v. State*, 117 Nev. 775, 786, 32 P.3d 1277, 1285 (2001) (providing that if the jurors find the defendant not eligible for the death penalty, they "may consider 'other matter' evidence under NRS 175.552 in deciding on the appropriate sentence"). But in those circumstances, the jury can still impose a lesser sentence.[3] *See* NRS 200.030(4)(b). A hung jury occurs only when the jury cannot unanimously agree on the sentence to be imposed. *See* NRS 175.556(1) (providing the procedure in a capital case when a jury cannot render a unanimous verdict as to the sentence to be imposed). Accordingly, the district court abused its discretion by prohibiting Barlow from making this argument regarding the weighing determination.[4] In this case, the district court correctly instructed the jury before deliberations began, and the jury unanimously found that the aggravating circumstances outweighed the mitigating circumstances. See *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (recognizing that jurors are presumed to follow their instructions). Therefore, we conclude that the error was harmless, *see* NRS 178.598, but, as discussed below, contributed to the cumulative error during the penalty hearing.

[3] To the extent the State asserts that this interpretation of the *Evans* instruction permits a single juror to usurp the process by announcing at the start of deliberations that he or she believes the mitigating circumstances are sufficient to outweigh the aggravating, thus foreclosing any further discussion, we do not share that concern. The *Evans* instruction lays out the process the jury must follow in considering the evidence presented at the penalty phase. Following the process set forth in that instruction, reasonable jurors would understand that the weighing decision is made only after full, good faith deliberations as to the existence of aggravating and mitigating circumstances. *See* *Evans*, 117 Nev. at 635-36, 28 P.3d at 516-17; *see also* NRS 175.111 (requiring jurors to swear to "truly try" a case and return "a true verdict"); *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (providing that "this court generally presumes that juries follow district court orders and instructions").

[4] To the extent Barlow contends the district court erred by denying his request to amend the non-death verdict forms to reflect the *Evans* language, we discern no abuse of discretion because the verdict must include a weighing determination only when the jury imposes a death

sentence. *See* NRS 175.554(4). But given the technical and precise nature of the capital sentencing process, we provide a verdict form in an appendix to this opinion. Using this verdict form in future capital penalty hearings will aid the jurors and provide a clear record that they followed the necessary steps in determining the appropriate sentence.

Prosecutorial misconduct

Barlow argues that prosecutorial misconduct during the penalty phase warrants reversal. In reviewing claims of prosecutorial misconduct, this court must determine whether the prosecutor's conduct was improper and, if so, whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). If the error was preserved, reversal is not warranted where the misconduct is harmless. *Id.* at 1189, 196 P.3d at 477. Misconduct of a constitutional nature does not warrant reversal if it is harmless beyond a reasonable doubt. *Id.* at 1189, 196 P.3d at 476. And errors of a nonconstitutional nature require reversal "only if the error substantially affects the jury's verdict." *Id.*

***4** Barlow challenges the prosecutor's argument that had Barlow killed only Woods, a life sentence might be appropriate but "if you decide that, what justice does Donnie Cobb get?" After Barlow objected, the prosecutor defended his argument: "I said, if there had been only one victim in this case" then "your verdict would have been life without. But because there's two, there's got to be more."

We conclude that the prosecutor's comments improperly "suggest that justice requires a death sentence because the defendant killed more than one person." *Jeremias*, 134 Nev. at 57, 412 P.3d at 53. The prosecutor implicitly argued that Barlow deserved the death penalty because he killed two people by arguing that a sentence of life without the possibility of parole might be appropriate if Barlow only killed Woods but was inappropriate because he also killed Cobb. We conclude that implication is just as improper as an explicit argument that Barlow deserved the death penalty simply because he killed two people. While we believe the prosecutor's comment was improper, the prosecutor also told the jury that the State would respect whatever verdict the jury rendered and that it would be "fine" if the jury decided Barlow did not deserve the death penalty, and the district court instructed the jury that the law never requires a death sentence. Thus, we conclude this error is harmless after considering the remark in context.[5] *See Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) ("[S]tatements should be considered in context, and a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." (internal quotation marks omitted)). However, as discussed below, the prosecutor's improper argument contributed to the cumulative error during the penalty hearing.

[5] Barlow also ascribes misconduct to the prosecutor (1) misstating the definition of mitigating circumstances, (2) arguing for imposition of the death penalty because Barlow should not be allowed to mistreat prison staff, (3) comparing him to his sister, and (4) asking the jurors to perform their duty. Having reviewed each alleged instance in context, we discern no misconduct. *See Burnside v. State*, 131 Nev. 371, 403-04, 352 P.3d 627, 649-50 (2015) (concluding that a prosecutor did not make improper comments after considering them in context); *Hernandez v. State*, 118 Nev. 513, 526, 50 P.3d 1100, 1109 (2002) (finding no misconduct where "the prosecutor was fairly responding to an earlier contention by defense counsel").

Great-risk-of-death-to-more-than-one-person aggravating circumstance

Barlow argues that the great-risk-of-death-to-more-than-one-person aggravating circumstance under NRS 200.033(3) is invalid for two reasons: the State did not provide sufficient notice and insufficient evidence supports it.

Inadequate notice of the State's alternative theory

SCR 250(4)(c) provides that a notice of intent to seek the death penalty "must allege all aggravating circumstances which the state intends to prove and allege with specificity the facts on which the state will rely to prove each aggravating circumstance." In other words, "a defendant should not have to gather facts to deduce the State's theory for an aggravating circumstance; the supporting facts must be stated directly in the notice itself." *Nunnery v. State*, 127 Nev. 749, 779, 263 P.3d

235, 255 (2011).

***5** The State's notice of intent to seek the death penalty alleged that Barlow knowingly created a great risk of death to more than one person based on the close proximity of the victims to one another when he shot them. While the State argued that theory at trial, it also argued that Barlow created a great risk of death to more than one person because a bullet went through a wall, out the window of an adjoining apartment, and into a public area. But the State never alleged in the notice that it would rely on the bullet exiting the apartment and the resulting risk of death to other residents to prove this aggravating circumstance.

The State asserts that this case is similar to *Nunnery* where this court found the notice of intent to seek the death penalty contained sufficient detail for the great-risk-of-death aggravating circumstance. The State's reliance on *Nunnery* is misplaced. Unlike the notice in *Nunnery* that alleged "that the [great-risk-of-death] aggravator was based on the crimes committed by the defendant in a location 'which the public has access to and which several citizens are located nearby,' " 127 Nev. at 780, 263 P.3d at 256, the notice in this case made no mention of the bullet entering a public area or that other persons were in that area. Accordingly, because the State did not provide adequate notice of the public-area theory, the State improperly argued those facts in support of the great-risk-of-death aggravating circumstance. See *Hidalgo v. Eighth Judicial Dist. Court*, 124 Nev. 330, 339, 184 P.3d 369, 376 (2008) (explaining that a notice of intent to seek the death penalty functions primarily "to provide the defendant with notice of what he must defend against at trial and a death penalty hearing"). While we find the presentation of the unnoticed theory improper, the State alleged six aggravating circumstances and only mentioned the public-area theory briefly when describing the evidence in aggravation. Thus, the brief remarks on the unnoticed theory were harmless beyond a reasonable doubt. *See Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (recognizing that a prosecutor's improper comments that are "merely passing in nature" are harmless beyond a reasonable doubt). But again, they contributed to cumulative error during the penalty hearing.

Sufficiency of the evidence

Next, Barlow contends that insufficient evidence supports the great-risk-of-death aggravating circumstance. We review the record to determine whether evidence supports the jury's finding of an aggravating circumstance beyond a reasonable doubt. *Leslie v. State*, 114 Nev. 8, 20, 952 P.2d 966, 975 (1998). Having concluded that the State failed to adequately notice its public-area theory, we look only to the evidence supporting the theory the State did include in the notice of intent to seek the death penalty.

NRS 200.033(3) provides that first-degree murder is aggravated if it "was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person." This court has concluded that the great-risk-of-death aggravating circumstance includes "a 'course of action' consisting of two intentional shootings closely related in time and place," *Hogan v. Warden*, 109 Nev. 952, 957, 860 P.2d 710, 714 (1993) (quoting *Hogan v. State*, 103 Nev. 21, 24, 732 P.2d 422, 424 (1987)) (rejecting challenge to great-risk-of-death aggravating circumstance where the defendant shot his female companion and her daughter but only one of them died), even when only the deceased victims were put at risk by that course of action, *Flanagan v. State*, 112 Nev. 1409, 1420-21, 930 P.2d 691, 698-99 (1996) (upholding great-risk-of-death aggravating circumstance where defendants shot and killed two people in a home with no one else present). But in *Flanagan*, we suggested that the great-risk-of-death aggravating circumstance no longer applies in the latter circumstance for murders committed after October 1, 1993, given the Legislature's adoption of the multiple-murder aggravating circumstance in 1993. 112 Nev. at 1421, 930 P.2d at 699. Specifically, we explained that the amendment, which provided that first-degree murder is aggravated if the defendant "has, in the immediate proceeding, been convicted of more than one offense of murder in the first or second degree," NRS 200.033(12), "apparently requires that for murders committed after October 1, 1993, the aggravator set forth in NRS 200.033(12), rather than the one in NRS 200.033(3), be applied to cases such as this one" where the defendant's course of action created a great risk of death only to the murder victims, *Flanagan*, 112 Nev. at 1421, 930 P.2d at 699. Thus, absent evidence that Barlow put other people at risk, the great-risk-of-death aggravating circumstance should not have been applied in this case. *See Leslie*, 114 Nev. at 21-22, 952 P.2d at 975-76 (concluding that the State did not prove defendant knowingly created a great risk of death to others because no evidence showed defendant knew other people were in a room where a

bullet entered through the wall); *Moran v. State*, 103 Nev. 138, 142, 734 P.2d 712, 714 (1987) (holding that aggravating circumstance did not apply where no other persons were in the apartment, no neighbor was at immediate risk of death, and the defendant was not aware of any other person within close proximity when he shot the victim).

***6** The two murdered victims being near each other when shot by Barlow constitutes the only properly noticed evidence. Therefore, we conclude that the State did not present sufficient evidence to support the jury's finding of the great-risk-of-death aggravating circumstance beyond a reasonable doubt.[6] However, "[a] death sentence based in part on an invalid aggravator may be upheld either by reweighing the aggravating and mitigating evidence or conducting a harmless-error review." *Archanian v. State*, 122 Nev. 1019, 1040, 145 P.3d 1008, 1023 (2006).

[6] Having found that the State did not present sufficient evidence to prove this aggravating circumstance, we need not consider Barlow's claim that it is duplicative of the multiple-murder aggravating circumstance under NRS 200.033(12).

Here, we conclude the error in presenting the invalid aggravating circumstance was harmless beyond a reasonable doubt. Barlow did not contest that the State proved five other aggravating circumstances. Each of those aggravating circumstances was more compelling than the invalid aggravating circumstance: Barlow was convicted in the immediate proceeding of more than one offense of murder, the murders were committed during a home invasion or burglary, and Barlow had been convicted of three violent felonies—assault with the use of a deadly weapon in the instant case, a prior conviction for attempting to murder Woods, and a prior conviction for breaking into an apartment and shooting his ex-girlfriend's new boyfriend. Accordingly, the invalid aggravating circumstance did not constitute a significant part of the State's case. *Cf. State v. Haberstroh*, 119 Nev. 173, 184, 69 P.3d 676, 683 (2003) (providing that the prosecutor emphasizing an invalid aggravating circumstance caused "concern that this argument likely induced the jurors to rest their sentence to a significant degree on the invalid aggravator"). And the jurors found only three mitigating circumstances—Barlow received an honorable military discharge, he sought help for mental health, and his daughters' love. Thus, we conclude beyond a reasonable doubt that, absent the invalid aggravating circumstance, the jury still would have found the mitigating circumstances were insufficient to outweigh the aggravating circumstances. *See Archanian*, 122 Nev. at 1040-41, 145 P.3d at 1023; *see also Clemons v. Mississippi*, 494 U.S. 738, 750, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (observing "nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence"). Because the invalid aggravating circumstance did not affect the jury's sentencing determination, the error was harmless, but we further conclude that it contributed to the cumulative error in the penalty hearing.

Cumulative error in the penalty phase

Barlow argues that, even if harmless individually, cumulatively the errors during the penalty phase warrant relief. "The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Butler v. State*, 120 Nev. 879, 900, 102 P.3d 71, 85-86 (2004) (internal quotation marks omitted) (discussing cumulative error in appellant's penalty hearing). Generally, when considering a cumulative error claim, we look to the nature and number of errors, the evidence presented, and the gravity of the consequences a defendant faces. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (discussing cumulative error).

***7** Here, the following errors occurred: the district court improperly prohibited Barlow from making an important and legally accurate argument regarding the jury's deliberative process, the prosecutor improperly implied to the jury that a life sentence may have been appropriate if Barlow had only killed Woods but was inappropriate because he also killed Cobb, and the invalid great-risk-of-death aggravating circumstance and the related improper argument. And Barlow faced the gravest consequence—the death penalty. Individually, each of these errors was harmless, but we consider their effect collectively on the jury's decision to impose the death penalty. Barlow did not contest that the State proved multiple aggravating circumstances. Instead, he focused his defense on mercy and compassion. Thus, the district court erroneously prohibiting Barlow from making a legally valid argument that appealed to the individual jurors' ability to bestow mercy—in conjunction with the prosecutor's improper argument—creates a likelihood that Barlow was prejudiced. Viewed together, we conclude that the cumulative effect of these errors

deprived Barlow of a fair penalty hearing. Therefore, we reverse the judgment of conviction as to the death sentences and remand for a new penalty hearing. Given this conclusion, we need not review Barlow's death sentences under NRS 177.055.[7]

[7] Barlow also argues that the death penalty is unconstitutional and the district court admitted evidence during the penalty hearing in violation of his confrontation rights. We have considered these claims and conclude they lack merit and Barlow has not presented any persuasive reason to overrule this court's precedent. *See Belcher v. State*, 136 Nev. 261, 278, 464 P.3d 1013, 1031 (2020) (listing cases that have rejected similar challenges to the constitutionality of the death penalty); *Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (providing that the Sixth Amendment right to confrontation does not apply to capital sentencing hearings); *see also Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013) ("Under the doctrine of stare decisis, we will not overturn precedent absent compelling reasons for so doing." (internal quotation marks and alterations omitted)).

Guilt phase claims

Jury selection

Barlow argues that the jury selection process was unconstitutional based on the district court limiting his questioning, denying his objection to the State's use of its peremptory challenges, and denying his for-cause challenge.

First, Barlow argues that the district court improperly prevented him from "life qualifying" the prospective jurors. The district court proscribed a single question about whether the prospective jurors would impose death sentences because the case involved two victims. We conclude it was not improper to disallow questions aimed at acquiring information as to "how a potential juror would vote during the penalty phase of the trial" because such questions go "well beyond determining whether a potential juror would be able to apply the law to the facts of the case" *Witter v. State*, 112 Nev. 908, 915, 921 P.2d 886, 892 (1996), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011). And the district court did not otherwise prohibit questions about whether the prospective jurors could consider all the aggravating and mitigating evidence, all four potential penalties, and whether there were circumstances where first-degree murder would or would not warrant the death penalty. Therefore, the district court did not abuse its discretion. *See* NRS 175.031 (providing that the district court shall allow supplemental examination of potential jurors "as the court deems proper"); *Johnson v. State*, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006) (providing that conducting voir dire "rests within the sound discretion of the district court, whose decision will be given considerable deference by this court").

Next, pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), Barlow objected to the State's use of four peremptory challenges to strike one African-American and three Hispanic veniremembers. The district court found that Barlow had not satisfied the first *Batson* step (prima facie showing that the peremptory challenges were based on race) and overruled the objection. *See Cooper v. State*, 134 Nev. 860, 861, 432 P.3d 202, 204 (2018) (discussing the three-step *Batson* test). We agree that Barlow did not meet his burden. Other than the fact that the State used four peremptory challenges to remove members of two cognizable groups, Barlow did not point to anything to show that the peremptory challenges were based on race. Merely identifying minority veniremembers struck by the State does not meet the burden of showing an inference of discriminatory purpose.[8] See *id.* at 862, 432 P.3d at 205 ("The question is whether there is evidence, other than the fact that a challenge was used to strike a member of a cognizable group, establishing an inference of discriminatory purpose to satisfy the burden of this first step."). Therefore, the district court did not clearly err in denying Barlow's *Batson* objection. *See id.* at 863, 432 P.3d at 205 (reviewing a district court's resolution of a *Batson* objection at the first step for clear error).

[8] We decline Barlow's invitation to undertake comparative juror analysis as he did not raise this argument below, *see Snyder v. Louisiana*, 552 U.S. 472, 483, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (the Supreme Court has "recognize[d] that a retrospective comparison of jurors based on a cold appellate record may be very misleading when alleged similarities were not raised at trial"), and he failed to make a prime facie case of discrimination, *cf. Miller-El v. Dretke*, 545 U.S. 231, 241, 125 S.Ct. 2317, 162 L.Ed.2d 196

(2005) (stating that comparative juror analysis may be considered at *Batson's* third step).

***8** Finally, Barlow argues that the district court improperly denied his for-cause challenge of a prospective juror based on his inability to consider childhood evidence in mitigation. We discern no error. The prospective juror stated that he could be fair and impartial and was willing to consider everything presented in aggravation and mitigation. Reviewing the entirety of the challenged prospective juror's responses during voir dire, the record does not show he exhibited any bias or unwillingness to consider the evidence presented in mitigation. Therefore, we conclude that the district court did not abuse its discretion. *See Browning v. State*, 124 Nev. 517, 530, 188 P.3d 60, 69 (2008) (providing that "[g]reat deference is afforded to the district court in ruling on challenges for cause"); *see also* NRS 175.036 (providing that a juror should be excused for cause when voir dire reveals information "which would prevent the juror from adjudicating the facts fairly").

Expert testimony

Barlow argues that the district court erred by allowing an unqualified expert to testify about firearms and toolmark identification. To testify as an expert under NRS 50.275, the witness must be qualified to give specialized testimony, the testimony must assist the jury, and the testimony must be limited to the scope of the expert's knowledge. *Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). "Whether expert testimony will be admitted, as well as whether a witness is qualified to be an expert, is within the district court's discretion, and this court will not disturb that decision absent a clear abuse of discretion." *Mulder v. State*, 116 Nev. 1, 12-13, 992 P.2d 845, 852 (2000).

Based on the record, we conclude the district court did not abuse its discretion in admitting the expert's testimony. First, the witness qualified as an expert to testify about firearm and toolmark comparison. The witness had ample experience and technical knowledge in the field. While Barlow claims that the witness lacked knowledge of scientific standards, under NRS 50.275 an expert is someone with special knowledge, skill, or experience; thus, a forensic analyst's knowledge and experience about firearm and toolmark analysis is sufficient. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999) (explaining that the federal analog to NRS 50.275 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge"). Second, the witness provided testimony that assisted the jury and was within the scope of her expertise. Specifically, after conducting a microscopic comparison of the casings, the witness determined that the firearm recovered from Barlow's vehicle fired the bullet casings found at the scene of the murders. Finally, Barlow had the opportunity to attack the witness's credibility and methodology during his extensive cross-examination. Thus, it was for the jury to evaluate and weigh the testimony. *See McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) ("The established rule is that it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."); *Allen v. State*, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983) ("Expert testimony is not binding on the trier of fact; jurors can either accept or reject the testimony as they see fit."). And although Barlow had sufficient notice of the testimony to retain his own expert to testify at trial, he did not do so. *Cf. Turner v. State*, 136 Nev. 545, 554, 473 P.3d 438, 448 (2020) (providing that unnoticed expert testimony "prevented [the defense] from preparing for cross-examination" and consulting or retaining an expert for rebuttal purposes).

Prosecutorial misconduct

Barlow contends that the prosecutor improperly argued that Barlow saved the final bullet for the headshot to Woods because no evidence supported this comment. We agree but conclude the error was harmless. See *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) ("A prosecutor may not argue facts or inferences not supported by the evidence." (internal quotation marks omitted)). After the district court sustained Barlow's objection, the prosecutor conceded that the medical examiner could not determine the sequence of the gunshots and asked the jury to look at the physical evidence. Moreover, the State presented overwhelming evidence of Barlow's guilt, including testimony about his earlier confrontation with the victims, the discovery of a handgun in Barlow's vehicle with his fingerprint and DNA, and the expert testimony that the weapon fired the spent casings found at the crime scene. Thus, we conclude that the comment did not have a substantial effect on the guilt phase verdict. *See King v. State*, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (providing that

prosecutorial misconduct may be harmless where there is overwhelming evidence of guilt).

***9** Barlow also argues that the prosecutor improperly commented on his right to remain silent by asserting at the end of closing argument that "there's at least one person in this room who knows who executed Donnie Cobb and Danielle Woods." Barlow did not object at trial, therefore, we review for plain error. *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). "It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest...." *Morris v. State*, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (internal quotation marks omitted). However, in *Taylor v. State*, this court considered a similar comment and found no error. 132 Nev. 309, 325-26, 371 P.3d 1036, 1047 (2016). While the prosecutor's isolated remark indirectly touched upon Barlow's decision not to testify, it tracks with the comment in *Taylor*. Therefore, we conclude that Barlow has not shown plain error, which must be "clear under current law from a casual inspection of the record." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018); *see also Coleman v. State*, 111 Nev. 657, 665, 895 P.2d 653, 658 (1995) (considering "the frequency and intensity of the references to" a defendant's silence when determining if reversal is warranted).

Jury instructions

Barlow argues that the district court erroneously instructed the jury. Barlow first contends that the burglarous-intent instruction unconstitutionally shifted the burden of proof by allowing a finding of guilt without the State proving intent beyond a reasonable doubt. We disagree because the instruction accurately reflects NRS 205.065, and we have consistently upheld the statute's constitutionality. *See, e.g., Redeford v. State*, 93 Nev. 649, 653-54, 572 P.2d 219, 221-22 (1977) (explaining that "an inference of criminal intent logically flows from the fact of showing unlawful entry"); *White v. State*, 83 Nev. 292, 296, 429 P.2d 55, 57 (1967) ("There is clearly rational connection between the fact proven, i.e., unlawful entry, and the presumption. It is clear that the [L]egislature has the power to establish inferences from facts proven, provided there is such rational connection."). Barlow also contends that the state-of-mind and intent-to-kill instructions misled the jury. The instructions told the jury that the State is not required to present direct evidence to prove Barlow's state of mind and the jury may infer his state of mind from the circumstances proved at trial, including the use of a deadly weapon. We discern no error, as the instructions correctly state Nevada law. *See* *Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) ("Intent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence."); *State v. Hall*, 54 Nev. 213, 240, 13 P.2d 624, 632 (1932) (approving the same instruction challenged here that stated "[t]he intention [to kill] may be ascertained or deduced from the facts and circumstances of the killing such as the use of a weapon calculated to produce death, the manner of its use, and the attendant circumstances characterizing the act"). Therefore, the district court did not abuse its discretion in instructing the jury. *See Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (providing that we review a district court's decision to give or refuse a jury instruction for an abuse of discretion or judicial error); *see also* *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007) (whether an instruction correctly states the law presents a legal question that is reviewed de novo).

Cumulative error in the guilt phase

Barlow argues that cumulative error during the guilt phase warrants relief. Because we discern only one error, there is nothing to cumulate. *See* *Lipsitz v. State*, 135 Nev. 131, 140 n.2, 442 P.3d 138, 145 n.2 (2019) (concluding that there were no errors to cumulate when the court found only a single error).

CONCLUSION

***10** Having considered all of Barlow's guilt phase claims, we conclude no relief is warranted as to the guilt phase and therefore affirm the judgment of conviction in part. Due to cumulative error during the penalty phase of trial, we reverse the judgment of conviction as to the death sentences for first-degree murder with the use of a deadly weapon and remand for a new penalty hearing.

We concur:

Parraguirre, C.J.

Hardesty, J.

Stiglich, J.

Cadish, J.

Pickering, J.

APPENDIX

Barlow v. State

SPECIAL VERDICT

We, the Jury in the above-entitled case, having found the Defendant, [list name], guilty of Count [#] - [list the offense], find:

Section I: Aggravating Circumstances
Instructions: Answer by checking "Yes" or "No" as to whether the jury unanimously finds that the State has proven the listed aggravating circumstances beyond a reasonable doubt.

1. [list individual aggravating circumstance]

☐ Yes

☐ No

[list any additional aggravating circumstance(s)]

Instructions: If you answered "No" to all of the above aggravating circumstances, proceed to Section V to record your verdict as to the sentence to be imposed for Count [#].

If you answered "Yes" to any of the above aggravating circumstances, proceed to Section II to record your findings as to any mitigating circumstances.

Section II: Mitigating Circumstances
Instructions: Answer by checking "Yes" as to each mitigating circumstance that any individual juror has found and checking "No" as to any mitigating circumstance that no juror has found.

1. [list individual mitigating circumstance]

☐ Yes

☐ No

[list any additional mitigating circumstances and allow space for the jury to record any mitigating circumstances not listed]

Instructions: Proceed to Section III to record your findings as to the weighing of aggravating and mitigating circumstances.

Section III: Weighing of Aggravating and Mitigating Circumstances
Instructions: Check only one of the following findings.

☐ We unanimously find there are no mitigating circumstances sufficient to outweigh the aggravating circumstance(s).

Instructions: Proceed to Section IV to record your verdict as to the sentence to be imposed for Count [#].

☐ At least one juror finds there are one or more mitigating circumstances sufficient to outweigh the aggravating circumstance(s).

Instructions: Proceed to Section V to record your verdict as to the sentence to be imposed for Count [#].

Section IV: Sentencing Decision (death sentence available)
Instructions: Complete this section if the jury has unanimously determined in Section III above that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance(s). You must unanimously decide the sentence and the foreperson must sign and date the final verdict.

VERDICT

We, the Jury in the above-entitled case, having found the Defendant, [list name], guilty of Count [#] - [list the offense], and having unanimously found that at least one aggravating circumstance exists beyond a reasonable doubt and that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance(s), unanimously impose a sentence of:

☐ A definite term of 50 years in prison, with eligibility for parole beginning when a minimum of 20 years has been served.

☐ Life in prison with the possibility of parole.

☐ Life in prison without the possibility of parole.

☐ Death.

Section V: Final Sentencing Decision (death sentence not available)

Instructions: Complete this section if (1) the jury determined in Section I above that the State did not prove any aggravating circumstance(s) beyond a reasonable doubt or (2) at least one juror found in Section III above that there are mitigating circumstances sufficient to outweigh the aggravating circumstance(s). If you have determined a sentence under Section IV, do not fill out this section. You must unanimously decide the sentence and the foreperson must sign and date the final verdict.

VERDICT

***11** We, the Jury in the above-entitled case, having found the Defendant, [list name], guilty of Count [#] - [list the offense], unanimously impose a sentence of:

☐ A definite term of 50 years in prison, with eligibility for parole beginning when a minimum of 20 years has been served.

☐ Life in prison with the possibility of parole.

☐ Life in prison without the possibility of parole.

All Citations

--- P.3d ----, 2022 WL 1132317, 138 Nev. Adv. Op. 25

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2022 WL 1052001
Supreme Court of Nevada.

DeQuincy BRASS, Appellant,
v.
The STATE of Nevada, Respondent.

No. 81142
|
FILED APRIL 07, 2022

Synopsis
Background: Defendant was convicted in the District Court, Clark County, Joe Hardy, Jr., J., of multiple counts of lewdness with child under age 14, sexual assault of minor under age 14, and related charges. Defendant appealed.

Holdings: The Supreme Court, Cadish, J., held that:

on motion to substitute retained counsel, trial court had to determine whether motion was untimely and would result in disruption of orderly processes of justice unreasonable under circumstances of particular case;

motion to substitute retained counsel on eve of trial was timely, even though case had been pending for two years;

disruption of orderly processes of justice by grant of motion to substitute retained counsel would not have been unreasonable, under circumstances; and

trial court's abuse of discretion in denying motion was structural error warranting reversal of convictions and remand for new trial.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

Appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of lewdness with a child under the age of 14; nine counts of sexual assault of a minor under 14; one count of child abuse, neglect, or endangerment; three counts of first-degree kidnapping of a minor; two counts of preventing or dissuading a witness or victim from reporting a crime or commencing prosecution; and one count of battery with the intent to commit sexual assault of a victim under 16. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Attorneys and Law Firms

Darin Imlay, Public Defender, and Deborah L. Westbrook, Chief Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Alexander G. Chen, Chief Deputy District Attorney, and John T. Afshar, Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, CADISH, J.:

Appellant retained Mitchell Posin as defense counsel in a 22-count criminal matter. After four continuances over two years at appellant's request, appellant moved to substitute counsel on the eve of the trial based on Posin's alleged failure to adequately prepare the defense. After two hearings, the district court denied appellant's motion even though a defense investigator testified to various shortcomings in Posin's preparation—shortcomings that Posin conceded at the hearings. A jury convicted appellant of most of the counts, and the district court sentenced him to an aggregate term of 115 years to life in prison. On appeal, appellant argues that the district court's decision denying his motion to substitute violated his Sixth Amendment right to counsel.

The Sixth Amendment right to counsel "encompasses two different rights, namely, the right to effective assistance of counsel and the right of a non-indigent defendant to be represented by the counsel of his or her choice." *Patterson v. State*, 129 Nev. 168, 175, 298 P.3d 433, 438 (2013). A decision denying a motion to substitute appointed counsel with different appointed counsel implicates the right to effective assistance of counsel, while a motion to substitute retained counsel with different counsel implicates a non-indigent defendant's Sixth Amendment right to counsel of his or her choice.

Separate tests apply to determine whether a court should grant a motion to substitute depending on whether counsel is appointed or retained. Here, the district court applied the wrong test in deciding Brass's motion to substitute counsel because Posin was retained, not appointed. Under the appropriate test, as set forth in *Patterson* and clarified in this opinion, we conclude that the district court abused its discretion by denying the motion to substitute counsel, as the record shows that Brass promptly sought relief after learning of his counsel's inadequate preparation and the serious concerns raised outweighed the disruption caused by another trial continuance. Because the error was structural, we reverse the judgment of conviction and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In September 2017, the State charged appellant DeQuincy Brass with five counts of lewdness with a child under the age of 14; ten counts of sexual assault of a minor under the age of 14; one count of child abuse, neglect, or endangerment; three counts of first-degree kidnapping of a minor; two counts of preventing or dissuading a witness or victim from reporting a crime or commencing prosecution; and one count of battery with the intent to commit sexual assault of a victim under 16. The charges were based on allegations that between May 2015 and February 2017, while he was dating the mother of two children who were eight and three years old in 2015, Brass kidnapped and sexually assaulted and/or abused those children, as well as another child who was 13 years old at the time, and then used intimidation or threats to dissuade the children from reporting his crimes. The justice court concluded that Brass was indigent and appointed the Clark County Public Defender's office to represent him. However, Brass's family retained Mitchell Posin, and the court substituted Posin as Brass's counsel in January 2018 before Brass's preliminary hearing.

***2** Brass pleaded not guilty and waived his right to a speedy trial on February 14, 2018. Shortly thereafter, Posin filed an ex-parte motion requesting that the district court appoint and pay an investigator to investigate Brass's case. On March 12, 2018, Posin filed a motion to withdraw as Brass's attorney, alleging that Brass's family had not paid his fee. Posin did not inform Brass of his motion to withdraw, and Posin did not appear for the hearing on his motion. Posin later withdrew his motion because Brass's family agreed to pay him.

The district court set trial for April 30, 2018. Brass requested his first continuance at an April 3, 2018, status check hearing because his counsel needed more time to prepare. The district court granted the motion and rescheduled the trial for July 23, 2018. The district court then entered an order granting Brass's motion for an investigator on June 8, 2018. At a July 19, 2018, calendar call, Brass requested a second continuance, to which the State did not object. The district court granted the continuance and rescheduled the trial for November 13, 2018.

At a November 8, 2018, calendar call, the State announced that it was ready for trial. Brass, however, requested his third continuance, at which point Posin stated that he did not "feel that ... I can provide, um adequate assistance of counsel understand [sic] the circumstances." Posin explained that the State "made some discovery ready and available some time back" but that he did not get that discovery "until recently" due to "financial reason[s] of my client's family."[1] The district court offered to reschedule the trial to July 8, 2019, but Posin requested an earlier trial date in May or June. The district court rescheduled trial for May 13, 2019.

[1] Following this hearing, the State filed a receipt showing that it had produced the discovery on July 19, October 9, and October 19, 2018, but Posin did not pick it up until November 2, 2018—only 11 days before trial was set to begin.

At the May 7, 2019, calendar call, Posin stated that he had an issue with his investigator, who had, by that point, "sent out some [subpoenas]," and that Posin was trying to determine the status of those subpoenas. He asked the court to continue the calendar call until May 9, at which time he would give the court "an updated report" on his readiness for trial. The State pointed out that Posin had not noticed any witnesses, so it did not "know what subpoenas he's waiting for." The court continued the hearing, and when it resumed, Brass requested his fourth continuance. Posin explained that the initial investigator, who was employed by Investigator Robert Lawson to work on Brass's case, had "apparently quit" and had not responded to Posin's phone calls "over the last week or two." The State opposed the continuance, pointing out that it had issued subpoenas to the alleged minor victims and their parents four times, and the State was ready to proceed. The district court denied the motion, concluding that there was no good reason to grant a continuance and pointing out that the matter had been pending for over a year after having granted several continuances at Brass's request.

On May 13, 2019, the first day of trial, Brass renewed his

motion for a continuance. Posin stated that Lawson was now personally handling the case but was not available to help at that point because he was working on a murder case. Posin claimed that he received new discovery from the State on the prior Friday, which included photographs of the motel where some of the alleged acts occurred, and that he needed time to investigate. The State argued that Brass was not prejudiced by the disclosure of photographs because the information regarding the motel was "available to him by reading the discovery." It further contended that "all that information has been available to [Posin] since the preliminary hearing ... which was almost two years ago."

***3** Brass personally expressed to the district court that he had not spoken with Posin since "December of last year." He stated, "I don't think [Posin is] prepared to represent me," and explained that Posin had not discussed the case with him in any detail. Posin stated that he had spoken with Brass on the phone and saw him the previous Friday or Saturday, as well as at the preliminary hearing almost two years earlier. The court asked the State to comment on the "assistance of counsel" issue raised by Brass, to which the State answered that Posin was retained counsel who had been on the case since the preliminary hearing and there had been no showing that warranted another continuance. The State further pointed out that Brass had proffered nothing specific in terms of what he wanted Posin to do or what Posin had failed to do, and an investigator had been working on the case as well, who presumably had provided Posin with information. Posin replied that he had not prepared for the case or communicated with his client because the investigator who worked for Lawson, and whose employment had since been terminated, had not followed up on any assignments or responded to his calls. After asking why none of these concerns were raised until the day of trial, the court continued the hearing and instructed Posin to bring Lawson to the hearing later that day. Before recessing, the court stated that it disagreed with Posin's statement that another continuance would be only a minor inconvenience to the State, pointing out that roughly 90 people (potential jurors, witnesses) were waiting in the hallway, the prosecution was prepared, and the alleged victims were waiting to testify, having prepared for trial for the fourth time.

At the continued hearing, Lawson explained that he had fired the investigator he assigned to Brass's case because the investigator "didn't do any" investigative work, such as interview witnesses and contact experts. While he acknowledged that he did not follow up with his investigator, Lawson did not know why Posin never called him "in [the] three weeks that [Posin] tried to get ahold of [the other investigator]." While the State objected to the continuance, pointing out that the victims, who were now 7, 11, and 15 years old, have had to "rehash this multiple times in preparation for trial," with every continuance being at the defense's request, the court continued the trial a fourth time over its concerns that proceeding to trial at that time would raise an ineffective-assistance-of-counsel issue. Thus, the court rescheduled the trial for February 24, 2020, which gave the defense roughly nine additional months to prepare for trial.

Nevertheless, at the August 2019 status check, the State pointed out that although the defense had raised issues about records and other items it was investigating and for which it needed the trial continuance, the defense still had not provided any of that information to the State. At the October 2019 status check, the court asked Lawson whether he had communicated with Brass and Posin, and Lawson stated he had spoken with Posin on several occasions but had yet to meet with Brass, and that Posin had provided direction on what to investigate. After Posin stated he would be ready for trial, the court asked Brass if there was any information he would like to communicate to Posin, privately, or anything he would like to tell the court on the record, explaining, "I want this to be a real trial date. I don't want a jury ... literally in the hallway, witnesses all lined up," like last time, with "time and money spent to give you a good trial," if his defense was not ready. Brass stated that he understood. When asked if he communicated everything he needed to communicate to Posin, Brass said, "not completely, but I think that he is supposed to come and visit me." The court told Posin to make sure to get whatever information Brass had so that Lawson can complete the investigation, and Posin agreed.

At the December 2, 2019, status check, the State expressed concerns that Posin had not prepared because he had not provided any discoverable material. The State pointed out that seven months earlier, the court continued the matter at the start of trial after the defense represented that Brass wanted an investigation into his phone and for the defense to retain a phone expert. Posin explained that while he had not retained an expert, he "anticipate[d] on having one shortly." He further explained that he had consulted with Lawson and reviewed documents related to the case. The court asked if "shortly" meant by the end of the year, and Posin responded affirmatively. The court set a status check for two weeks later, observing that the history of the case and "vagueness and the lack of an expert in the last seven months" required it to follow up again.

***4** At the December 17 status check, Posin reiterated that

he was "working on" getting an expert and that he had "made inquiries" into various experts, but he had not yet retained one.[2] Posin further explained that he had prepared for the February trial by meeting with Brass and Lawson and reviewing the preliminary hearing transcripts. At the January 2020 status check, Posin stated that he no longer believed an expert was necessary and had been "working diligently" to be ready for trial. The State confirmed that it had provided all discovery to the defense, including data from the victims' phones. Posin denied receiving transcripts of certain recordings, and the State responded that it had a receipt showing the information was delivered to the defense. Lawson stated that the defense "might have" the transcripts and that he was going to follow up with the State's attorney, who had been "bending over backward for [the defense]" and very helpful in providing information. Posin told the court there was no need for another status check before trial, and the State's attorney said she was counting on Posin's statement that the defense would be ready.

[2] Posin stated that the defense wanted an expert "who can tell us what a particular program can or cannot do," because he understood that the State alleged that Brass "remotely deleted information from these cell phones." The State's attorney stated that she spoke to Lawson, who confirmed he was speaking to someone about the phones, but it was unclear why because the State was never in possession of Brass's phone, and although the victims believed that at certain times Brass remotely connected to their phones, the State had no evidence to proceed on that and there was no data for an expert to examine.

At a February 20, 2020, calendar call, Posin explained that Brass told Posin that morning that he had mailed a motion to have the court appoint substitute counsel. Although the district court had not received a written motion from Brass, it conducted a sealed hearing pursuant to *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004), outside the State's presence. Brass stated that Posin "hasn't done anything in preparation for trial." He asserted that Posin had not subpoenaed any witnesses, visited with Brass, or discussed the trial strategy with Brass. According to Brass, his concerns were prompted by the fact that Lawson visited him one week earlier and stated that he had been unable to contact Posin to discuss the case or get subpoenas issued. Brass believed that Posin was "kind of trying to freestyle at trial with nothing prepared."

When the court asked when Posin last met with Brass, Posin said "about a month ago," to which Brass agreed, despite having just claimed that Posin had not visited him. Brass stated that the last time Posin visited, which lasted "all of about five minutes," Posin suitably answered a question Brass had, but they "did not discuss the case" or anything about the trial. When asked what he had done to prepare, Posin explained that he had met with the investigators several times and "extensively" gone over all the documents. Posin stated he had a strategy but acknowledged that Brass "[did] not seem to feel that [strategy] was adequately explained to him." When asked why he had not raised these concerns before, Brass stated that, "as [Posin] does when he comes in for status checks, he leads me on to believe that he's working" on the case. While Brass could not identify whom he would call as witnesses beyond his brother as a character witness, he claimed that Lawson informed him of individuals who "needed to be subpoenaed" and could discuss the victims' characters, as well as testify as to job records purporting to show where Brass was at "certain dates and times." Posin explained that he did not intend to call witnesses and only planned to cross-examine the State's witnesses.[3] He did not believe the witnesses Brass wanted to testify should be called.

[3] The district court went off the record for the express purpose of allowing Posin to explain his strategy to Brass; however, Posin did not do so because he had previously told Brass what his strategy was generally, and he did not see how explaining his exact strategy would be "a useful exercise just now."

***5** The court called the State back into the hearing, and the State objected to Brass's request for a continuance because it had three minor victims who had been ready to testify since May 2019, but who had to come back to court several times because of defense continuances, one of which was last minute, and the continued delays were stressful to the victims. It explained that it was prepared for trial and that its witnesses, all of whom were prepared to testify, included the law enforcement officers, the victims' mothers, and an out-of-state physician. The State argued that the motion, which no one had a written copy of, was untimely and suspect considering the continuance granted on what was supposed to be the first day of trial in May 2019, and that because this case began in 2017, the length of time created a risk that the victims' memories would fade. The State also argued that Brass failed to demonstrate why the court should appoint someone new, especially since Brass had retained Posin as his attorney since the preliminary hearing over two years earlier.

The district court denied the motion. The court concluded the motion was untimely because Brass first raised his concerns right before trial was set to start when he could have raised them at one of the prior status checks. It concluded that "it appeared [Brass] did not want to proceed to trial" and noted that the only witness Brass identified was his brother, who would testify without being subpoenaed. It also concluded that another continuance would be "highly prejudicial" to the State, alleged victims, witnesses, and "the potential for justice through the trial process," as the case was extremely old for a criminal matter and memories fade. The court stated that the fact that the public defender originally represented Brass and that Brass chose Posin "weighed against" granting the motion.

On the first day of trial, before voir dire began, the court held a second sealed *Young* hearing to consider Brass's renewed oral motion to substitute counsel. At the hearing, Posin acknowledged he was "concerned that there may be an issue of whether I'm providing adequate representation of counsel based on whether perhaps I have dropped the ball." Specifically, Posin was "increasingly concerned that some of the subpoenas that [he] perhaps could have and should have sent out may affect [his] ability to provide that adequate representation of counsel." Because of his concerns about the adequacy of his investigation after speaking to Lawson, Posin had asked Lawson to appear and speak to the court.

Lawson expressed deep and serious concerns about the failure of Posin to follow up on investigative leads and prepare for trial. As an experienced investigator in connection with numerous criminal trials, Lawson stated that during the investigation, "it became apparent to me that Mr. Posin had literally no knowledge of this case." Lawson noted that he and Posin had "never done a file review on this case." He informed Posin that the investigators "developed exculpatory evidence" that "Mr. Brass likel[y] didn't commit this crime," but Posin did not subpoena this evidence. Specifically, he explained that (1) one of the victim's accounts had not remained consistent; (2) a coworker could provide timesheets showing when Brass and "the alleged victim's mother worked together and they could provide us a printout of the times that they were working, where they were working, and if they're on the computer at the same time"; (3) a hotel employee could confirm that an alleged incident did not occur at "the Palm Hotel"; (4) "we don't even know if" one of the victims, who Lawson claimed had a reputation for lying in general, was in Las Vegas at the time of one of the alleged incidents; (5) the older victim would often dominate one of the younger victims; and (6) one of the victims had a "substantial CPS history" that should have been subpoenaed and reviewed in camera. Lawson also stated that Posin had not talked to Brass about whether Brass would testify and that "on several occasions" Brass expressed to Lawson and the other investigator "his dissatisfaction with Mr. Posin." Lawson stated that he "cannot let this [c]ourt believe for one minute that Mr. Brass is getting any kind of a defense, let alone a bad defense."[4]

[4] The court pointed out that Lawson had been present for numerous status checks and assured the court that things were on track for trial and that the issues Lawson now raised were issues that had been dealt with a year ago. Lawson, after apologizing to the court, explained that he "cannot write a motion on behalf" of Brass or "contact the [c]ourt ex parte on behalf" of Brass.

***6** Posin confirmed that he had not issued any subpoenas, and while he disagreed with Lawson's characterization that he had done nothing to prepare, as he had reviewed the evidence provided by the State, including transcripts and recordings, discussed defense strategy with Lawson, and prepared opening statements and cross-examinations, Posin conceded that it was insufficient preparation.[5] He confirmed he did not follow up with Brass's employer or the hotel employee. He stated that he last met with Brass yesterday, and before that, about a month earlier. Brass agreed that Posin met with him on those occasions but claimed it was only for about 15 or 20 minutes the first time and an hour the second time. Posin acknowledged that while he initially focused on defending this case through cross-examination of the State's witnesses as opposed to presenting his own evidence, he became "more and more convinced" after talking to Lawson over the past few days "that this is the type of case that some of our ... own evidence in the defense case would have been appropriate. Not only appropriate but perhaps necessary."

[5] While Posin initially stated that he felt he did not sufficiently prepare for trial in light of his conversations with Lawson, he affirmed that he could provide competent representation at trial after the district court asked if it should refer Posin to the State Bar for potential discipline related to his conduct in this case.

The court took a recess, after which the State was permitted back in the courtroom. Not knowing what happened during the sealed hearing, the State opposed the motion. It pointed out that during the multiple status checks since the fourth continuance, at which Lawson and

Brass were present, no one ever raised the diligence and competence issues they now claimed warranted a last-minute substitution of an attorney who had been on the case for over two years, and instead, they had assured the court that the defense would be ready for the rescheduled trial. The court denied Brass's motion. It concluded the motion was untimely,[6] as Brass failed to raise these concerns at multiple status checks when he had the opportunity to do so, and the prejudice to the State and its witnesses was high. The court also concluded that Posin, Brass, and Lawson had multiple meetings and communications and the issue between Brass and Posin "boils down to potential strategy differences," which the court concluded did not warrant granting the motion. Brass went to trial, the jury convicted him of 20 of the 22 counts, and the district court sentenced Brass to an aggregate term of 115 years to life. Brass appeals.

[6] The court observed that Brass's written motion, which he apparently mailed on February 19 (one day before the calendar call), was not received and filed until after calendar call.

DISCUSSION

Brass argues that his motion to substitute counsel was timely and that the district court's denial of his motion violated his Sixth Amendment rights.[7] Reviewing the district court decision for an abuse of discretion, *Patterson*, 129 Nev. at 175, 298 P.3d at 438, we agree.

[7] While the parties in their briefs focus their attention on whether the district court's order violates the standards announced in *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004), the motion in this case qualifies as one seeking to substitute retained counsel, so the right to counsel of choice discussed in *Patterson v. State*, 129 Nev. 168, 298 P.3d 433 (2013), applies. Since we have the authority to "address ... constitutional error *sua sponte*," *Sterling v. State*, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992), we directed the parties to discuss *Patterson*'s application to this case at oral argument. Because the district court's findings of fact and conclusions of law effectively addressed the *Patterson* factors, and the parties had the opportunity to argue the *Patterson* factors at oral argument, we apply the *Patterson* analysis here.

A district court abuses its discretion when it "fails to give due consideration to the issues at hand." *Id.* at 176, 298 P.3d at 439. "The Sixth Amendment right to counsel encompasses two different rights, namely, the right to effective assistance of counsel and the right of a non-indigent defendant to be represented by the counsel of his or her choice." *Id.* at 175, 298 P.3d at 438 (citing *United States v. Rivera-Corona*, 618 F.3d 976, 979 (9th Cir. 2010)). When a defendant "seeks to replace court-appointed counsel with privately retained counsel, or previously retained counsel with newly retained counsel, or *privately retained counsel with court-appointed counsel*[,] ... the focus is on the right to counsel of one's choice."[8] *Id.* (emphasis added). In general, a defendant can replace his retained lawyer "for any reason or no reason" at all. *Rivera-Corona*, 618 F.3d at 979-80. However, the right to counsel of choice is not absolute, and a district court has "wide latitude in balancing the right to counsel of choice against the needs of fairness ... and against the demands of its calendar." *Patterson*, 129 Nev. at 175, 298 P.3d at 438 (quoting *United States v. Gonzalez-Lopez*, 548 U.S. 140, 152, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006)).

[8] We note that *Patterson*'s conclusion that the right to counsel of choice is implicated when a defendant attempts to discharge retained counsel and seeks appointed counsel due to the defendant's indigent status is consistent with most other courts' interpretation of the scope of the Sixth Amendment right to counsel of choice. *See, e.g., United States v. Brown*, 785 F.3d 1337, 1344 (9th Cir. 2015) (holding that "a defendant's request to substitute appointed counsel in place of a retained attorney 'implicate[s] the qualified right to choice of counsel' " (alteration in original) (quoting *Rivera-Corona*, 618 F.3d at 981)). Thus, while we often refer to "the right of a *non-indigent* defendant to be represented by the counsel of his or her choice," *Patterson*, 129 Nev. at 175, 298 P.3d at 438 (emphasis added), the right is also implicated if an indigent defendant attempts to replace *retained* counsel with appointed counsel.

***7** Thus, a defendant may substitute his retained counsel at any time, unless the motion to substitute is "untimely and would result in a 'disruption of the orderly processes

of justice unreasonable under the circumstances of the particular case." '[9] *Id.* at 176, 298 P.3d at 438 (quoting *People v. Lara*, 86 Cal.App.4th 139, 103 Cal. Rptr. 2d 201, 211-12 (2001)); *see also People v. Maciel*, 57 Cal.4th 482, 160 Cal.Rptr.3d 305, 304 P.3d 983, 1010 (2013) (explaining that a court must "consider[ ] the totality of the circumstances" when deciding whether a motion to discharge retained counsel is timely). Because "the defendant's right to ... counsel need not always yield to judicial efficiency," *Lara*, 103 Cal. Rptr. 2d at 212, the evaluating court must "balance the defendant's interest in new counsel against the disruption, if any, flowing from the substitution," *Patterson*, 129 Nev. at 176, 298 P.3d at 438 (quoting *Lara*, 103 Cal. Rptr. 2d at 212).

[9] We recognize that, in *Patterson*, we instructed the evaluating court to also consider whether denying the motion to substitute would significantly prejudice the defendant. 129 Nev. at 176, 298 P.3d at 438. However, *Patterson* misstated the test from *Lara*, and we take this opportunity to clarify that the proper test when evaluating a motion to substitute retained counsel is whether (1) *granting* the motion "would cause 'significant prejudice' to the defendant, e.g., by forcing him to trial without adequate representation," or (2) the motion "was untimely and would result in a 'disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' " *Lara*, 103 Cal. Rptr. 2d at 211-12 (quoting *People v Ortiz*, 51 Cal.3d 975, 275 Cal.Rptr. 191, 800 P.2d 547, 552 (1990)). No party here argues that granting Brass's motion to substitute counsel would cause him significant prejudice; thus we only address whether the motion is untimely and would result in an unreasonable disruption of the orderly processes of justice.

We emphasize that the *Patterson* analysis is distinct from the *Young* analysis, which is used when a defendant seeks to replace appointed counsel with different appointed counsel. *Patterson*, 129 Nev. at 175, 298 P.3d at 438 (noting that the *Young* inquiry "is used to evaluate an attempt to substitute one appointed attorney for another"). *Patterson* focuses on the defendant's right to retained counsel of choice and the court's countervailing interests in the timely and orderly administration of justice, while *Young*'s three-part inquiry focuses on "(1) the extent of the conflict [between client and counsel]; (2) the adequacy of the [district court's] inquiry [into the conflict]; and (3) the timeliness of the motion." 120 Nev. at 968, 102 P.3d at 576 (quoting *United States v. Moore*, 159 F.3d 1154, 1158-59 (9th Cir. 1998)). The focus is distinct because the *Young* inquiry "is designed to determine whether [an] attorney-client conflict is such that it impedes the adequate representation that the Sixth Amendment guarantees to all defendants, including those who cannot afford to hire their own attorneys," *Patterson*, 129 Nev. at 175, 298 P.3d at 438 (quoting *Rivera-Corona*, 618 F.3d at 979), while *Patterson* "balance[es] the right to counsel of choice against the needs of fairness ... and against the demands of [the district court's] calendar," *id.* (quoting *Gonzalez-Lopez*, 548 U.S. at 152, 126 S.Ct. 2557). Thus, under the *Patterson* test, a defendant need not show inadequate representation or an irreconcilable conflict to have his motion granted. *See People v. Ortiz*, 51 Cal.3d 975, 275 Cal.Rptr. 191, 800 P.2d 547, 553 (1990) ("While we do require an *indigent* criminal defendant who is seeking to substitute one *appointed* attorney for another to demonstrate either that the first appointed attorney provided inadequate representation, or that he and the attorney are embroiled in irreconcilable conflict, we have never required a *nonindigent* criminal defendant to make such a showing in order to discharge his *retained* counsel." (citations omitted)); *cf. United States v. Brown*, 785 F.3d 1337, 1348 (9th Cir. 2015) (explaining that the defendant's reasons "for wanting to discharge his retained lawyer were not properly the court's concern" because the defendant had the right to discharge his counsel "for any reason or [for] no reason" (alteration in original) (emphasis and internal quotation marks omitted)).

***8** The district court here erroneously relied on the factors in *Young*, 120 Nev. at 968-69, 102 P.3d at 576, rather than *Patterson*, when it denied Brass's motion. The district court's misplaced reliance on *Young* does not require reversal, however, if its decision effectively addressed the issues the district court should have considered under *Patterson*. *See Lara*, 103 Cal. Rptr. 2d at 214. Because the district court's findings of fact and conclusions of law did so here, we address whether the district court's decision to deny the motion was an abuse of discretion under *Patterson*.

To reiterate, in this case the relevant inquiry under

Patterson is whether the motion to substitute retained counsel is untimely and the resulting disruption of the orderly processes of justice outweighs the defendant's right to counsel of choice. *Patterson*, 129 Nev. at 176, 298 P.3d at 438. In deciding whether a motion to discharge retained counsel is timely, the court must "consider[ ] the totality of the circumstances." *Maciel*, 160 Cal.Rptr.3d 305, 304 P.3d at 1010; *see also* *Patterson*, 129 Nev. at 176, 298 P.3d at 438 (analyzing whether the motion to substitute retained counsel was timely "under the circumstances of the particular case" (internal quotation marks omitted)). Brass first moved to substitute retained counsel at the calendar call four days before the February 24, 2020, trial date, just seven days after Lawson visited Brass in jail and informed him that Posin had not prepared for trial. The district court deemed the motion untimely, finding that both Brass and Lawson could have raised their concerns with Posin's preparation at one of the numerous pretrial hearings in this case, but we cannot agree. The record shows that at each status check, Posin represented that he was diligently preparing for trial and that he would not need another continuance. Brass was entitled to rely on Posin's in-court representations that he was preparing for trial. *Cf.* *Oak Grove Inv'rs v. Bell & Gossett Co.*, 99 Nev. 616, 622, 668 P.2d 1075, 1078-79 (1983) ("The rationale for the [discovery rule in legal malpractice cases] is that a client has the right to rely on the attorney's expertise ....") *overruled on other grounds by* *Calloway v. City of Reno*, 116 Nev. 250, 264, 993 P.2d 1259, 1268 (2000). Brass thus raised his concerns about Posin's competence and preparation at the first opportunity after discovering those circumstances.[10] *See* *Lara*, 103 Cal. Rptr. 2d at 219 (concluding the defendant's motion to substitute retained counsel filed on the first day of trial was timely where the defendant "was unaware of the nature of [his attorney's] preparation until the moment the trial was finally set to begin"); *cf.* *Daniels v. Woodford*, 428 F.3d 1181, 1200 (9th Cir. 2005) ("Even if the trial court becomes aware of a conflict on the eve of trial, a motion to substitute counsel is timely if the conflict is serious enough to justify the delay.").

[10] While Lawson stated that Brass expressed dissatisfaction with Posin "on several occasions," nothing in the record indicates that Brass knew Posin was not adequately preparing for trial prior to Lawson's February visit to Brass. Similarly, the fact that Lawson did not raise his concerns with Posin's behavior at an earlier status check does not weigh against the timeliness of Brass's motion because we cannot impute Lawson's knowledge to Brass when the record does not show that Lawson had informed Brass of his concerns with Posin's preparation prior to any of the earlier status checks.

***9** Moreover, although a defendant generally can discharge retained counsel for any reason or no reason at all and therefore does not have to demonstrate inadequate representation or an irreconcilable conflict, the court can consider the absence or presence of such circumstances, and when defendant became aware of them, in deciding whether the motion to discharge retained counsel is untimely. *See* *Maciel*, 160 Cal.Rptr.3d 305, 304 P.3d at 1010-11 (observing that the trial court "did nothing improper" when it discussed the concerns the defendant raised about retained counsel during a hearing on the defendant's motion to discharge retained counsel). At the hearing on Brass's renewed motion, Posin acknowledged that "there may be an issue of whether I'm providing adequate representation of counsel based on whether perhaps I have dropped the ball." He conceded that "this is the type of case that some of ... our own evidence in the defense case would have been appropriate," "[or] perhaps necessary." Despite acknowledging that it was "necessary" to prepare and produce exculpatory evidence in this case and noting that Lawson provided several detailed leads on potentially exculpatory evidence, Posin conceded that he did not "issue a single subpoena" to follow up on that evidence. Further, Lawson—an experienced investigator appointed by the district court—told the court that "it became apparent to me that Mr. Posin had literally no knowledge of this case." After explaining both that "[he and Posin have] never done a file review on [Brass's] case" and the potentially exculpatory evidence he and his investigators discovered, Lawson declared that he "cannot let this [c]ourt believe for one minute that Mr. Brass is getting any kind of a defense, let alone a bad defense." The district court correctly noted the inadequacy of Posin's preparations when it discussed referring him to the State Bar for potential discipline, assuming the truth of "a substantial portion" of Lawson's testimony.[11] The record thus shows ample evidence that Posin did not adequately prepare for trial in this case.[12] Few derelictions by counsel are more significant than inadequate preparation for trial. *Cf.* *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970) ("Adequate preparation for trial often may be a more important element in the effective assistance of counsel to which a defendant is entitled than the forensic skill exhibited in the courtroom. The careful investigation of a case and the thoughtful analysis of the information it yields may disclose evidence of which even the defendant

is unaware and may suggest issues and tactics at trial which would otherwise not emerge."). In other words, this is not a situation where a defendant arbitrarily sought to discharge retained counsel on the first day of trial. *Cf.* *People v. Keshishian*, 162 Cal.App.4th 425, 75 Cal. Rptr. 3d 539, 542 (2008) (concluding that the trial court did not abuse its discretion in denying a defendant's motion to discharge retained counsel where the case had been pending for 2½ years; the defendant made a "last-minute" request on the day set for trial based solely on having "inexplicably 'lost confidence' in his experienced and fully prepared counsel"; and granting the request would have required an "indefinite continuance").

[11] While a potential conflict between Brass and Posin, who undertook Brass's case during a stayed 18-month bar suspension, *In re Discipline of Posin*, No. 69417, 2016 WL 1213354, at *1 (Nev. Mar. 25, 2016), is not a required consideration under *Patterson*, Posin's desire to avoid any potential bar discipline ties into the timeliness inquiry, as Posin initially expressed concern that he did not adequately prepare for trial yet immediately stated he could go to trial once the district court indicated it was considering referring him to the State Bar for potential discipline. Thus, Posin apparently gave false assurances when convenient for his own purposes at the status hearings and even at the hearing on Brass's renewed motion held on the day trial was set to begin.

[12] Although the district court found that Brass's complaints amounted to a disagreement with Posin's trial strategy, this finding is not supported by the record. Brass contended that Posin was not adequately prepared to represent him at trial because he did not adequately investigate the case, and Posin conceded that further review of the record convinced him that he should have issued subpoenas to follow up on the potentially exculpatory evidence Lawson identified. Thus, at the renewed motion hearing, there was no disagreement in strategy, as Posin conceded that his prior trial strategy to rely on cross-examination of the State's witnesses was inadequate.

We recognize that granting the motion would have disrupted the orderly processes of justice. In particular, it would have necessitated another continuance in the trial of a case that had been pending for more than two years and inconvenienced the State, victims, witnesses, and potential jurors. But that disruption was not unreasonable considering the totality of the circumstances: Brass promptly moved to discharge retained counsel after learning that counsel had not adequately prepared for trial; he faced going to trial with admittedly unprepared counsel in a 22-count felony case; and he was indigent and requested appointed counsel to replace Posin, not an indefinite delay to find new retained counsel.

Accordingly, while the district court understandably and appropriately had concerns about the prejudice to the State, as well as to the victims, witnesses, and potential jurors from the multiple defense-instigated trial continuances, it abused its discretion here because the motion was timely under the circumstances and any disruption to the orderly process of justice was reasonable under the unique facts of this case.[13] As this error is structural, *Gonzalez-Lopez*, 548 U.S. at 150, 126 S.Ct. 2557; *Patterson*, 129 Nev. at 177-78, 298 P.3d at 439, we reverse the judgment of conviction and remand for a new trial.[14]

[13] The district court also erred in concluding that the fact Brass retained Posin weighed against granting Brass's motion to substitute counsel. *See* *Rivera-Corona*, 618 F.3d at 979-80 ("Unless the substitution would cause significant delay or inefficiency or run afoul of the other considerations we have mentioned, a defendant can fire his retained or appointed lawyer and retain a new attorney for any reason or no reason." (emphasis omitted)). Indeed, the fact that Brass retained Posin gave him a greater ability to substitute counsel in recognition of his right to counsel of his choice. *See* *Patterson*, 129 Nev. at 175-76, 298 P.3d at 438. It is issues with Posin's representation, not Brass's manipulation, that results in the need to conduct a new trial here, and Posin's retention and payment as private counsel may not be held against Brass.

[14] In light of our disposition, we need not consider and express no opinion on Brass's remaining arguments, including his challenges to the sufficiency of the evidence. *See* *Buchanan v. State*, 130 Nev. 829, 833, 335 P.3d 207, 210 (2014) ("Because we reverse the district court's decision on the independent grounds of structural error, we decline to consider Buchanan's

challenge to the sufficiency of the evidence supporting his convictions.").

***10** Further, Posin's conduct in this case may violate the Rules of Professional Conduct. Consequently, we refer Posin to the State Bar of Nevada for such disciplinary investigations or proceedings as are deemed warranted. *See* SCR 104(1)(a). Accordingly, we direct the clerk of this court to provide a copy of this opinion to the State Bar of Nevada.[15] Bar counsel shall, within 90 days of the date of this opinion, inform this court of the status or results of the investigation and any disciplinary proceedings in this matter.

15 While our decision is based solely on the pretrial motion to substitute counsel, the State Bar's review of Posin's conduct may take into consideration Posin's actions at trial—many of which are raised in the appellate briefing herein—as well.

CONCLUSION

The Sixth Amendment right to counsel includes the right of a non-indigent defendant to the retained counsel of his or her choice. When a defendant moves to substitute retained counsel, the evaluating court analyzes whether the motion is timely and whether the defendant's right to counsel of choice outweighs countervailing interests in the efficient and orderly administration of justice. Here, the motion was timely under the circumstances, given retained counsel's assurances at the status checks about his trial preparation compared to his last-minute concession that he was not prepared, given that his choices not to subpoena records or witnesses were not strategy-based, and given that Brass did not become aware of these deficiencies until a week before calendar call. Brass's right to counsel of choice outweighs the disruption and inconvenience of a further trial continuance, as the record shows retained counsel took no steps to follow up on potentially exculpatory evidence his investigator identified and Brass raised these issues at the first opportunity after learning about them. Because the erroneous denial of a motion to substitute counsel at the trial level is structural error, we reverse the judgment of conviction and remand for a new trial.

We concur:

Pickering, J.

Herndon, J.

All Citations

--- P.3d ----, 2022 WL 1052001, 138 Nev. Adv. Op. 23

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506 P.3d 325
Supreme Court of Nevada.

In the MATTER OF the Application of Breck Warden SMITH for a Writ of Habeas Corpus.
The State of Nevada, Appellant,
v.
Breck Warden Smith, Respondent.

No. 82696
|
FILED MARCH 24, 2022

Synopsis

Background: Parolee whose parole had been revoked, after he entered *Alford* plea to new charge of attempted burglary, filed emergency petition for writ of habeas corpus, arguing Parole Board had exceeded its authority by immediately returning parolee to custody of Nevada Department of Corrections (NDOC) after he was detained on the new charge but deferring the parole revocation hearing until he entered plea, which was beyond the 60-day statutory period for holding the hearing. The District Court, Clark County, Kathleen E. Delaney, J., granted the petition and ordered that parolee receive sentence credit. State appealed.

The Supreme Court, Silver, J., held that parolee's return to custody of NDOC, pursuant to retake warrant issued by Parole Board after parolee was arrested on new criminal charges, triggered statutory 60-day period for Parole Board to hold parole revocation hearing.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

Appeal from a district court order granting a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Attorneys and Law Firms

Aaron D. Ford, Attorney General, and Katrina A. Samuels, Deputy Attorney General, Carson City, for Appellant.

McAvoy Amaya & Revero Attorneys and Michael J. McAvoy-Amaya and Timothy E. Revero, Las Vegas, for Respondent.

Claggett & Sykes Law Firm and Micah S. Echols, Las Vegas; Sharp Law Center and A.J. Sharp, Las Vegas; The Powell Law Firm and Tom W. Stewart, Las Vegas, for Amicus Curiae Nevada Justice Association.

BEFORE THE SUPREME COURT, SILVER, CADISH, and PICKERING, JJ.

OPINION

By the Court, SILVER, J.:

When a parolee is detained for a parole violation and returned to the custody of the Nevada Department of Corrections (NDOC), NRS 213.1517(3) requires the Nevada Board of Parole Commissioners (the Parole Board) to hold a hearing on the matter within 60 days. NRS 213.1517(4) sets out an exception to this 60-day rule when the parolee is detained on a new criminal charge but not returned to NDOC until after the final adjudication of that new charge. At issue in this appeal is whether subsection 4's exception applies where the Parole Board executes a warrant to return the parolee to NDOC *before* the final adjudication on the new criminal charge. We conclude that the parolee's return to NDOC pursuant to a warrant triggers subsection 3's 60-day hearing requirement. We therefore determine that the district court here correctly applied NRS 231.1517 and ordered the Parole Board to credit respondent for the time he spent incarcerated pending adjudication on his new criminal charges.

FACTS

In 2008, respondent Breck Smith was adjudicated as a habitual criminal and sentenced to serve a prison term of ten years to life. He was released on parole in March 2017. One year later, in March 2018, he was arrested on new criminal charges of attempted burglary and possession of burglary tools and remanded into the

custody of the Clark County Sheriff. As a result of his new arrest, he was incarcerated at the Clark County Detention Center.

Soon after, the Division of Parole and Probation issued parole violation reports based on the new criminal charges. Based on the new arrest report, the Division found probable cause for the parole violation. On April 11, 2018, the Parole Board issued a retake warrant that resulted in Smith being remanded back into the custody of NDOC. Although Smith was remanded into NDOC's custody and physically incarcerated in the prison, Smith's parole revocation hearing was continued for over a year, until June 25, 2019, the day after Smith entered an *Alford*[1] plea to the new attempted burglary charge. On that date, the Parole Board revoked Smith's parole for one year, until July 1, 2020. Because Smith received a consecutive sentence on his new charge, he did not begin serving his new sentence until July 2, 2020, after he was paroled on the previous charges.

[1] *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

In January 2021, Smith filed an emergency petition for a writ of habeas corpus, arguing that under NRS 213.1517, the Parole Board exceeded its authority by immediately returning Smith to NDOC's custody but deferring the parole revocation hearing until he pleaded guilty on the new criminal charges—far beyond the 60 days allowed by that statute. Because he was not given proper credit for any time served after the 60-day statutory period, he claimed that he effectively lost over a year of credit for time served due to him on his parole violation case. The district court agreed and ordered NDOC to ensure Smith was awarded flat time and statutory credit from June 12, 2018, to June 17, 2019—the dates by which his parole revocation hearing should have been held and his one-year parole revocation penalty would have expired, respectively. The State appeals, arguing that NRS 213.1517(4) creates an exception to the 60-day statutory rule that allowed the Parole Board to defer the parole revocation hearing to after Smith entered his *Alford* plea on the new criminal charges.

DISCUSSION

We review questions of statutory interpretation de novo, giving the statute its plain meaning unless doing so would create an unreasonable result. *Moore v. State*, 136 Nev. 620, 622-23, 475 P.3d 33, 36 (2020); *Lofthouse v. State*, 136 Nev. 378, 380, 467 P.3d 609, 611 (2020). We will avoid interpretations that would render words or phrases superfluous or nugatory. *Harvey v. State*, 136 Nev. 539, 543, 473 P.3d 1015, 1019 (2020).

Before the Parole Board may revoke parole, a parolee is entitled to a parole revocation hearing. *See Morrissey v. Brewer*, 408 U.S. 471, 487-88, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972). Minimal due process requires that this hearing "be tendered within a reasonable time after the parolee is taken into custody." *Id.* at 488, 92 S.Ct. 2593; *see also Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 124, 206 P.3d 975, 979 (2009) (explaining the due process protections of the United States and Nevada Constitutions require an opportunity to be heard where a liberty interest is at stake). This is so because the execution of a parole violation warrant, and custody under that warrant, together are "the operative event triggering any loss of liberty attendant upon parole revocation." *Moody v. Daggett*, 429 U.S. 78, 87, 97 S.Ct. 274, 50 L.Ed.2d 236 (1976).

To this end, the Legislature established that where probable cause exists for a parolee's detention, the Parole Board must conduct the parole revocation hearing within 60 days after a parolee is returned to NDOC's custody. NRS 213.1517(3). NRS 213.1517(4) provides an exception to that rule:

> If probable cause for continued detention of a paroled prisoner is based on conduct which is the subject of a new criminal charge, the Board may consider the prisoner's case under the provisions of subsection 3 or defer consideration until not more than 60 days after his or her return to the custody of the Department of Corrections following the final adjudication of the new criminal charge.

The State argues that under subsection 4, where a parolee is detained on new criminal charges, the Parole Board may defer the parole revocation hearing up to 60 days after the final adjudication on the new criminal charges, even where, as here, the parolee is in NDOC's custody pending the adjudication. Smith counters that subsection

4's exception to the 60-day requirement applies only where the parolee remains in local custody pending adjudication on the new charges and returns to NDOC after that adjudication.

We read NRS 213.1517 with a due process overlay and are persuaded by Smith's arguments. NRS 213.1517(4) provides that where the probable cause for the parolee's continued detention is based on conduct underlying a new criminal charge, the Parole Board may either conduct the revocation hearing in accordance with subsection 3—return the parolee to NDOC's custody and hold the hearing within 60 days—*or* defer the revocation hearing until no later than 60 days after the parolee's return to NDOC's custody following final adjudication of the new charge. The phrase "following the final adjudication of the new criminal charge" in subsection 4 attaches to the phrase "after [the parolee's] return to the custody of the Department of Corrections," creating separate and sequential requirements here: final adjudication on the new charges, followed by a return to NDOC's custody. And because each of these conditions must be met to defer consideration under subsection 4, it follows that subsection 4's exception will not apply where the Parole Board executes a warrant and returns the parolee to NDOC's custody *before* adjudication on the new charges. This interpretation avoids rendering the phrase "after [the parolee's] return to the custody of the Department of Corrections" superfluous. It also comports with due process considerations, as a parolee loses liberty once the parolee is taken into custody under the warrant and this loss triggers due process protections. *See* *Moody*, 429 U.S. at 87, 97 S.Ct. 274 (explaining that the trigger for the parolee's loss of liberty is the execution of the warrant and the return to custody); *Morrissey*, 408 U.S. at 487-88, 92 S.Ct. 2593 (explaining that once a parolee is taken into custody, due process requires the Parole Board hold a hearing within a reasonable time).[2]

[2] Although the State argued below that Smith requested the continuances of his parole revocation hearing and thus created the complained-of error, the State does not renew these arguments in its opening brief on appeal and, moreover, the State failed to provide us with a sufficient record to review that point. See *Cooper v. State*, 134 Nev. 860, 861 n.2, 432 P.3d 202, 204 n.2 (2018) (declining to consider an argument raised for the first time in the reply brief); *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("It is appellant's responsibility to make an adequate appellate record. We cannot properly consider matters not appearing in that record." (citation omitted)). We note, however, that a petitioner may not leverage an error he or she invited or waived. *See Jeremias v. State*, 134 Nev. 46, 52-53, 412 P.3d 43, 50 (2018). Thus, where a parolee delays the revocation hearing by requesting continuances pending the outcome of the parolee's new criminal charges, neither due process nor NRS 213.1517 will require the Parole Board to hold the revocation hearing within 60 days of the parolee's return to NDOC.

Here, the Parole Board issued a retake warrant in April 2018, at which point Smith was immediately remanded back into the custody of NDOC and returned to incarceration at the prison. His parole revocation hearing was continued until after adjudication on his new criminal charges in June 2019—well in excess of the 60 days allowed by NRS 213.1517. We therefore conclude that the Parole Board exceeded its authority under that statute and that the district court properly ordered NDOC to reflect a parole revocation date of June 12, 2018, and to ensure that any credits, expiration date of his parole revocation case, and start date of the sentence for his new case reflect the June 12, 2018, parole revocation date.[3]

[3] We do not reach the State's arguments against the district court's remedy of ordering the recalculation of Smith's time, as the State neither raised its arguments below nor supports them with adequate authority on appeal. See *Jeremias*, 134 Nev. at 50, 412 P.3d at 48 ("The failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal."); *Mazzan v. Warden*, 116 Nev. 48, 75, 993 P.2d 25, 42 (2000) ("Contentions unsupported by specific argument or authority should be summarily rejected on appeal.").

CONCLUSION

When probable cause exists to detain a parolee, NRS 213.1517(3) requires the Board of Parole Commissioners to consider the parolee's case within 60 days of the date the parolee returns to the custody of the Department of Corrections. NRS 213.1517(4) provides an exception to the 60-day rule and allows the Parole Board to defer consideration until the parolee is adjudicated on the new criminal charge and subsequently returned to NDOC. Each of the conditions set forth in NRS 213.1517(4) must

be met to defer consideration beyond 60 days from the date the parolee is returned to the custody of NDOC. Because, here, the Parole Board executed a retake warrant and returned Smith to the custody of NDOC before Smith's new criminal charges were adjudicated, this exception did not apply and the Parole Board exceeded its authority by deferring the revocation hearing beyond 60 days after Smith's return to the custody of NDOC. Accordingly, we affirm the district court order granting Smith' postconviction petition for a writ of habeas corpus.

We concur:

Cadish, J.

Pickering, J.

All Citations

506 P.3d 325, 138 Nev. Adv. Op. 16

505 P.3d 846
Supreme Court of Nevada.

Michael Phillip ANSELMO, Appellant,
v.
The STATE of Nevada, Respondent.

No. 81382
|
FILED MARCH 10, 2022

Synopsis
Background: Prisoner petitioned for postconviction DNA genetic marker analysis using a procedure that was not available at time of murder trial. The District Court, Washoe County, Lynne K. Simons, J., dismissed the petition. Prisoner appealed.

Holdings: The Supreme Court, Cadish, J., held that:

a district court must assume that requested genetic marker analysis will produce exculpatory DNA evidence;

reasonable possibility existed that prisoner would not have faced prosecution or conviction for first-degree murder if exculpatory DNA results been obtained before trial; and

state's inventory, which merely described packaging for some evidence, was insufficient.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***847** Appeal from a district court order dismissing a postconviction petition for genetic marker analysis. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Attorneys and Law Firms

Holland & Hart LLP and Sydney R. Gambee, J. Robert Smith, and Jessica E. Whelan, Las Vegas; Rocky Mountain Innocence Center and Jennifer Springer, Salt Lake City, Utah, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Christopher J. Hicks, District Attorney, and Marilee Cate, Appellate Deputy District Attorney, Washoe County, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, CADISH, J.:

This appeal presents issues concerning Nevada's statutory scheme governing postconviction petitions for genetic marker analysis. A jury convicted appellant of first-degree murder in 1972. In 2018, he filed a postconviction petition for genetic marker analysis, seeking to examine the DNA found on various pieces of evidence under a procedure that was not available at the time of his trial. The district court concluded that appellant failed to show a reasonable possibility that the State would not have tried him, or the jury would not have convicted him, had he obtained exculpatory evidence through the testing because the jury heard similar exculpatory evidence but nevertheless convicted him.

Under NRS 176.09183(1), the district court must assume that the requested genetic marker analysis will produce exculpatory DNA evidence and order such analysis if a reasonable possibility exists that the petitioner would not have faced prosecution or conviction had the exculpatory results been obtained before trial. Applying that statute to the facts here, we conclude that the district court acted outside the bounds of its discretion in denying appellant's petition, as the State tried appellant on a felony-murder theory based on rape and DNA evidence that would have excluded appellant as the perpetrator necessarily creates a reasonable possibility that he would not have faced prosecution or conviction for felony-murder.

Additionally, the existence or nonexistence of evidence relevant to the claims in the petition for genetic marker analysis necessarily impacts the district court's resolution ***848** of the petition. Thus, to the extent the custodian's inventory of evidence merely described the packaging holding the evidence in the State's possession, rather than the items of evidence contained therein, we agree with appellant that the inventory lacked sufficient detail for the

district court to determine whether the evidence on which appellant sought testing existed. Consequently, appellant's motion for relief as to the inventory should have been granted. Accordingly, we reverse the district court's order and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

The female victim disappeared from a hotel employee parking lot near the Cal-Neva Lodge at Lake Tahoe on July 15, 1971. Two days later, appellant Michael Anselmo found the victim's body and reported it to the police. The responding officers noted that the victim was nude. Several days later, Anselmo told the police where they could find the victim's jacket and keys, which the police recovered.

After conducting an autopsy, the coroner concluded that the victim died from strangulation. He further concluded that the perpetrator manually strangled the victim with his right hand. The perpetrator also stabbed the victim 15 times, which the coroner concluded was a contributing cause of death. The autopsy revealed evidence of sexual assault, and the coroner recovered semen from the victim. The semen did not contain any sperm, which indicated that either the male supplier was sterile or had a vasectomy, or the sperm degenerated before the victim's body was found.

Several officers interviewed Anselmo at different times. Throughout those interrogations, Anselmo asserted that another individual, John Soares, killed the victim. During an interview on July 18, Anselmo went into a comatose state and law enforcement transported him to the hospital. After the hospital discharged Anselmo, Detective Gordon Jenkins interrogated him. While Anselmo initially reaffirmed that Soares committed the murder, he eventually confessed to the crime. The State charged Anselmo with first-degree murder.

At trial, the State argued that Anselmo committed first-degree murder under the felony-murder rule. Specifically, the State introduced evidence that the victim had sexual intercourse between 12 and 24 hours before her death and that, due to the timeline of her activities, the only time the intercourse could have occurred was shortly before the victim's death. The State emphasized that the victim was found nude and that "the facts scream out to tell [the jury]" that the victim "was murdered in the perpetration of rape." In support, the State introduced evidence that the victim had an inflamed cervix and the coroner recovered semen from the victim's vaginal cavity. The forensic pathologist testified that there was no sperm found in the semen, which could be due to either the degenerative nature of sperm or the sterility of the semen's supplier.

Alternatively, the State argued that Anselmo committed first-degree murder under a willful, deliberate, and premeditated theory. In support, the State introduced evidence that the perpetrator stabbed the victim in the neck and chest 15 times. It argued that the perpetrator forced the victim from the parking lot to the clearing where the police recovered her body, which showed the perpetrator had time to form premeditation. The State also introduced evidence that Anselmo had been lurking in the employee parking lot during the early morning hours the day before the victim went missing. It introduced evidence of a struggle occurring in the car that the victim was using that night. Finally, the State relied on the fact that Anselmo (1) knew the body's location; (2) knew the location of the victim's jacket and keys, which the perpetrator had tossed into Lake Tahoe; and (3) confessed to committing the crime.

Anselmo's primary defense theory was that John Soares murdered the victim. Anselmo testified that he saw Soares in Reno the day before the victim went missing. On the night the victim went missing, Anselmo stated that he played pool and other games at the Cal-Neva Lodge's lounge until 1 a.m. When he left the club, Anselmo testified that he heard a scream and went to investigate it. He alleged that Soares emerged from the ***849** bushes near the Lodge, took Anselmo into the brush, and showed Anselmo the victim's body. Anselmo claimed Soares threatened him to keep quiet and directed Anselmo to throw the victim's coat into Lake Tahoe, which Anselmo conceded he did.

In support of this theory, Anselmo pointed to evidence that police in the Lake Tahoe area had received a report that Soares was in the area. In closing argument, Anselmo reminded the jury that he had consistently told police that Soares killed the victim. He argued his confession was both involuntary and inconsistent with the facts of the killing. Specifically, he pointed out that he confessed to choking the victim with her nylon shirt while the pathologist concluded that the perpetrator likely choked the victim with his right hand. He identified other inconsistencies, like the fact that he confessed to stabbing the victim 3 to 4 times, whereas the autopsy identified approximately 15 stab wounds, and the fact that his description of the knife did not match the actual stab wounds. Further, he argued that the fact that he could show police where he disposed of the victim's jacket and keys, but not the knife, supported his innocence because

he claimed Soares told him to dispose of the jacket and keys, not the knife. Finally, he argued that he could not have been the source of the semen recovered because he was not sterile. The jury found Anselmo guilty of first-degree murder and sentenced him to life without the possibility of parole. The jury's verdict was a general verdict that did not indicate which theory of first-degree murder the jury relied on to convict Anselmo.

In October 2018, Anselmo filed a postconviction petition requesting genetic marker analysis of the victim's clothes, the victim's fingernail clippings, blonde hair found in the victim's car, and the rape kit. He argued that the testing, which did not exist at the time of trial, would create a reasonable possibility that the jury would not have convicted him because it would reveal that another individual killed the victim. The district court found that Anselmo met the procedural requirements of NRS 176.0918 and set a hearing on the petition, directing the agency having custody of the evidence to prepare an inventory of all evidence related to Anselmo's claims. After the evidence custodians filed several inventories, Anselmo moved for an order to show cause, arguing the inventories were insufficient because they failed to identify all the evidence in the State's possession. In particular, he asserted that the inventories described the packaging in which the evidence was stored, as opposed to the evidence itself, or that the inventories were otherwise vague.

The State opposed the motion to show cause, arguing that the statutory scheme did not require the evidence custodians to open sealed evidence and provide descriptions of the contents therein. The district court denied the motion, concluding that the inventories were sufficient and that Anselmo failed to provide authority showing the evidence custodians were required to identify to whom the evidence belonged or to what the evidence pertained at the time of the crime.

The district court held a hearing on the petition. Anselmo argued that exculpatory DNA evidence would have contradicted his confession in which he claimed to have had sex with the victim. Regarding judicial estoppel, he asserted that the statutory scheme does not prohibit individuals who confessed to the crime from seeking genetic marker analysis. The State argued that the jury heard similar exculpatory evidence that another person committed the crime and still convicted Anselmo. The State asserted that overwhelming evidence supported the conviction, and thus, exculpatory genetic marker evidence would not create a reasonable possibility that Anselmo would not have been tried or convicted otherwise. It also contended that judicial estoppel applied because Anselmo confessed to committing the crime at a Pardons Board hearing in 2005.

The district court dismissed Anselmo's petition. It concluded that the jury heard similar exculpatory information when the pathologist testified that the semen may not have been from Anselmo. It further found that the felony-murder theory was secondary to the State's premeditated-and-deliberate-murder theory, and "[t]hus, the fact that Mr. Anselmo's DNA may or may not be found inside or on [the victim] is not of consequence." The ***850** court also observed that the jury found Anselmo guilty beyond a reasonable doubt after (1) hearing testimony about his suspicious behavior on the night the victim disappeared and during the searches and discovery of her body, (2) considering evidence as to his inconsistent statements to law enforcement and his knowledge of the location of the victim's belongings, and (3) considering his confession and corresponding argument that it was made involuntarily. The district court made no findings regarding the State's judicial estoppel argument.

DISCUSSION

The district court abused its discretion by denying Anselmo's petition because Anselmo demonstrated a reasonable possibility that he would not have been tried or convicted if exculpatory results had been obtained from the genetic marker analysis

Anselmo argues that he satisfied the reasonable-possibility standard. Specifically, he asserts that the identity of the perpetrator is in question, as he denied that he was the perpetrator and he does not match the description of the perpetrator that one of the victim's roommates gave. He also contends that the presumed presence of another individual's DNA creates a reasonable possibility that he would not have been tried or convicted because it (1) supports his contention that his confession was coerced and corroborates his earlier statements that another individual murdered the victim, (2) corroborates his testimony that he disposed of the victim's jacket and keys at the direction of the actual perpetrator, (3) gives the jury reason to believe his similarly exculpatory evidence, and (4) might contradict Soares's testimony that Soares was not in the Tahoe area at the time of the murder. We agree.

While we review an order denying a petition for genetic

marker analysis for an abuse of discretion, NRS 176.09183(1) (providing that the district court must order genetic marker analysis "if the court finds" that the enumerated requirements are satisfied), we review questions of statutory interpretation de novo, *Washington v. State*, 132 Nev. 655, 660, 376 P.3d 802, 806 (2016). When interpreting a statute, we look to the statute's plain language. *Id.* If a statute's plain language is unambiguous, we enforce the statute as written. *Id.*

As relevant here, a court must order a genetic marker analysis if it finds that

> (a) The evidence to be analyzed exists;
>
> (b) Except as otherwise provided in subsection 2, the evidence was not previously subjected to a genetic marker analysis, including, without limitation, because such an analysis was not available at the time of trial; and
>
> (c) One or more of the following situations applies:
>
> (1) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted *if exculpatory results had been obtained through a genetic marker analysis* of the evidence identified in the petition ....

NRS 176.09183(1) (emphasis added). The plain language of the statute requires the district court first to assume that the genetic marker evidence would be exculpatory and then ask whether there is a "reasonable possibility" that the petitioner would not have been convicted or prosecuted in light of the exculpatory genetic marker evidence.[1] Such an interpretation is consistent with the statutory scheme, as the results of the genetic marker testing must be "favorable to the petitioner" for the petitioner to then move for a new trial based on newly discovered evidence, NRS 176.09187, and is consistent with other jurisdictions' interpretations of analogous statutes, *see, e.g., Lambert v. State*, 435 P.3d 1011, 1019 (Alaska Ct. App. 2018) ("Importantly, the defendant need not show any likelihood that the DNA results will actually be favorable to his claim of innocence. Instead, he need only show that, assuming ***851** the results are as favorable as the defendant has shown they could be, these favorable results would raise a reasonable probability that the outcome of the defendant's trial would be different." (emphasis and internal quotation marks omitted)).

[1] The governing statute does not require the petitioner to show, or even assert, that he is actually innocent of the crime. Instead, the petition need only explain "[t]he rationale for why a reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of" the identified evidence. NRS 176.0918(3)(b).

The "reasonable possibility" standard is satisfied if there is "a real possibility that the [exculpatory] evidence would have affected the result."[2] *Roberts v. State*, 110 Nev. 1121, 1132, 881 P.2d 1, 8 (1994) (emphasis and internal quotation marks omitted), *overruled on other grounds by Foster v. State*, 116 Nev. 1088, 13 P.3d 61 (2000); *cf. James v. State*, 137 Nev. Adv. Op. 38, 492 P.3d 1, 5 (2021) (concluding that a reasonable possibility does not exist "[w]hen the results of the analysis would be irrelevant to the State's theory of the crime or the defendant's defense"). The first theory the State proposed in closing arguments was felony murder based on rape. While the State also presented a willful, deliberate, and premeditated theory as an alternative, the jury returned a general guilty verdict. Thus, the jury could have convicted Anselmo on the felony-murder theory based on the rape of the victim. Therefore, genetic marker evidence that definitively excludes Anselmo as the supplier of the semen recovered from the victim creates a reasonable possibility that the jury would not have convicted Anselmo because it directly contradicts the State's felony-murder theory. Moreover, as Anselmo points out, genetic material recovered from under the victim's fingernails would allow a jury to infer that the victim fought back against the perpetrator and, if analyzed and shown to be exculpatory, would create a reasonable possibility that the jury would not have convicted Anselmo, as it supports the defense theory that another individual assaulted the victim.

[2] In analyzing whether this standard is met, we look at the actual charge of which the petitioner stands convicted, which is first-degree murder. No party has argued that we should look at whether Anselmo would have been prosecuted or convicted of *any* crime as opposed to the crime the State chose to prosecute and of which the jury convicted him.

The State's contrary arguments are not persuasive. While the State asserts that the jury considered and rejected similarly exculpatory evidence, the evidence it identifies is not the same as the presumed exculpatory evidence the

genetic marker analysis would produce. For example, the State points out that the pathologist testified that the semen *may not have been* Anselmo's due to the lack of sperm. But that testimony still allowed the jury to conclude that Anselmo *may have* provided the DNA, and indeed, the State argued that Anselmo was the source of the semen and that the sperm had simply degenerated. NRS 176.09183, however, requires the district court to assume that the DNA evidence would exclude Anselmo, and thus, the jury would have received evidence that the semen *was not* from Anselmo. Moreover, the fact that the State had other circumstantial evidence of Anselmo's guilt does not preclude a reasonable-possibility finding because the district court must ask only whether there is a real possibility that the jury would not have convicted Anselmo if it had exculpatory genetic marker testing results.[3]

[3] The State argues that the principle of judicial estoppel provides additional support for the district court's dismissal of Anselmo's petition because Anselmo allegedly took an inconsistent position in a Pardons Board hearing. Judicial estoppel applies if, among other things, the same party takes two different positions in judicial or quasi-judicial administrative proceedings. *Marcuse v. Del Webb Cmtys., Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468-69 (2007). However, the State provides no authority or analysis to support the proposition that a Pardons Board hearing is a quasi-judicial proceeding for purposes of applying judicial estoppel and instead assumes that it is. Because not every administrative hearing is quasi-judicial, *see State ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 273-74, 255 P.3d 224, 229-30 (2011) (adopting the judicial functions test to determine when an administrative hearing is a quasi-judicial hearing), and it is not obvious that a Pardons Board hearing would qualify, we conclude that the State's argument is not cogent, and thus, we need not consider it, *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (concluding that this court need not address issues not cogently argued and supported by relevant authority).

The district court abused its discretion when it concluded that the State's inventory was sufficient

Anselmo argues that the State's inventory of the evidence was insufficient ***852** because it lacked sufficient detail to identify the evidence remaining in the State's custody. We agree to the extent that the inventory described the packaging of some of the items of evidence as opposed to the actual evidence contained within it.[4]

[4] The State argues that we lack jurisdiction to review the district court order denying Anselmo's motion regarding the sufficiency of the inventory because (1) the inventory order is not a final judgment and (2) the evidence custodians are not parties to this appeal. Neither argument is persuasive. While the inventory order is not a final judgment, we may review "any decision of the [district] court in an intermediate order or proceeding, forming a part of the record." NRS 177.045. Further, because we have the statutory authority to review an order denying a petition for genetic marker testing, NRS 176.09183(6), we may likewise review this intermediate decision pertaining to the allegedly insufficient evidence inventory. Moreover, NRS 176.0918(4)(c) gives the district court the authority to order each evidence custodian to provide an inventory of all relevant evidence. Thus, should we conclude that the evidence inventories are insufficient, we can instruct the district court to exercise its authority over the evidence custodians to require that the custodians provide sufficiently detailed inventories of the evidence.

Reviewing the district court's interpretation of NRS 176.0918(4) de novo, *Washington*, 132 Nev. at 660, 376 P.3d at 806, we conclude that an inventory that describes only the packaging in which the evidence is contained, as opposed to the actual evidence, is insufficient. The purpose of making postconviction genetic testing available to a convicted felon is to evaluate evidence that may contain genetic marker information pertinent to the investigation and prosecution that led to the conviction, NRS 176.0918(1), and to that end, NRS 176.0918(4)(c)(2) requires the State to provide a detailed list "of all evidence relevant to the claims in the petition ... that may be subjected to genetic marker analysis." Here, the inventory, while sufficiently detailed regarding some pieces of evidence, described the containers of other pieces of evidence as opposed to the evidence itself. For example, the inventory described some pieces of evidence as "small paper canister," "film canister," and "one cardboard 'FONDA ONE PINT U.S. LIQUID MEASURE' canister." The inventory as to those pieces of evidence does not satisfy the statutory directive to produce an inventory of relevant evidence that may be

tested because the district court cannot determine what evidence is inside a "small paper canister" or "film canister" for purposes of evaluating its relevancy or whether it should be tested. Accordingly, the district court improperly denied Anselmo's motion for an order to show cause related to the insufficient evidence inventory. *See Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012) (noting that discovery orders are generally reviewed for an abuse of discretion); *cf.* *State v. Nye*, 136 Nev. 421, 423-25, 468 P.3d 369, 371-72 (2020) (holding, in the context of an inventory search, that an inventory was insufficient because it did not detail all the contents of the defendant's bag).

The State's contrary arguments are not persuasive. First, the crux of the State's argument is that there is no statutory requirement that evidence custodians must open or manipulate sealed containers until the district court orders testing of an item in that container. However, the district court can only order testing if it finds "[t]he evidence to be analyzed exists." NRS 176.09183(1)(a). The district court cannot determine whether relevant evidence exists if the inventory merely describes the evidence container, e.g., "film canister," as opposed to the evidence itself.[5] Similarly, the State's argument that it need not open a sealed container until the court orders that item to be tested lacks merit, as such an interpretation would frustrate the detailed statutory scheme that requires the inventory after the petition meets the requirements and then ***853** allows a hearing for the court to determine exactly which, if any, pieces of evidence it should order to be tested. *See* NRS 176.0918(4)(c); NRS 176.09183(l)(a).

[5] At oral argument before this court, the State expressed concern that opening the sealed items may affect the chain of custody. However, opening and testing of evidence in sealed containers does not break the chain of custody as long as the evidence custodians follow their established procedures for handling evidence. *See Burns v. Sheriff*, 92 Nev. 533, 534-35, 554 P.2d 257, 258 (1976) (concluding that the chain of custody was established when the arresting officer testified that he placed the evidence in a sealed and initialed envelope in the evidence locker, and the chemist testified that she retrieved the sealed envelope from the evidence locker, opened the envelope and tested the evidence within it, and then placed the evidence back in the evidence vault in a newly resealed and initialed envelope).

CONCLUSION

When determining whether to grant a petition for genetic marker analysis under NRS 176.09183(1)(a), the district court must assume that the analysis will produce exculpatory evidence and then ask whether there is a reasonable possibility that the petitioner would not have been tried or convicted due to that exculpatory evidence. Further, an evidence custodian's inventory of evidence is insufficient if it merely describes the packaging in which evidence is contained as opposed to the evidence within. On the record before us, the district court abused its discretion by denying Anselmo's petition for genetic marker analysis because he showed a reasonable possibility that, assuming exculpatory results, the jury would not have convicted him. The district court also abused its discretion when it concluded the inventory was sufficient as to the items that were identified only by their packaging because such a description does not satisfy the statutory requirement for an evidence inventory. Accordingly, we reverse the district court's order and remand for further proceedings. Upon remand, the district court must instruct the evidence custodians to submit a new evidence inventory that details the evidence within the containers it previously identified but did not open. After the district court receives and reviews the new evidence inventories, it must order genetic marker analysis of any relevant evidence it concludes exists.

We concur:

Pickering, J.

Herndon, J.

All Citations

505 P.3d 846, 138 Nev. Adv. Op. 11

502 P.3d 177
Supreme Court of Nevada.

Sean Maurice DEAN, Appellant,
v.
Aitor NARVAIZA, Elko County Sheriff, Respondent.

No. 81209
|
FILED JANUARY 13, 2022

Synopsis

Background: Following affirmance of conviction for attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon, and battery with the use of a deadly weapon resulting in substantial bodily harm, 2019 WL 398002, petitioner sought writ of habeas corpus, alleging that counsel was ineffective for introducing racial issues into trial. The District Court, Elko County, Alvin R. Kacin, J., denied petition. Petitioner appealed.

Holdings: The Supreme Court, Stiglich, J., held that:

counsel's comments suggesting that all African Americans, including petitioner, had attribute of being sneaky and violent constituted deficient performance;

counsel's comments prejudiced petitioner and thus amounted to ineffective assistance of counsel; and

counsel's inappropriate conduct of discussing harmful racial stereotypes warranted intervention by trial court.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***178** Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Attorneys and Law Firms

Lockie & Macfarlan, Ltd., and David B. Lockie, Elko, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Tyler J. Ingram, District Attorney, and Mark S. Mills, Deputy District Attorney, Elko County, for Respondent.

BEFORE THE SUPREME COURT, HARDESTY and STIGLICH, JJ., and GIBBONS, Sr. J.[1]

[1] The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

OPINION

By the Court, STIGLICH, J.:

In this appeal, we consider whether a defense attorney's overt interjection of racial stereotypes into a criminal trial constituted ineffective assistance of counsel. In conducting voir dire, counsel discussed several offensive racial stereotypes. Because counsel carelessly introduced racial animus into this criminal trial, we conclude that the district court erred in denying appellant Sean Dean's postconviction petition for a writ of habeas corpus, as counsel's performance fell below an objective standard of reasonableness and resulted in prejudice. We therefore reverse the district court's order denying Dean's petition and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Dean faced charges of attempted murder with the use of a deadly weapon and other related offenses. During jury selection, Dean's counsel asked the prospective jurors if they had any preconceived ideas about African Americans having "certain attributes." None of the prospective jurors answered that they did. Counsel responded "You don't?" Counsel followed this with a ***179** discussion involving several offensive racial stereotypes. Counsel insisted that the prospective jurors must have heard that all African Americans "like watermelon" or "have an attribute of violence, that they are sneaky." Again, no one on the venire responded.

Eventually, one outspoken prospective juror rejected counsel's suggestions and asserted that "we're all equal" and that it was "unfair" to make assumptions based on race. Despite this clear disavowal of racial bias, counsel further interrogated this prospective juror with more questions about offensive racial stereotypes, including the following: "[Dean] has a propensity for violence because he is black. You have heard that?" Despite receiving no affirmative response, counsel asked if any of the prospective jurors could not evaluate Dean "as just another guy, not a black guy?"

The jury found Dean guilty of attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon, and battery with the use of a deadly weapon resulting in substantial bodily harm. The district court sentenced Dean to an aggregate prison term of 144 to 372 months. Dean appealed, and the court of appeals affirmed his conviction. *Dean v. State*, No. 74602-COA, 2019 WL 398002 (Nev. Ct. App. Jan. 25, 2019) (Order of Affirmance). Dean filed a timely postconviction petition for a writ of habeas corpus, alleging, among other claims, that counsel was ineffective for introducing racial issues into the trial. After an evidentiary hearing, the district court denied the petition. Dean appealed.

DISCUSSION

Dean argues that counsel's method of broaching the subject of race during voir dire by asking the venire about offensive racial stereotypes constitutes ineffective assistance of counsel. We agree.

To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulted in prejudice such that, but for counsel's errors, there is a reasonable probability of a different outcome in the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). "With respect to the prejudice prong, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Johnson v. State*, 133 Nev. 571, 576, 402 P.3d 1266, 1273 (2017) (quoting *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052). A petitioner must show both deficient performance and prejudice to warrant postconviction relief. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052. We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. *See Turner v. Murray*, 476 U.S. 28, 36 & n.9, 106 S.Ct. 1683, 90 L.Ed.2d 27 (1986). "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873, 109 S.Ct. 2237, 104 L.Ed.2d 923 (1989) (internal citations omitted). In some cases, after weighing the risks and benefits, trial counsel may decide to raise the issue of race and racial prejudice during voir dire. *See Mahdi v. Bagley*, 522 F.3d 631, 638 (6th Cir. 2008) (explaining that "counsel had to weigh the potential harm that could flow from a *voir dire* on racial and religious bias against its arguable benefit"); *see also Commonwealth v. Henry*, 550 Pa. 346, 706 A.2d 313, 323 (1997) ("[R]aising the issue of racial bias may have the adverse effect of emphasizing racial stereotypes by focusing the jurors' attentions on skin color instead of the guilt or innocence of the accused."). And under some circumstances, counsel may be compelled to broach the issue of race. For example, counsel may be ineffective for not asking any individual questions of an empaneled juror "who expressly admitted her racially biased view that black people—including [the defendant]—are ***180** inherently more violent than other people." *State v. Bates*, 159 Ohio St.3d 156, 149 N.E.3d 475, 484 (2020). But when probing for racial bias, counsel must discuss the subject in a careful and responsible manner. *See Middleton v. State*, 64 N.E.3d 895, 901 (Ind. Ct. App. 2016) (explaining that counsel referring to his client as a "negro" while exploring potential racial bias during voir dire "was wholly unacceptable and amounted to deficient performance").

In this case, counsel chose to delve into possible racial bias among the prospective jurors but did so in a flawed and inappropriate manner. Among the numerous problematic comments, counsel suggested that all African Americans, and Dean himself, had an "attribute" of being sneaky and violent. Given that Dean faced charges involving violence, we conclude that counsel's conduct went beyond an objectively reasonable inquiry into potential racial bias. We, like the Florida Supreme Court, are concerned that "[t]he manner in which counsel approached the subject [of race] unnecessarily tended either to alienate jurors who did not share his animus against African Americans 'just because they're black,' or

to legitimize racial prejudice without accomplishing counsel's stated objective of bringing latent bias out into the open." *State v. Davis*, 872 So. 2d 250, 256 (Fla. 2004). At the evidentiary hearing on Dean's postconviction petition, counsel testified that he sought to bring out the unconscious racial biases present "in all of us." However, counsel's stated goal does not make his method of addressing possible racial bias reasonable. Indeed, at the evidentiary hearing, the State described the outspoken prospective juror as "offended" and counsel testified that the prospective juror was "very angry" about the implication that race would factor into his deliberation, which further demonstrates the impropriety of counsel's conduct. *See* *Mazzan v. State*, 100 Nev. 74, 79-80, 675 P.2d 409, 412-13 (1984) (finding counsel ineffective for, in part, antagonizing the jury). Whether counsel himself believed any of the offensive stereotypes is immaterial because bringing such racial invective into the courtroom cannot be justified. *See* *Davis*, 872 So. 2d at 253 ("Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated."). In particular, we are troubled by counsel's comment that "[Dean] has a propensity for violence because he is black." This comment came after the outspoken prospective juror rejected the idea of making any assumptions based on race. Rather than ending this line of inquiry, counsel chose to ask more problematic racial questions and undercut his stated purpose of challenging the prospective jurors' unconscious feelings about race. Based on the foregoing, we conclude that counsel's conduct constituted deficient performance, as we discern no reasonable basis for his method of exploring possible racial bias among the prospective jurors.

We next consider whether that deficient performance prejudiced Dean. Under the facts in this case, we conclude that counsel's offensive discussion about race resulted in prejudice. First, of particular note, counsel's repeated suggestion that African Americans are inherently violent severely compromised Dean's defense that he did not wield a knife during the altercation and the victims stabbed each other. *See* *Strickland*, 466 U.S. at 686, 104 S.Ct. 2052 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). Next, counsel's suggestion that African Americans are "sneaky" potentially undermined his own client's credibility, particularly in this case where Dean testified at trial. Lastly, counsel created an unacceptable risk of infecting the jury's deliberations because his statements "appealed to a powerful racial stereotype—that of black men as violence prone," *Buck v. Davis*, 580 U.S. ——, ——, 137 S. Ct. 759, 776, 197 L.Ed.2d 1 (2017) (internal quotation marks omitted). Because counsel suggested that Dean "has a propensity for violence" based on his race, we do not believe that counsel's concluding remarks about not evaluating Dean by his race cured the prejudicial effect of counsel's earlier statements about African Americans. Based on counsel's poorly designed introduction of offensive racial stereotypes into the jury-selection process, we do ***181** not have confidence in the outcome at trial, as counsel's conduct created a reasonable probability of an unreliable conviction. *See* *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome."); *Davis*, 872 So. 2d at 255 (finding that counsel's conduct in discussing racial prejudice "created a reasonable probability of unreliable convictions"). Because Dean's counsel performed deficiently and that performance resulted in prejudice, we conclude that Dean received ineffective assistance of counsel at trial.

We must also note that, under the facts of this case, the trial court's inaction heightens our lack of confidence in the outcome of the trial. In this case, counsel's conduct of discussing harmful racial stereotypes warranted intervention by the trial judge. Instead, the venire may have seen the judge's silence as normalizing, or even tacitly approving, counsel's offensive questioning. *See* *Azucena v. State*, 135 Nev. 269, 272, 448 P.3d 534, 538 (2019) ("[J]udges [must] be mindful of the influence they wield over jurors, as a trial judge's words and conduct are likely to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced." (internal quotation marks omitted)). The United States Supreme Court has recognized "that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). Here, the trial court neither cautioned counsel nor canvassed any of the prospective jurors to assess whether the inappropriate comments had any adverse effect. Such actions were needed because "[t]he trial judge has a duty to restrict attorney-conducted voir dire to its permissible scope: obtaining an impartial jury." *Whitlock v. Salmon*, 104 Nev. 24, 28, 752 P.2d 210, 213 (1988). When counsel treads into improper or antagonistic lines of inquiry, it is incumbent on judges to exercise their discretion and reign

in such behavior. *See* *id.* (acknowledging "the absolute right of a trial judge to reasonably control and limit an attorney's participation in voir dire"); *see also* Nev. Code of Judicial Conduct Canon 2, Rule 2.8. Exercising reasonable control over the conduct of counsel safeguards not only the integrity of an individual trial proceeding but also the decorum and public confidence in the justice system as a whole. The district court's duty is particularly critical when it comes to sensitive issues like racial prejudice because vigilance is required from trial courts to combat the corrosive effects of such prejudice in the justice system. As the United States Supreme Court has explained, "[b]ecause of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)). Accordingly, counsel's offensive questioning of the venire warranted intervention by the trial court.[2] Thus, we take this opportunity to urge trial judges to exercise reasonable control when counsel exceeds the appropriate bounds of voir dire. *See* NRS 175.031 (providing that the district court shall allow supplemental examination of potential jurors "as the court deems proper").

[2] We do not suggest that the court needed to reprimand counsel in front of the venire; rather, the court could have excused the venire or conducted a bench conference to admonish counsel.

CONCLUSION

We conclude that counsel's statements impermissibly tainted the jury pool by introducing racial invective into the proceedings. Counsel's performance fell below an objective standard of reasonableness and prejudiced the defense. Accordingly, we reverse the district court's order denying Dean's postconviction habeas petition and remand this matter for further proceedings.

We concur:

Hardesty, J.

Gibbons, Sr. J.

All Citations

502 P.3d 177, 138 Nev. Adv. Op. 2

501 P.3d 935
Supreme Court of Nevada.

James Montell CHAPPELL, Appellant,
v.
The STATE of Nevada, Respondent.

No. 77002
|
FILED DECEMBER 30, 2021

Synopsis

Background: After convictions and death sentence were affirmed on direct appeal, 114 Nev. 1403, 972 P.2d 838, defendant filed postconviction petition for writ of habeas corpus. The District Court, Clark County, granted petition in part, vacated sentence, and ordered new sentencing hearing. At resentencing, defendant was again sentenced to death, and he appealed. The Supreme Court, 125 Nev. 1025, 281 P.3d 1160, affirmed. Defendant then filed second petition for writ of habeas corpus. The District Court denied petition, and defendant appealed. The Supreme Court, 2015 WL 3849122, affirmed. Defendant then filed third petition for writ of habeas corpus. The District Court dismissed petition based on determination that claims were procedurally defaulted and that defendant failed to demonstrate good cause and prejudice to excuse procedural bar. Defendant appealed.

Holdings: The Supreme Court, Cadish, J., held that:

alleged ineffectiveness of counsel who represented defendant in first postconviction petition was not good cause for procedural default of various habeas challenges to conviction arising out of guilt phase of capital murder trial;

defendant did not have statutory right to appointed counsel on second habeas petition, and thus, counsel's acts or omissions on second petition did not provide good cause to excuse procedural default of guilt-phase claims brought in third petition more than one year after they became available;

defendant did not show good cause and actual prejudice necessary to excuse procedural default of claims raised in third petition based on unsupported, meritless claims of ineffective assistance of second postconviction counsel;

defendant waived habeas review of claims challenging constitutionality of Nevada's death-penalty scheme;

defendant failed to demonstrate that he was actually innocent of burglary, robbery, and murder, as basis for overcoming procedural default of claims raised in third petition;

defendant did not demonstrate that he was ineligible for death penalty, as basis for excusing procedural bars to claims raised in third petition; and

third petition was barred by statutory laches.

Affirmed.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***944** Appeal from a district court order dismissing a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Attorneys and Law Firms

Rene L. Valladares, Federal Public Defender, and Bradley D. Levenson, Ellesse Henderson, and Scott Wisniewski, Assistant Federal Public Defenders, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Alexander G. Chen, Chief Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, EN BANC.[1]

[1] The Honorable Abbi Silver, Justice, and the Honorable Douglas W. Herndon, Justice, did not participate in the decision of this matter.

OPINION

By the Court, CADISH, J.:

Several mandatory procedural bars apply to postconviction habeas petitions under NRS Chapter 34. To overcome those mandatory procedural bars and avoid dismissal of a postconviction habeas petition, a petitioner must demonstrate good cause and prejudice unless certain narrow exceptions apply. A petitioner must raise a claim of good cause within a reasonable time after it becomes available.

In this case, appellant James Chappell asserted the ineffective assistance of his first postconviction counsel as good cause and ***945** prejudice to raise procedurally barred grounds for relief from the guilt phase of his trial. But he did not do so until after the penalty phase retrial he obtained in the first postconviction proceeding, the direct appeal from the judgment entered after the penalty phase retrial, and the remittitur issued on appeal from the district court order denying his second postconviction habeas petition. We conclude that his delay based on those circumstances was not reasonable and therefore he could not rely on the alleged ineffective assistance of first postconviction counsel as good cause and prejudice to raise grounds for relief from the guilt phase of his trial. He did, however, timely assert the alleged ineffective assistance of second postconviction counsel, who was appointed pursuant to a statutory mandate for purposes of Chappell's first opportunity to assert collateral challenges to the death sentence imposed in the penalty phase retrial, as good cause and prejudice to raise procedurally barred grounds for relief from the death sentence. We conclude those ineffective-assistance claims lack merit and therefore the district court did not err in dismissing the petition as procedurally barred. Because we also conclude that Chappell did not show that the failure to consider his claims would result in a fundamental miscarriage of justice sufficient to excuse the procedural bars, we affirm the district court order dismissing Chappell's third postconviction petition for a writ of habeas corpus.

FACTS AND PROCEDURAL HISTORY

Almost three decades ago, appellant James Chappell was serving time for domestic battery in a Las Vegas jail when he was mistakenly released from custody. Upon his release, Chappell went to the mobile home park where his ex-girlfriend lived, climbed through a window into her residence, had sexual intercourse with her, and stabbed her to death with a kitchen knife before fleeing in her car. A jury found Chappell guilty of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and burglary and sentenced him to death for the murder. We affirmed the judgment of conviction and sentence on direct appeal. *Chappell v. State* (*Chappell I*), 114 Nev. 1403, 972 P.2d 838 (1998).

Chappell filed a timely postconviction petition for a writ of habeas corpus. David Schieck was appointed to represent Chappell in that proceeding. Although the district court rejected Chappell's claims related to the guilt phase, it found that Chappell received ineffective assistance during the penalty phase and ordered a new penalty hearing as to the murder conviction. We affirmed the district court's order partially granting and partially denying the petition. *Chappell v. State* (*Chappell II*), Docket No. 43493, 122 Nev. 1658, 178 P.3d 741 (Order of Affirmance, Apr. 7, 2006). At the penalty phase retrial, Schieck and another attorney represented Chappell. The jury returned a death sentence, and this court affirmed the sentence on appeal. *Chappell v. State* (*Chappell III*), No. 49478, 2009 WL 3571279 (Nev. Oct. 20, 2009) (Order of Affirmance).

Following the appeal from the judgment entered after the penalty phase retrial, Chappell filed his second postconviction petition for a writ of habeas corpus. The claims in that petition focused on challenges to the death sentence imposed at the penalty phase retrial. Christopher Oram represented Chappell in the second postconviction proceeding. The district court denied the petition, and this court affirmed. *Chappell v. State* (*Chappell IV*), No. 61967, 2015 WL 3849122 (Nev. June 18, 2015) (Order of Affirmance).

Chappell filed a third postconviction petition for a writ of habeas corpus on November 16, 2016. The district court conducted a limited evidentiary hearing on one of Chappell's claims but ultimately dismissed the petition as procedurally barred. This appeal followed.

DISCUSSION

The district court did not err in dismissing the petition as untimely, successive, and an abuse of the writ

Chappell's third postconviction habeas petition was untimely, given that he filed it more than 17 years after the remittitur issued in his direct appeal from the original judgment of conviction and more than 6 years after the remittitur issued in his direct appeal from the judgment of conviction entered ***946** after the penalty phase retrial. *See* NRS 34.726(1) ("[A] petition that challenges the validity of a judgment or sentence must be filed within 1

year after entry of the judgment of conviction or, if an appeal has been taken from the judgment, within 1 year after the appellate court ... issues its remittitur."). The petition included many grounds for relief that Chappell had waived because he could have raised them on direct appeal or in the previous postconviction petitions. NRS 34.810(1)(b)(2). The petition was also successive to the extent it alleged grounds for relief that had been considered on the merits in a prior proceeding, and it constituted an abuse of the writ because it included new and different grounds for relief (i.e., grounds that had not been raised in the prior postconviction petitions). NRS 34.810(2). Therefore, Chappell's third petition was subject to multiple, mandatory procedural bars. *See State v. Eighth Judicial Dist. Court (Riker)*, 121 Nev. 225, 231, 112 P.3d 1070, 1074 (2005) ("Application of the statutory procedural default rules to post-conviction habeas petitions is mandatory.").

To avoid dismissal based on those procedural bars, Chappell had to demonstrate good cause and prejudice, save for certain narrow exceptions addressed below at pp. 36-38. *See* NRS 34.726(1); NRS 34.810(1)(b), (3). "In order to demonstrate good cause, a petitioner must show that an impediment external to the defense prevented him or her from complying with the state procedural default rules." *Hathaway v. State*, 119 Nev. 248, 252, 71 P.3d 503, 506 (2003). "An impediment external to the defense may be demonstrated by a showing that the factual or legal basis for a claim was not reasonably available to counsel, or that some interference by officials, made compliance impracticable." *Id.* (internal quotation marks omitted). "To establish prejudice, a petitioner must show not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage ...." *State v. Powell*, 122 Nev. 751, 756, 138 P.3d 453, 456 (2006) (internal quotation marks omitted).

Chappell claims he demonstrated good cause and prejudice based on ineffective assistance of postconviction counsel, referring to both first postconviction counsel (Schieck) and second postconviction counsel (Oram). Ineffective assistance of postconviction counsel can constitute good cause for an untimely and successive petition where postconviction counsel was appointed as a matter of right, if the postconviction-counsel claim is not itself untimely and therefore procedurally barred. *See generally Rippo v. State*, 134 Nev. 411, 423 P.3d 1084 (2018) (discussing procedural bars and availability of a postconviction-counsel claim as good cause and prejudice); *see also Lisle v. State*, 131 Nev. 356, 360, 351 P.3d 725, 728 (2015) (stating that a good-cause claim based on a *Brady* violation must be raised within a reasonable time after the claim became available); *State v. Huebler*, 128 Nev. 192, 198 n.3, 275 P.3d 91, 95 n.3 (2012) (same); *Riker*, 121 Nev. at 235, 112 P.3d at 1077 (explaining that a postconviction-counsel claim is not "immune to other procedural default [statutes]" such as NRS 34.726); *Hathaway*, 119 Nev. at 252-53, 71 P.3d at 506 (explaining that ineffective-assistance claim asserted as good cause "itself must not be procedurally defaulted" and thus must be raised in a timely fashion). The first question, then, is whether Chappell timely raised his good-cause claims based on ineffective assistance of postconviction counsel, which requires a showing that he raised those claims within a reasonable time after they became available. *Rippo*, 134 Nev. at 419-22, 423 P.3d at 1095-97 (discussing the time bar set forth in NRS 34.726 as applied to a postconviction-counsel claim that is asserted as good cause to obtain review of other procedurally barred grounds for relief). A postconviction-counsel claim is raised within a reasonable time and therefore is not itself procedurally barred when it is raised within one year of "the conclusion of the postconviction proceedings in which the ineffective assistance allegedly occurred." *Id.* at 420, 423 P.3d at 1096. Thus, the postconviction-counsel claim must be raised within one year after entry of a final written decision by the district court resolving all the grounds in the petition or, if a timely appeal was taken, the issuance of the appellate court's remittitur. *Id.* at 421, 423 P.3d at 1096.

***947** *Chappell did not timely raise the good-cause claims based on ineffective assistance of first postconviction counsel*

Chappell claims first postconviction counsel's ineffectiveness provides good cause for him to raise procedurally barred grounds for relief from the conviction (i.e., grounds related to the guilt phase of the 1996 trial and the subsequent direct appeal). He contends that the third petition provided the first opportunity to pursue those postconviction-counsel claims and that he filed that petition within a reasonable time after those claims became available. We disagree.

The remittitur in Chappell's first postconviction appeal issued on May 2, 2006. Any good-cause claim based on first postconviction counsel's ineffectiveness became available on that date. Thus, Chappell had one year from

May 2, 2006, to assert first postconviction counsel's ineffectiveness as good cause to raise procedurally barred challenges to his conviction. Having missed that deadline by almost a decade, Chappell urges us to hold that the first-postconviction-counsel claims were not available until November 17, 2015, when the remittitur issued on appeal from the order denying his second postconviction habeas petition, in which Chappell challenged the death sentence imposed at the penalty phase retrial. We find Chappell's arguments unpersuasive.

First, relying on *Johnson v. State*, 133 Nev. 571, 402 P.3d 1266 (2017), Chappell argues that after he obtained relief from the original death sentence, there was no judgment of conviction to challenge in a postconviction petition until the new judgment was entered after the penalty phase retrial. In *Johnson*, we held that there was no final judgment of conviction to trigger the one-year period outlined in NRS 34.726(1) until after a penalty phase retrial where the penalty phase retrial had been granted *on direct appeal.* *Id.* at 573-75, 402 P.3d at 1271-73. But here, the penalty phase retrial was granted in a postconviction proceeding. Chappell's reliance on *Johnson* is therefore misplaced. Indeed, *Johnson* distinguished between cases where the death sentence was reversed on direct appeal and those where the death sentence was vacated in a postconviction proceeding. *Id.* at 575 n.1, 402 P.3d at 1273 n.1. As succinctly put by the California Supreme Court, when a capital defendant is granted a new penalty hearing on collateral review, "[t]he scope of [the] retrial is a matter of state procedure under which *the original judgment on the issue of guilt remains final during the retrial of the penalty issue* and during all appellate proceedings reviewing the trial court's decision on that issue." *People v. Kemp*, 10 Cal.3d 611, 111 Cal.Rptr. 562, 517 P.2d 826, 828 (1974) (emphasis added) (internal quotation marks omitted). We reached a similar conclusion on appeal from the judgment entered after the penalty phase retrial. In that appeal, Chappell tried to raise guilt-phase trial errors, arguing that his conviction was not yet final. Citing *Kemp* and other similar cases, we determined that the issue of Chappell's guilt was final on October 4, 1999, when the United States Supreme Court denied certiorari from our decision in *Chappell I.* *Chappell III,* 2009 WL 3571279, at *13.

Second, Chappell argues that if he had to file a petition raising the postconviction-counsel claims before the penalty phase retrial, related appeal, and postconviction challenges were complete, there would have been confusion about whether the petition would be subject to the special rules that apply to petitions filed by a person who is under a death sentence. His primary concern in this respect seems to be the appointment of postconviction counsel to assist with that petition. But there is no statutory right to appointed counsel to represent a petitioner who has filed a successive petition, even when the petitioner has been sentenced to death. *See* NRS 34.820(1)(a) (mandating the appointment of postconviction counsel if the "petitioner has been sentenced to death and the petition is the *first one* challenging the validity of the petitioner's conviction or sentence" (emphasis added)). We therefore are not convinced that it would be unworkable in practice to require a person in Chappell's position to file a postconviction petition before a penalty phase retrial and related appellate and postconviction challenges are complete. *Cf.* *Johnson*, 133 Nev. at 574-75, 402 P.3d at 1272-73 (recognizing possible confusion ***948** as to whether the rules regarding statutorily appointed postconviction counsel for a petitioner who has been sentenced to death would apply to a first petition filed while the petitioner is facing a retrial of the penalty phase).

Third, Chappell argues that he could not raise his good-cause claims based on first postconviction counsel's performance earlier because first postconviction counsel (Schieck) continued to represent him in the penalty phase retrial and new postconviction counsel had not been appointed to represent him on a second postconviction petition. We again disagree. Schieck's continued representation of Chappell with respect to the penalty phase retrial and subsequent direct appeal did not impede Chappell's ability to file a second postconviction petition asserting that Schieck's ineffectiveness as first postconviction counsel provided good cause to raise procedurally barred challenges to the conviction. Because such a petition would have been a wholly separate proceeding from the penalty phase retrial, Chappell could have filed the second petition pro se and requested the appointment of counsel under NRS 34.750. And any adverse impact a second postconviction petition might have had on Schieck's performance during the penalty phase retrial could have been addressed in the retrial proceedings or in a subsequent postconviction petition challenging the sentence imposed on retrial.

We acknowledge that parallel retrial and postconviction proceedings in these circumstances may be complicated. But we must weigh those complications against the "[p]assage of time, erosion of memory, and dispersion of witnesses" that would affect both a possible retrial of the issue of guilt and litigation of the second postconviction petition. *Groesbeck v. Warden*, 100 Nev. 259, 261,

679 P.2d 1268, 1269 (1984) (quoting *Engle v. Isaac*, 456 U.S. 107, 127-28, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982)); *see also* *Rippo*, 134 Nev. at 420, 423 P.3d at 1095-96 (pointing to interest in finality of a criminal conviction as support for the conclusion that "a petitioner does not have an indefinite period of time to raise a postconviction-counsel claim"). And while we generally prefer to avoid piecemeal litigation, that preference similarly "must be counterbalanced against the interest in the finality of a conviction." *Witter v. State*, 135 Nev. 412, 416, 452 P.3d 406, 409 (2019). That balance tips toward finality in the circumstances presented here, given that piecemeal litigation is unavoidable when a penalty phase retrial is ordered on collateral review.

Consistent with *Rippo* and earlier cases, Chappell's good-cause claims based on first postconviction counsel's performance as to guilt-phase issues were available when the remittitur issued on appeal from the district court's order denying his first postconviction petition in that regard. Because Chappell filed the petition asserting those postconviction-counsel claims more than one year later, those claims were untimely and could not provide good cause. Accordingly, the district court did not err in denying the petition as to the asserted grounds for relief related to the issue of Chappell's guilt because those grounds are procedurally barred under NRS 34.726(1), NRS 34.810(1)(b)(2), and NRS 34.810(2).

Chappell timely raised good-cause claims based on second postconviction counsel's alleged ineffective assistance

Chappell claims that counsel's ineffectiveness during the second postconviction proceeding provides good cause to raise procedurally barred grounds for relief from the death sentence imposed during the penalty phase retrial.[2] These good-cause claims were ***949** raised within one year after they became available (i.e., when remittitur issued on appeal from the order denying the second postconviction petition). Thus, Chappell has "met the first component of the good-cause showing required under NRS 34.726(1)." *Rippo*, 134 Nev. at 422, 423 P.3d at 1097. But to satisfy the second component of the showing required under NRS 34.726(1)(b)—undue prejudice—and the cause-and-prejudice showings required under NRS 34.810(1)(b) and NRS 34.810(3), Chappell also had to *prove* that second postconviction counsel was ineffective. *Id.* at 422, 425, 423 P.3d at 1097, 1099. We turn then to the substance of Chappell's claims regarding second postconviction counsel's performance.

[2] Chappell also argues that second postconviction counsel's ineffectiveness excuses any delay in raising good-cause claims based on first postconviction counsel's ineffectiveness. He is wrong. The appointment of second postconviction counsel (Oram) was statutorily mandated only because that petition was the first one challenging the validity of the death sentence imposed at the penalty phase retrial. *See* NRS 34.820(1)(a) (requiring the district court to appoint postconviction counsel "[i]f a petitioner has been sentenced to death and the petition is the first one challenging the validity of the petitioner's conviction or sentence"). Because Chappell did not have a right to appointed postconviction counsel for a second challenge to his conviction, second postconviction counsel's acts or omissions do not provide good cause to excuse the delay in asserting first postconviction counsel's ineffectiveness. *See* *Brown v. McDaniel*, 130 Nev. 565, 569 & n.1, 331 P.3d 867, 870 & n.1 (2014) (reiterating that "[w]here there is no right to counsel there can be no deprivation of effective assistance of counsel" and that death-penalty defendants are entitled to effective assistance of appointed counsel in first postconviction proceedings (alteration in original) (internal quotation marks omitted)).

Chappell's claims that second postconviction counsel provided ineffective assistance lack merit

We have adopted the *Strickland* test "to evaluate postconviction counsel's performance where there is a statutory right to effective assistance of that counsel." *Id.* at 423, 423 P.3d at 1098; *see generally* *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Thus, to prove that second postconviction counsel was ineffective, Chappell had to show "(1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced [him]." *Rippo*, 134 Nev. at 423, 423 P.3d at 1098. Both showings are required. *Id.* The inquiry on the first prong focuses on whether postconviction counsel's performance fell below an objective standard of

reasonableness. *See id.* at 438, 423 P.3d at 1108 (indicating that postconviction counsel's performance is not deficient if it comes within "the wide range of reasonable professional assistance" (quoting *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052)). The inquiry on the second prong focuses on whether the "deficient performance prevented [Chappell] from establishing ... that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State." *Id.* at 424, 423 P.3d at 1099 (recognizing that "the question is more than whether the first postconviction relief proceeding should have gone differently" (internal quotation marks omitted)).

Before evaluating Chappell's postconviction-counsel claims under the *Strickland* test, we find it necessary to address the level of specificity required when pleading such claims in a postconviction petition and arguing them on appeal. NRS Chapter 34 requires a petitioner to identify the applicable procedural bars for *each* claim presented and the good cause that excuses those procedural bars. *See* NRS 34.735 (outlining the form for a postconviction habeas petition, questions 17-19); *see also* NRS 34.726(1) (requiring a petitioner to show cause for the delay in filing a petition and undue prejudice); NRS 34.810(3) (providing that "*the petitioner has the burden of pleading* and proving *specific facts that demonstrate* ... [*g*]*ood cause* for the petitioner's failure to present the claim or for presenting the claim again[ ] *and* ... [*a*]*ctual prejudice* to the petitioner" (emphases added)). And a petitioner's explanation of good cause and prejudice for each procedurally barred claim must be made on the face of the petition. *See State v. Haberstroh*, 119 Nev. 173, 181, 69 P.3d 676, 681 (2003). Thus, to avoid dismissal under NRS 34.726(1) or NRS 34.810, a petitioner "cannot rely on conclusory claims for relief but must provide supporting specific factual allegations that if true would entitle him to relief." *Riker*, 121 Nev. at 232, 112 P.3d at 1075; *see also Haberstroh*, 119 Nev. at 181, 69 P.3d at 681; *Bejarano v. Warden*, 112 Nev. 1466, 1471, 929 P.2d 922, 925 (1996). This pleading requirement is nothing new. *See, e.g.*, *Hargrove v. State*, 100 Nev. 498, 502-03, 686 P.2d 222, 225 (1984) (requiring a postconviction petitioner to assert more than bare or naked allegations but rather specific factual allegations, not belied or repelled by the record, that would entitle him or her to relief if true).

***950** The specificity required to plead an ineffective-assistance claim as good cause is further reflected in the *Strickland* standard. In particular, courts must presume that counsel performed effectively, and "[t]o overcome this presumption, a petitioner must do more than baldly assert that his attorney could have, or should have, acted differently." *Johnson*, 133 Nev. at 577, 402 P.3d at 1274. "Instead, he must *specifically explain* how his attorney's performance was objectively unreasonable ...." *Id.* (emphasis added); *see also Strickland*, 466 U.S. at 690, 104 S.Ct. 2052 ("A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment."). When it comes to postconviction-counsel claims in particular, conclusory or general assertions of deficient performance are insufficient because "the mere omission of a claim developed by new counsel does not raise a presumption that prior [postconviction] counsel was incompetent, or warrant consideration of the merits of a successive petition." *In re Reno*, 55 Cal.4th 428, 146 Cal.Rptr.3d 297, 283 P.3d 1181, 1210 (2012) (internal quotation marks omitted), *quoted with approval in Rippo*, 134 Nev. at 429, 423 P.3d at 1102. Similarly, a petitioner must specifically articulate how counsel's deficient performance prejudiced him or her. *See Riley v. State*, 110 Nev. 638, 649, 878 P.2d 272, 279 (1994) (rejecting an ineffective-assistance claim where the petitioner did not "articulate prejudice in a persuasive manner" because he or she failed "to present an argument demonstrating the type and strength of evidence that might have been presented, and that there exists a reasonable probability that presentation of the evidence would have resulted in a different outcome at trial"). We have reiterated these requirements when reviewing ineffective-assistance claims on appeal, making it clear that a petitioner's appellate briefs must address ineffective-assistance claims with specificity, not just "in a *pro forma*, perfunctory way" or with a "conclusory[ ] catchall" statement that counsel provided ineffective assistance. *Evans v. State*, 117 Nev. 609, 647, 28 P.3d 498, 523 (2001), *overruled on other grounds by Lisle*, 131 Nev. at 366 n.5, 351 P.3d at 732 n.5.

To satisfy those specificity requirements, a petitioner arguing good cause and prejudice in a capital case based on the ineffective assistance of postconviction counsel must specifically plead in the petition and explain in any appellate briefs how postconviction counsel's performance was objectively unreasonable and how postconviction counsel's acts or omissions prejudiced the petitioner in the prior postconviction proceeding. The merits of the procedurally barred grounds for relief may play an integral part in pleading and arguing good cause and prejudice based on the ineffective assistance of

postconviction counsel. *See* *Rippo*, 134 Nev. at 424, 423 P.3d at 1098 (recognizing that "when a petitioner presents a claim of ineffective assistance of postconviction counsel on the basis that postconviction counsel failed to prove the ineffectiveness of his trial or appellate attorney, the petitioner must prove the ineffectiveness of both attorneys"). But the petitioner cannot satisfy his or her burden to plead and argue postconviction counsel's ineffectiveness with specificity by focusing solely on the merits of the procedurally barred grounds for relief.

With these principles in mind, we consider whether Chappell proved that second postconviction counsel (Oram) provided ineffective assistance. In doing so, we address the merits of the procedurally barred grounds for relief only to the extent that they are intertwined with the merits of the postconviction-counsel claim asserted as good cause and prejudice. And to the extent that we address the merits of any postconviction-counsel claims that lack the required specificity in pleading or appellate argument, we do so only as an alternative basis to deny relief.

Failure to support claims related to evidence of Fetal Alcohol Spectrum Disorders

Chappell argues that penalty phase counsel should have presented evidence of Fetal Alcohol Spectrum Disorders (FASD) and of Chappell's irreversible brain damage due to prenatal exposure to alcohol and drugs. The second postconviction petition included ***951** a claim regarding FASD that the district court and this court rejected on the merits. To overcome the procedural bars to raising that claim again, Chappell argues that second postconviction counsel did not support the claim with readily available evidence, did not support his request for an investigator and funding with sufficiently specific arguments to establish necessity, and should have presented the claim in a more compelling manner.

The district court conducted an evidentiary hearing on this claim. Second postconviction counsel testified that he requested funding for a PET scan and for an FASD expert, using uncontroverted information that Chappell's mother had been addicted to drugs and alcohol to support the request. Counsel recollected the State's argument that FASD would not have made a difference to the jury and his counterargument that he needed to retain an expert because penalty phase counsel had not looked into FASD. Second postconviction counsel recalled that the district court denied the request as bare and conclusory and that, while he believed FASD was an important enough topic to raise in the petition, he focused more on challenging the sole aggravating circumstance so that Chappell would be ineligible for the death penalty. The district court concluded that penalty phase counsel presented most of the evidence Chappell hoped to introduce about an FASD diagnosis during the penalty phase retrial and therefore rejected Chappell's postconviction-counsel claim.

Chappell argues that the district court erred because the jury did not hear evidence about FASD and resulting brain damage, evidence he contends is fundamentally different from any other evidence presented during the penalty phase retrial because it could have explained his actions. We disagree. As we noted on appeal from the order denying the second postconviction petition, penalty phase counsel presented extensive evidence of Chappell's cognitive deficits at the penalty phase retrial and the jury determined that the evidence was not sufficiently mitigating. *Chappell IV*, 2015 WL 3849122, at *2. Thus, we concluded that Chappell had not shown deficient performance or prejudice due to penalty phase counsel's failure to further investigate FASD. *Id.* Likewise here, Chappell fails to show prejudice due to second postconviction counsel's performance where the omitted information merely supplements what the jury heard during the penalty phase retrial: that Chappell suffered from substance abuse, was born to a mother addicted to drugs and alcohol, and suffered a learning disability. One expert explained during the penalty phase retrial that Chappell had less free will than the average person. That same expert noted Chappell's placement in special-education classes as early as second grade, his lack of early success in school, his behaviors that were atypical of a second grader, and his classification "as severely learning disabled" in fourth grade. Additionally, the expert explained that those with a low verbal IQ, such as Chappell, were overrepresented in the prison population because they have trouble problem solving and making good decisions. Lastly, the expert testified that Chappell's low verbal IQ, difficult childhood, constant drug use, and diagnosed personality disorder(s) negatively affected his free will. Thus, the jury heard evidence that Chappell had cognitive deficits and that those deficits, along with Chappell's upbringing, resulted in diminished free will and difficulty with decision-making. Information regarding FASD may have explained the *cause* of Chappell's cognitive deficits, but we are not convinced that the cause of those deficits would have been more compelling than the deficits themselves. Therefore, Chappell has not demonstrated that he would have been granted relief had second postconviction counsel handled the FASD claim differently. Accordingly, the district court did not err in rejecting this claim as procedurally

barred.[3]

[3] Chappell alternatively contends that the district court's denial of second postconviction counsel's request for funding and for an evidentiary hearing provides good cause because that decision precluded him from discovering the factual and legal bases for some of his grounds for relief. Any issues related to the district court's decisions in the second postconviction proceeding could have been raised in the second postconviction appeal, *see* NRS 34.810(1)(b), and Chappell does not demonstrate good cause for his failure to do so, *see* NRS 34.810(3).

***952** *Failure to raise grounds for relief based on ineffective assistance during jury selection at the penalty phase retrial*

Chappell raises multiple procedurally barred grounds for relief related to jury selection at the penalty phase retrial, claiming that second postconviction counsel provided ineffective assistance by omitting them from the prior petition. He first argues that the State used two of its peremptory strikes in a racially biased manner in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In his appellate brief, Chappell summarily alleges in a footnote that "post-conviction counsel was ineffective for failing to challenge [penalty phase] counsel's effectiveness on this basis."[4] The pleading below fares no better, as it simply identified the procedurally barred ground for relief, along with a list of others, and summarily alleged that it was not "raised previously due to ineffective assistance of ... state post-conviction counsel." Chappell's appellate arguments and pleading below are deficient. Beyond those deficiencies, Chappell has not shown second postconviction counsel's omission of the *Batson* claim was unreasonable, as Chappell does not point to another juror who expressed a doubt as to the ability to be fair like prospective Juror Mills did or who was as inconsistent and equivocal in expressing hesitations about the death penalty as prospective Juror Theus was or other evidence to show the challenges were exercised based on discrimination. *See Ford v. State*, 122 Nev. 398, 405, 132 P.3d 574, 578-79 (2006) (identifying one category of circumstantial evidence that is probative of the prosecutor's intent as "the similarity of answers to voir dire questions given by African-American prospective jurors who were struck by the prosecutors and answers by nonblack prospective jurors who were not struck"). Thus, Chappell did not demonstrate cause and prejudice. Accordingly, the district court did not err in denying the underlying claim as procedurally barred without conducting an evidentiary hearing.

[4] Chappell's reply brief adds scarcely more, as he offers a perfunctory assertion that second postconviction counsel's failure to raise a *Batson* claim "amounted to prejudicial, deficient performance."

Next, Chappell claims that penalty phase counsel should have challenged several biased veniremembers who ultimately were seated on the jury for the penalty phase retrial. To excuse the procedural bars to that claim, Chappell alleges that second postconviction counsel provided ineffective assistance by omitting it. But once again, Chappell's pleading and appellate argument regarding second postconviction counsel's ineffectiveness are deficient. We have found no assertions about second postconviction counsel's performance specifically related to this penalty-phase-counsel claim in Chappell's appellate briefing.[5] The pleading below is similarly deficient. Additionally, Chappell averred in his petition both that he was raising the penalty-phase-counsel claim again "because state post-conviction counsel failed to adequately develop, present, or demonstrate prejudice" and that he was raising the penalty-phase-counsel claim as a new ground for relief "due to ineffective assistance of ... state post-conviction counsel." This contradictory pleading is problematic—the penalty-phase-counsel claim is either new or it is not. *See* NRS 34.735 (postconviction habeas petition form, questions 17-18, requiring a petitioner to identify, among other things, which claims are re-raised and which are new); *cf. Reno*, 146 Cal.Rptr.3d 297, 283 P.3d at 1196 (requiring petitioners to submit a table or chart to identify which claims are re-raised and which are new). A reviewing court, and a responding party, should not be expected to scour a voluminous petition and record in an effort to ascertain whether a particular ground for relief has been raised in a prior postconviction petition. Beyond those pleading and briefing deficiencies, Chappell has not shown second postconviction counsel acted unreasonably in omitting this claim, as he has not demonstrated that the challenged jurors were biased and therefore has not shown good cause and actual prejudice. We ***953** conclude the district court did not err in denying this claim as procedurally barred without conducting an evidentiary hearing.

[5] Although Chappell's opening brief includes a

> section that generally asserts second postconviction counsel's ineffectiveness as good cause and prejudice, the allegations in that section—save for those surrounding the FASD claim, addressed *supra*—are bare and conclusory.

Chappell next claims that the trial court erroneously denied his for-cause challenges of three veniremembers who did not serve on the jury during the penalty phase retrial. To excuse the procedural bars to that claim, Chappell relies on ineffective assistance of second postconviction counsel in omitting it. But again, Chappell's appellate argument and pleading are deficient. There is no specific argument about second postconviction counsel's performance related to this claim in Chappell's appellate briefs. The petition includes this claim as part of a larger allegation that is inconsistent as to whether the claim is new and not specific about how second postconviction counsel's performance was deficient or prejudiced Chappell. Chappell also did not sufficiently identify which facts supporting this claim are new and which have been previously considered. *See Moore v. State*, 134 Nev. 262, 264, 417 P.3d 356, 359 (2018) (recognizing that, where a petitioner claims new facts provide good cause for a successive claim, the petitioner must "identify with specificity which facts this court previously considered and which facts are new"). Beyond the deficiencies in Chappell's pleading and appellate argument, the record reveals an objectively reasonable basis for second postconviction counsel to have omitted the underlying claim: it would have been barred by the law-of-the-case doctrine because it was raised on direct appeal and rejected on the merits, *Chappell III*, 2009 WL 3571279, at *5. *See Hall v. State*, 91 Nev. 314, 315-16, 535 P.2d 797, 798-99 (1975) (recognizing that "[t]he law of a first appeal is the law of the case on all subsequent appeals in which the facts are substantially the same" and that "[t]he doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument" (internal quotation marks omitted)). Although the law-of-the-case doctrine can sometimes be avoided, *see Hsu v. Cty. of Clark*, 123 Nev. 625, 630-31, 173 P.3d 724, 729 (2007) (recognizing reasons for law of the case to be avoided), the record does not clearly reveal any reasons to reconsider the law of the case here, particularly given our caselaw that would have made it impossible for second postconviction counsel to demonstrate prejudice because none of the purportedly biased veniremembers were seated, *see* *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005) ("If the jury actually seated is impartial, the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury."). We therefore conclude the district court did not err in denying this trial-error claim as procedurally barred without conducting an evidentiary hearing.

Last, Chappell claims that penalty phase counsel did not attempt to rehabilitate death-scrupled veniremembers. Again, Chappell relies on ineffective assistance of second postconviction counsel to overcome the procedural bars to this claim, but his pleadings below do not specifically allege how postconviction counsel's performance was deficient. And although the petition includes conflicting assertions as to whether the underlying ground for relief was new, it appears Chappell had not raised the claim regarding juror rehabilitation in any prior proceeding. Beyond the deficiencies in Chappell's pleading and appellate argument, the record reveals an objectively reasonable basis for second postconviction counsel to omit the underlying claim: it lacked merit, given that it did not focus on the jurors who were actually seated. *See* *Weber v. State*, 121 Nev. 554, 581, 119 P.3d 107, 125 (2005) ("Any claim of constitutional significance must focus on the jurors who were actually seated, not on excused jurors."), *overruled on other grounds by Farmer v. State*, 133 Nev. 693, 405 P.3d 114 (2017). We therefore conclude the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to raise grounds for relief based on evidence of Chappell's traumatic childhood

Chappell argues that penalty phase counsel did not investigate and present evidence of his traumatic childhood. Specifically, ***954** Chappell claims that penalty phase counsel should have presented more evidence about his family history of substance abuse and mental illness; the abuse, neglect, and loss he suffered while living with his grandmother; the poverty-stricken neighborhood where he spent his childhood; the brain damage he suffered due to prenatal exposure to drugs and alcohol; and his use of drugs to escape reality. To overcome the procedural bars to this penalty-phase-counsel claim, Chappell asserted that second postconviction counsel provided ineffective assistance in omitting it. But his pleadings below omitted anything specific about second postconviction counsel's performance in this respect and did not clearly indicate whether the underlying claim was new or had been raised in a prior proceeding. In his appellate briefs, Chappell's arguments about second postconviction counsel's performance in omitting this claim are limited to catchall

statements that counsel failed to investigate readily available witnesses to discover the evidence and failed to do any extra-record investigation. Beyond the deficiencies in the pleadings and appellate argument, the record reveals objectively reasonable grounds for second postconviction counsel to have omitted the penalty-phase-counsel claim. First, penalty phase counsel's omission did not prejudice Chappell. One or more jurors found several mitigating circumstances that covered the subjects identified in this penalty-phase-counsel claim, including that Chappell (1) suffered from substance abuse, (2) had no father figure in his life, (3) was raised in an abusive household, (4) was the victim of physical abuse as a child, (5) was born to a mother addicted to drugs and alcohol, (6) suffered a learning disability, and (7) was raised in a depressed housing area. Cumulative evidence on the same subjects would not have had a reasonable probability of altering the jury's determination that the mitigating circumstances did not outweigh the aggravating circumstance. *Cf. Cullen v. Pinholster*, 563 U.S. 170, 200, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) (concluding there was no reasonable probability that "new" mitigation evidence would have changed the jury's verdict, in part because "[t]he 'new' evidence largely duplicated the mitigation evidence at trial"); *Atkins v. Virginia*, 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (recognizing that mitigating evidence "can be a two-edged sword that" juries might find to show future dangerousness). Second, postconviction counsel pursued an objectively reasonable strategy focused on eliminating the single aggravating circumstance that, if successful, would have made Chappell ineligible for the death penalty. *See Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986) ("Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome."), *cited with approval in Smith v. Robbins*, 528 U.S. 259, 288, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); *Mayo v. Henderson*, 13 F.3d 528, 533 (2d Cir. 1994) ("[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant and obvious issues while pursuing issues that were clearly and significantly weaker."); *see also Lara v. State*, 120 Nev. 177, 180, 87 P.3d 528, 530 (2004) (observing that strategic decisions are "virtually unchallengeable absent extraordinary circumstances" (internal quotation marks omitted)). We therefore conclude that the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Chappell also summarily suggests that penalty phase counsel should have presented witnesses at the penalty phase retrial that counsel identified in the first postconviction petition. But second postconviction counsel *did* raise that claim, and this court rejected it. *Chappell IV*, 2015 WL 3849122, at *2. Chappell has not explained in his petition below or his appellate briefing how second postconviction counsel's performance was deficient or prejudiced him in litigating this penalty-phase-counsel claim. And Chappell has not provided any cogent argument to overcome the doctrine of the law of the case. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99; *see also Hsu*, 123 Nev. at 630-31, 173 P.3d at 729. Accordingly, we conclude the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

***955** *Failure to present expert witnesses*

Chappell argues that penalty phase counsel should have investigated and presented evidence of his addiction to drugs through an addiction expert, of the effects of drugs on the brain through a neuropharmacologist, and of his childhood through an expert on trauma. He again relies on the ineffective assistance of second postconviction counsel to overcome the procedural bars to this claim. But in the petition filed below, Chappell did not specifically allege how second postconviction counsel performed deficiently with respect to investigating and retaining expert witnesses. And in his appellate briefing, Chappell acknowledges that counsel hired some experts but broadly asserts that more were needed. Beyond these deficiencies in the pleadings and appellate argument, the record reveals an objectively reasonable basis for second postconviction counsel to omit this penalty-phase-counsel claim: penalty phase counsel's omission did not prejudice the defense. A defense expert testified in the desired manner at the penalty phase retrial, telling the jury that Chappell became dependent on cocaine at a young age and that regular use of the drug may cause paranoid delusions and psychosis and result in uncontrollable behaviors and thoughts. And one or more jurors found *as a mitigating circumstance* that Chappell suffered from substance abuse. Thus, the jury was able to and did consider Chappell's substance abuse as a mitigating circumstance without additional testimony from an addiction expert or neuropharmacologist. And because the jury also heard evidence about Chappell's traumatic childhood, we are not convinced there is a reasonable probability that an expert's testimony about how the trauma impacted the course of Chappell's life would have altered the jurors' sentencing decision. *See Pinholster*,

563 U.S. at 201, 131 S.Ct. 1388; *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242. Under these circumstances, Chappell has not demonstrated that second postconviction counsel provided ineffective assistance by omitting this penalty-phase-counsel claim. Accordingly, we conclude the district court did not err by denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

Failure to prepare witnesses

Chappell argues that penalty phase counsel did not adequately prepare witnesses to testify during the penalty phase retrial. He again summarily points to second postconviction counsel's alleged ineffective assistance to overcome the procedural bars to this claim without pleading below or arguing on appeal any specifics about second postconviction counsel's performance in this respect. Beyond the deficiencies in the pleadings and appellate argument, the record belies in part the cause-and-prejudice claim based on second postconviction counsel's performance. Specifically, second postconviction counsel argued that penalty phase counsel failed to prepare expert witnesses Dr. Lewis Etcoff, Dr. William Danton, and Dr. Todd Grey and lay witness Benjamin Dean to testify at the penalty phase retrial, but this court concluded that penalty phase counsel was not ineffective.[6] *Chappell IV*, 2015 WL 3849122, at *3-4. The record also reveals an objectively reasonable ground for second postconviction counsel to omit another aspect of this penalty-phase-counsel claim: the allegation that counsel did not adequately prepare Chappell to testify was procedurally barred because it implicated trial counsel's performance in the first trial.[7] And finally, as for the remaining witnesses, Chappell has not presented cogent argument that the State was able to discredit those witnesses because penalty phase counsel did not adequately prepare them to testify, *see* *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987), nor has he shown prejudice due to penalty phase counsel's failure to adequately prepare those witnesses. For these reasons, we conclude the district court did not err by denying this ***956** penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

6 This court's decision on the penalty-phase-counsel claim in *Chappell IV* is the law of the case. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99. Chappell does not identify any basis to reconsider the law of the case on that claim. *See Hsu*, 123 Nev. at 630-31, 173 P.3d at 729.

7 This aspect of the penalty-phase-counsel claim implicates trial counsel's performance because it was Chappell's testimony from the 1996 trial that the jury heard during the penalty phase retrial; Chappell did not take the stand during the penalty phase retrial.

Failure to object to prosecutorial misconduct[8]

8 To the extent Chappell alleges good cause because the State withheld material impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), he did not adequately plead the claim. The burden is on Chappell "to identify with specificity which facts this court previously considered and which facts are new" and to "explain why he is raising [the] claim again, or if it is new, why he did not raise it sooner." *Moore*, 134 Nev. at 264, 417 P.3d at 359. But Chappell has not specified what facts are new, when he discovered this alleged *Brady* violation, and why this claim should excuse the procedural bars. Therefore, the district court did not err by denying this claim as procedurally barred without conducting an evidentiary hearing. *See* *State v. Bennett*, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (outlining good cause and prejudice requirements for a *Brady* claim).

Chappell complains about multiple instances of alleged prosecutorial misconduct, claiming that penalty phase counsel should have objected. To overcome the procedural bars to this claim, Chappell asserts that second postconviction counsel provided ineffective assistance. But once again, he did not plead in his petition how second postconviction counsel's performance was deficient, and his appellate briefing is similarly deficient with catchall contentions that second postconviction counsel failed to effectively raise this penalty-phase-counsel claim in the previous postconviction petition. Beyond these deficiencies in the pleadings and appellate argument, the record belies the

arguments about second postconviction counsel in part and reveals objectively reasonable grounds for second postconviction counsel to omit other parts of this penalty-phase-counsel claim. First, second postconviction counsel raised some of the prosecutorial misconduct arguments; this court rejected them. *Chappell IV*, 2015 WL 3849122, at *5 (rejecting Chappell's argument that counsel should have objected to the prosecution describing him "as 'a despicable human being' who 'chose evil' " and concluding that there was no prejudice from the prosecutor's improper impeachment of Fred Dean). And it was objectively reasonable for second postconviction counsel to omit the underlying allegations of prosecutorial misconduct that had been raised and rejected on direct appeal after the penalty phase retrial, *see Chappell III*, 2009 WL 3571279, at *11-12 (rejecting Chappell's claim of prosecutorial misconduct based on arguments about comparative worth, justice for the victim and the State, no mercy for Chappell, the jury not being "conned," and the role of mitigating circumstances), given that this court's decision in *Chappell III* established the law of the case as to those allegations. *See Hall*, 91 Nev. at 315-16, 535 P.2d at 798-99; *see also Hsu*, 123 Nev. at 630-31, 173 P.3d at 729.

And finally, as to the underlying allegations of prosecutorial misconduct that have not been previously considered, Chappell asserts the prosecutor disparaged the defense by characterizing it as an attempt to blame Chappell's upbringing for the crimes and making sarcastic comments. As we previously held the State was allowed to rebut evidence of Chappell's childhood, mental impairment, and character and the State properly commented that Chappell's past "did not take away his actions," *see Chappell III*, 2009 WL 3571279, at *12 (internal quotation marks omitted), and as the comments went to the State's point of view as to the incredulity of the defense, *cf.* *Ross v. State*, 106 Nev. 924, 927, 803 P.2d 1104, 1106 (1990) ("It was within the parameters of proper argument to point out to the jury that [a witness's] testimony might be incredible."), Chappell has not shown second postconviction counsel acted unreasonably in omitting this claim. Regarding Chappell's claim that the prosecutor improperly referenced the Holocaust,[9] the record reveals an objectively reasonable basis ***957** for second postconviction counsel to omit this penalty-phase-counsel claim: penalty phase counsel's omission did not prejudice the defense. In reviewing the death sentence on appeal after the penalty phase retrial, we referenced evidence that Chappell had supported his drug habit for nearly a decade by stealing from the victim and their children; he also beat the victim during this same time frame. After Chappell was mistakenly released from custody, he immediately went to the victim's home, where he stabbed her 13 times. While one or more jurors found 7 of the 13 alleged mitigating circumstances, we observed that the mitigating evidence waned when considered alongside the rebuttal evidence of Chappell's history of blaming others for his problems and behavior. Indeed, Chappell may have acknowledged killing the victim, but he continued to blame her, at least partially, for her own murder. Other evidence at the penalty phase retrial showed that Chappell had an overall indifference to others' well-being and that he had a lengthy criminal history, including crimes of domestic violence. Under these circumstances, Chappell has not proven that second postconviction counsel provided ineffective assistance by omitting this penalty-phase-counsel claim. Accordingly, we conclude the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

[9] On appeal, Chappell also alleges that the prosecutor compared the victim's life living with Chappell to Anne Frank's life during the Holocaust. Because Chappell did not cogently raise this specific allegation in district court, we will not consider it for the first time on appeal. *See* *State v. Wade*, 105 Nev. 206, 209 n.3, 772 P.2d 1291, 1293 n.3 (1989). Even were we to overlook this pleading defect, Chappell's claim is not clearly borne out by the record, as the prosecutor never mentioned Frank's name nor the Holocaust in the challenged quotation.

Failure to object during penalty phase retrial

Chappell claims that penalty phase counsel should have made various objections during the penalty phase retrial. To overcome the procedural bars, he asserts that second postconviction counsel provided ineffective assistance. But his pleadings filed below and his appellate briefing provide no specifics as to second postconviction counsel's performance in this regard or how it was unreasonable.[10] And the petition indicates that Chappell was re-raising this penalty-phase-counsel claim and raising it for the first time without identifying which parts of the claim were successive and which were new. Our review of the record reveals that Chappell raised some of the allegations in his direct appeal after the penalty phase retrial and this court rejected them. *Chappell III*, 2009 WL 3571279, at *6-7 (rejecting claims that hearsay testimony and old presentence investigation reports were erroneously admitted). Because the decision in *Chappell III* establishes the law of the case as to those issues, *see Hall*,

91 Nev. at 315-16, 535 P.2d at 798-99, second postconviction counsel had an objectively reasonable basis to omit a penalty-phase-counsel claim based on them. Second postconviction counsel raised another allegation in this penalty-phase-counsel claim as an appellate-counsel claim, *see Chappell IV*, 2015 WL 3849122, at *4 (rejecting claim "that appellate counsel was ineffective for failing to argue that the victim-impact evidence was unfairly cumulative"), thus rebutting the claim that second postconviction counsel omitted that allegation. The remaining allegations in this penalty-phase-counsel claim (failure to object to prosecutorial misconduct, jury instructions, prospective jurors who were allegedly biased, and improper impeachment of Fred Dean) are addressed and rejected elsewhere in this opinion in the context of other penalty-phase-counsel claims. For these reasons, we conclude the district could did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

[10] In his appellate briefing, Chappell presents no cogent argument related to his allegations about unrecorded bench conferences and gruesome photographs. We therefore do not address them. *See* *Maresca*, 103 Nev. at 673, 748 P.2d at 6.

Failure to challenge jury instructions

Chappell contends that penalty phase counsel did not object to erroneous jury instructions and that second postconviction counsel provided ineffective assistance by omitting related penalty-phase-counsel claims. Chappell argues that penalty phase counsel should have (1) asked the court to instruct the jury that the State had to prove beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances, (2) objected to an instruction that told the jury it had to unanimously find mitigating circumstances, and (3) objected to the instruction that told the jury ***958** "[a] verdict may never be influenced by prejudice or public opinion." He again made no specific allegations in the petition or his appellate briefing about second postconviction counsel's performance as to this penalty-phase-counsel claim, focusing instead on the merits of the underlying omitted claims. Beyond those deficiencies in his pleadings and appellate arguments, the record reveals an objectively reasonable ground for second postconviction counsel to omit these claims: they lacked merit. The first claim depends on a strained reading of *Hurst v. Florida*, 577 U.S. 92, 136 S.Ct. 616, 193 L.Ed.2d 504 (2016), that we have repeatedly rejected, *see, e.g., Castillo v. State*, 135 Nev. 126, 442 P.3d 558 (2019), *cert. denied* —— U.S. ——, 140 S. Ct. 2682, 206 L.Ed.2d 830 (2020); *Jeremias v. State*, 134 Nev. 46, 412 P.3d 43 (2018).[11] The second claim lacks merit because the trial court properly instructed the jury that "[a] mitigating circumstance itself need not be agreed to unanimously" but that "[t]he entire jury must agree unanimously ... as to whether the aggravating circumstances outweigh the mitigating circumstances." And as to the final claim, we have previously approved of the given instruction and have rejected the idea that it undermines the "right to have the jury consider all mitigating evidence" when "the jury was also instructed to consider any mitigating factors." *Byford v. State*, 116 Nev. 215, 233, 994 P.2d 700, 712 (2000). The trial court so instructed the jury in the penalty phase retrial. For these reasons, we conclude the district court did not err in denying this penalty-phase-counsel claim as procedurally barred without conducting an evidentiary hearing.

[11] Chappell asks us to reconsider *Jeremias* and *Castillo* but provides no compelling reason to overrule this precedent. *See Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013). And to the extent he relies on *Hurst* as good cause to challenge the constitutionality of Nevada's capital sentencing statutes on the ground that they allow this court to act as a sentencer, his contention lacks merit. Nevada's death-penalty statutes abide by *Hurst*'s holding that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death. A jury's mere recommendation is not enough." 577 U.S. at 94, 136 S.Ct. 616; *see Jeremias*, 134 Nev. at 59, 412 P.3d at 54. As we have observed, *Hurst* does not mention appellate reweighing or harmless-error review and the United States Supreme Court has not overruled *Clemons v. Mississippi*, 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), which permits both. *Castillo*, 135 Nev. at 131 n.2, 442 P.3d at 561 n.2. And more recently, the Supreme Court has acknowledged that "*Hurst* did not require jury weighing of aggravating and mitigating circumstances." *McKinney v. Arizona*, 589 U.S. ——, ——, 140 S. Ct. 702, 708, 206 L.Ed.2d 69 (2020).

Failure to challenge the death penalty

Chappell raises numerous challenges to Nevada's death penalty scheme and his death sentence. He asserts that the penalty is applied in an arbitrary and capricious way, clemency is not practically available, and the total time on death row renders the sentence unconstitutional. He also contends that Nevada's system of electing judges renders his convictions and sentence invalid and that his severe mental illness renders him ineligible for execution.[12]

[12] While Chappell also challenges Nevada's lethal injection protocol, he acknowledges that his claim "falls outside the scope of a post-conviction petition for a writ of habeas corpus," *McConnell v. State*, 125 Nev. 243, 249, 212 P.3d 307, 311 (2009). To the extent Chappell argues this amounts to an unconstitutional suspension of the writ of habeas corpus, that argument is raised for the first time on appeal, and we therefore decline to consider it. *See* *Wade*, 105 Nev. at 209 n.3, 772 P.2d at 1293 n.3.

Chappell could have raised these claims on appeal from the judgment entered after the penalty phase retrial. By not raising them in that proceeding, Chappell waived these claims and must demonstrate good cause and actual prejudice to assert them now. NRS 34.810(1)(b). Although Chappell generically asserted ineffective assistance of second postconviction counsel to overcome that procedural bar, his petition did not include any specific allegations about counsel's performance in this respect. Instead, Chappell focused below and in his appellate briefing on the substance of the procedurally barred claims. Beyond the deficiencies in Chappell's pleadings and appellate arguments, the record reveals that second postconviction counsel did raise some of these challenges to the death sentence. *Chappell IV*, 2015 WL 3849122, at *1 n.1 (rejecting ***959** arguments that the death penalty is unconstitutional because state law does not genuinely narrow death eligibility, the death penalty is cruel and unusual, and executive clemency is not available). And second postconviction counsel had an objectively reasonable basis to omit the other, new arguments against the death penalty, given that "[t]his court has repeatedly upheld Nevada's death penalty against similar challenges," *Leonard v. State*, 117 Nev. 53, 83, 17 P.3d 397, 416 (2001) (listing cases); *see Nunnery v. State*, 127 Nev. 749, 782-83, 263 P.3d 235, 257 (2011) (rejecting claims that "Nevada's death penalty scheme does not narrow the class of persons eligible for the death penalty, [that] it constitutes cruel and unusual punishment, and [that] executive clemency is unavailable"); *see also McConnell v. State*, 125 Nev. 243, 256, 212 P.3d 307, 316 (2009) (rejecting claim of bias regarding elected judges who preside over capital proceedings); *Flanagan v. State*, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996) (rejecting contention that lengthy confinement before imposition of the death penalty amounted to cruel and unusual punishment). Additionally, neither this court nor the United States Supreme Court has suggested that the severely mentally ill are ineligible for the death penalty. We therefore conclude the district court did not err in denying these claims as procedurally barred.

Ineffective assistance of appellate counsel

Chappell claims appellate counsel who represented him in *Chappell III* (the direct appeal from the judgment entered after the penalty phase retrial) should have argued, or did not effectively argue, claims he raised elsewhere in the third petition. The allegations about appellate counsel's performance are vague. And Chappell has not sufficiently asserted that second postconviction counsel unreasonably omitted those appellate-counsel claims. We therefore conclude the district court did not err in denying the appellate-counsel claim as procedurally barred without conducting an evidentiary hearing.

Cumulative error as good cause

Chappell argues that the district court should have considered several claims that he raised in his prior appeals and petitions so that it could take into account their cumulative effect alongside the claims presented in the third petition. This argument fails because the claims raised in the prior proceedings were rejected on the merits or as procedurally barred. A petitioner cannot turn to "cumulative error" in an effort to relitigate claims that the court has rejected on the merits or to reach the merits of claims that are procedurally barred. *See* *Rippo*, 134 Nev. at 436, 423 P.3d at 1107.

Actual innocence

Chappell contends that even if he has not demonstrated cause and prejudice, he can overcome the procedural bars based on actual innocence. To do so, Chappell had to "make[ ] a colorable showing [that] he is actually innocent of the crime or is ineligible for the death penalty." *Pellegrini v. State*, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001), *abrogated on other grounds by Rippo*, 134 Nev. at 423 n.12, 423 P.3d at 1097 n.12.

Chappell claims he is actually innocent of burglary, robbery, and murder. To succeed he had to "show that it is more likely than not that no reasonable juror would have convicted him in light of ... new evidence." *Berry v. State*, 131 Nev. 957, 966, 363 P.3d 1148, 1154 (2015) (internal quotation marks omitted); *see also House v. Bell*, 547 U.S. 518, 537, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006) ("[A] gateway claim requires 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.' " (quoting *Schlup v. Delo*, 513 U.S. 298, 324, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995))); *Schlup*, 513 U.S. at 316, 115 S.Ct. 851 ("Without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim."). But Chappell does not identify any new evidence; instead, he focuses on perceived inconsistencies or insufficiencies in the evidence presented at trial. And Chappell's argument that he cannot be convicted of an underlying felony ***960** and felony murder consistent with the Double Jeopardy Clause does not implicate factual innocence and is inconsistent with our caselaw. *See Brown v. McDaniel*, 130 Nev. 565, 576, 331 P.3d 867, 875 (2014) (holding that a showing of actual innocence must be "of actual innocence—factual innocence, not legal innocence"); *Talancon v. State*, 102 Nev. 294, 297, 721 P.2d 764, 766 (1986) ("[W]e disagree with [appellant's] contention that double jeopardy prohibits his conviction for both felony-murder and the underlying felony.").

Chappell next claims he is ineligible for the death penalty. Specifically, he argues that scant and conflicting evidence supports the sole aggravating circumstance, there were inconsistencies in the State's case, his counsel was ineffective, the aggravating circumstance also functioned as an uncharged felony for felony murder such that it did not narrow the class of defendants eligible for capital punishment, and the State violated the Confrontation Clause when introducing DNA evidence. Chappell "points to no new evidence supporting his claim of actual innocence with respect to the aggravating circumstance," and "his arguments [do not] present any issue of first impression as to the legal validity of the aggravating circumstance." *Lisle*, 131 Nev. at 362, 351 P.3d at 730; *see also Chappell III*, 2009 WL 3571279, at *1-2 (rejecting challenges to the sexual assault aggravating circumstance on the grounds that it was not supported by sufficient evidence and was invalid under *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004)). Equally unavailing is Chappell's claim that he is ineligible for the death penalty based on his severe mental illness. Although he cites caselaw recognizing that juveniles and intellectually disabled persons are ineligible for the death penalty, *see Roper v. Simmons*, 543 U.S. 551, 578, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); *Atkins*, 536 U.S. at 321, 122 S.Ct. 2242, he cites no authority holding that the mentally ill are also categorically ineligible for the death penalty. And neither this court nor the United States Supreme Court has recognized such a categorical exemption.[13] Accordingly, Chappell does not demonstrate a fundamental miscarriage of justice would occur if his procedurally barred claims are not considered on the merits. We therefore conclude the district court did not err in denying this claim.

[13] We note there are mechanisms by which a person sentenced to death may challenge the execution of the sentence based on his or her current mental status. *See* NRS 176.425; NRS 176.455.

Statutory laches

Chappell's petition was also subject to dismissal under NRS 34.800. NRS 34.800(1) states that a petition may be dismissed if the delay in filing the petition prejudices the State in either responding to the petition or retrying the petitioner. A rebuttable presumption of prejudice arises when the delay is more than five years from a decision on direct appeal. NRS 34.800(2). To overcome the presumption of prejudice to the State in responding to the petition, the petitioner must show that "the petition is based upon grounds of which the petitioner could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred." NRS 34.800(1)(a). And to overcome the prejudice to the State in retrying the petitioner, the petitioner must demonstrate that "a fundamental miscarriage of justice has occurred in the proceedings

resulting in the judgment of conviction or sentence." NRS 34.800(1)(b); *see also Little v. Warden*, 117 Nev. 845, 853, 34 P.3d 540, 545 (2001). A petitioner may demonstrate a fundamental miscarriage of justice by presenting new evidence of actual innocence. *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (indicating that a fundamental miscarriage of justice to overcome the procedural bars to an untimely or successive petition and to satisfy NRS 34.800(1)(b) can both be satisfied with a showing of actual innocence); *see also Berry*, 131 Nev. at 974, 363 P.3d at 1159 (indicating that if a petitioner could not show a fundamental miscarriage of justice for purposes of an actual-innocence-gateway claim, his or her petition would also be barred by NRS 34.800).

***961** Here, the State pleaded laches under NRS 34.800, and the district court found that Chappell had not rebutted the presumption of prejudice to the State. We agree with the district court's assessment. The overwhelming majority of the claims in the third petition are based on grounds of which Chappell could or did have knowledge long before he filed the third petition. In fact, the district court and this court have considered and rejected the substance of many claims in the petition in prior proceedings. And again, Chappell does not allege new evidence demonstrating his factual innocence. Accordingly, we conclude the district court did not abuse its discretion in applying statutory laches to Chappell's petition.

CONCLUSION

Various mandatory procedural bars foreclosed Chappell's petition, and he did not show good cause and prejudice to overcome those bars. The untimely claims about first postconviction counsel's performance could not constitute good cause, and Chappell does not show good cause and prejudice based on the alleged ineffective assistance of second postconviction counsel, of which most instances were not adequately pleaded below or addressed in the appellate briefs. Finally, Chappell did not demonstrate that the failure to consider his petition would result in a fundamental miscarriage of justice, and we conclude the district court did not abuse its discretion in applying statutory laches. Therefore, we affirm the district court's order dismissing the petition.

We concur:

Hardesty, C.J.

Parraguirre, J.

Stiglich, J.

Pickering, J.

All Citations

501 P.3d 935, 137 Nev. Adv. Op. 83

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500 P.3d 1263
Supreme Court of Nevada.

Christian Stephon MILES, Appellant,
v.
The STATE of Nevada, Respondent.

No. 79554
|
FILED DECEMBER 23, 2021

Synopsis

Background: Defendant was convicted in the District Court, Clark County, Mary Kay Holthus, J., and James Bixler, Senior Judge, of sex trafficking of a child under 18 years of age, first-degree kidnapping, living from the earnings of a prostitute, and child abuse, neglect, or endangerment, and he appealed.

Holdings: The Supreme Court, Stiglich, J., held that:

defendant's inability to state the elements of charged offense of sex trafficking did not nullify his right to try to defend himself;

trial court's *Faretta* canvas of defendant was inadequate;

defendant's waiver of the right to counsel was not knowing and voluntary;

defendant's invalid waiver of the right to counsel was not subject to harmless-error analysis; and

trial court inappropriately disparaged the defendant's choice to waive counsel during *Faretta* canvass.

Reversed and remanded.

Procedural Posture(s): Appellate Review.

***1266** Appeal from a judgment of conviction, pursuant to a jury verdict, of sex trafficking of a child under 18 years of age, first-degree kidnapping, living from the earnings of a prostitute, and child abuse, neglect, or endangerment. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge, and James Bixler, Senior Judge.

Attorneys and Law Firms

Mario D. Valencia, Henderson, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and John Niman, Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, EN BANC.

Opinion

By the Court, STIGLICH, J.:

This case concerns the warnings a trial court must give to a criminal defendant who has expressed a desire to exercise his right, under *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975), to waive the right to counsel and represent oneself. In this opinion, we emphasize that a *Faretta* canvass must ensure that a defendant decides whether to waive counsel with eyes open. The canvass must safeguard against the unacceptable danger that defendants would choose to represent themselves with an incomplete understanding of the risks they face. Inadequate warnings harm not only the defendant, but also the credibility of our justice system.

We hold today that a trial court should not ignore a defendant's lack of understanding about the charges and potential sentences that becomes evident during the canvass. While no specific questions are required, the trial court should not disregard a defendant's evident lack of understanding. Here, because the trial court's canvass did not ensure that the defendant understood the aggregate mandatory minimum sentence he potentially faced or the risks and disadvantages of waiving the right to counsel, we reverse and remand. We further observe that the trial court inappropriately disparaged the defendant's choice to waive counsel during the canvass. While it is important that the ***1267** trial court ensure that a defendant understands the risks of deciding to waive counsel, the court must conduct its canvass in a courteous manner, consistent with the respect due to the defendant's exercise of a constitutional right and the decorum and impartiality demanded by the judicial process.

FACTS AND PROCEDURAL HISTORY

Appellant Christian Stephon Miles was charged with sex trafficking of a child under 18 years of age, first-degree kidnapping, living from the earnings of a prostitute, and child abuse, neglect, or endangerment. The victim, who was 16 years old at the time of the crimes, testified that Miles contacted her to entice her to engage in prostitution, helped her to run away from home and to remove an ankle bracelet she was required to wear in connection with a previous prostitution arrest, and advertised her sexual services on Craigslist.

Well before trial, Miles became dissatisfied with the attorney assigned to him, and he moved for permission to represent himself. The trial court immediately began to discourage Miles from doing so, calling self-representation "the stupidest thing in the world," "a bonehead move," and "a nail in your coffin." But Miles was insistent, and the court engaged in a *Faretta* canvass, stating that "I'll try and make it quick."[1]

[1] Eighth Judicial District Court Senior Judge James Bixler conducted the canvass in question.

The court explained to Miles that an attorney trains in the law and has the skills and experience to properly defend a case; Miles acknowledged that his legal training was limited to reading litigation manuals "and trial books." The court probed Miles' understanding of his Fifth Amendment right not to testify and the consequences of waiving that right. The court explained in particular that the State might be able to introduce Miles' prior conviction for pandering to impeach him as a witness, and Miles said he understood. The court also asked Miles to explain the difference between peremptory and for-cause challenges to jurors. Miles' responses to these questions indicated a generally accurate, if rough, understanding of trial procedure.

The court also asked Miles to state the elements of sex trafficking. Miles answered: "Recruiting—recruiting, enticing a person to commit sex trafficking, conspiracy; it's a whole bunch, Your Honor. I don't know off the top of my head, but there's a whole bunch of elements, Your Honor." The court did not inquire further as to Miles' understanding of the substantive law underlying sex trafficking and did not ask Miles whether he understood the elements of the other charges.

The court also asked Miles to state the range of punishment for the crimes he was charged with. Miles replied:

> THE DEFENDANT: Five to life, life.
>
> THE COURT: Life. You could be—if you're convicted on first-degree kidnapping in Count 2, you could be sentenced to life. Do you understand that?
>
> [THE PROSECUTOR]: And Your Honor, Count 1 is non-probationable, and he does have to register as a sex offender if he's convicted.
>
> THE COURT: You understand all that?
>
> THE DEFENDANT: Whereas sex trafficking is registered—you have to register—
>
> [THE PROSECUTOR]: And non-probationable.
>
> THE DEFENDANT: —I'm aware of that.
>
> THE COURT: You're going to prison. You get convicted, you're going to prison.
>
> THE DEFENDANT: I'm aware of that.

No other discussion of the potential sentence occurred during the *Faretta* canvass. At the conclusion of the canvass, the court observed, "You've already answered the rest of these questions. You've already explained why you want to represent yourself and why you think you can do a better job; and I tried to talk you out of it ...." The court reluctantly granted Miles' motion.

Miles represented himself at trial. A jury found him guilty of all charges. The court sentenced him to 5 years to life on the sex trafficking charge, 5 years to life on the kidnapping charge, 19 to 48 months on the living-off-the-earnings charge, and 24 to 72 ***1268** months on the child abuse charge. The court ordered the minimum sentences for each charge to run consecutively, for a total of 163 months to life. Miles appealed, and the court of appeals affirmed the judgment of conviction. *Miles v. State*, No. 79554-COA, 2021 WL 398992 (Nev. Ct. App. Jan. 29, 2021) (Amended Order of Affirmance and Order Denying Rehearing). We granted Miles' subsequent petition for review under NRAP 40B.

DISCUSSION

Background of the Faretta *right*

A criminal defendant may waive one's right to counsel and represent oneself. *See generally* *Faretta v.*

California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). The right to represent oneself, and to refuse appointed counsel of the State's choosing, stems from "that respect for the individual which is the lifeblood of the law." *McCoy v. Louisiana*, 584 U.S. ——, ——, 138 S. Ct. 1500, 1507, 200 L.Ed.2d 821 (2018) (internal quotation marks omitted); *see* *McKaskle v. Wiggins*, 465 U.S. 168, 178, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (recognizing that the right to represent oneself "exists to affirm the accused's individual dignity and autonomy").

Dissenting from *Faretta*, Justice Blackmun observed that "[i]f there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself." 422 U.S. at 852, 95 S.Ct. 2525. Justice Blackmun was surely correct that a criminal defendant can rarely, if ever, represent oneself as effectively as a trained attorney. Yet the right to represent oneself is firmly embedded in our law as a fundamental aspect of the right to control one's own defense. Accordingly, courts and legislatures have developed various safeguards to ensure that defendants who choose to exercise that right are well-informed enough not to make fools of themselves—even if their choice is, in an objective sense, likely unwise.

The need for at least some safeguards has been recognized from the beginning, when the Supreme Court of the United States wrote that a defendant who chooses to waive counsel "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' " *Id.* at 835, 95 S.Ct. 2525 (quoting *Adams v. United States*, 317 U.S. 269, 279, 63 S.Ct. 236, 87 L.Ed. 268 (1942)). Thus, "an accused who chooses self-representation must satisfy the court that his waiver of the right to counsel is knowing and voluntary." *Vanisi v. State*, 117 Nev. 330, 337-38, 22 P.3d 1164, 1170 (2001). A court does not show respect for individual dignity and autonomy by allowing an individual who has not knowingly and voluntarily waived counsel—or, to put it another way, who has waived counsel with eyes closed—to represent oneself. A conviction obtained after an invalid waiver of the right to counsel—that is, one that fails to demonstrate that the defendant knowingly, intelligently, and voluntarily waived the right—is per se invalid and is not subject to harmless-error analysis. *Hooks v. State*, 124 Nev. 48, 57-58 & n.23, 176 P.3d 1081, 1086-87 & n.23 (2008).

Determining whether a waiver is valid is not a mechanical task. The Supreme Court of the United States has not "prescribed any formula or script to be read to a defendant who states that he elects to proceed without counsel." *Iowa v. Tovar*, 541 U.S. 77, 88, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). Likewise, "this court has 'rejected the necessity of a mechanical performance of a *Faretta* canvass.' " *Hooks*, 124 Nev. at 55, 176 P.3d at 1085 (quoting *Graves v. State*, 112 Nev. 118, 125, 912 P.2d 234, 238 (1996)). Despite not requiring any "mechanical performance" of a script, we have nevertheless repeatedly "urge[d] the district courts to conduct a thorough inquiry of a defendant who wishes to represent himself and to make findings as to whether the defendant's waiver of the right to counsel is knowing, intelligent, and voluntary." *Id.* at 55-56, 176 P.3d at 1085 (internal quotation marks omitted); *see* *Wayne v. State*, 100 Nev. 582, 585, 691 P.2d 414, 416 (1984). Certain "areas of suggested inquiry are set forth in SCR 253(3), including the defendant's understanding of the charges ***1269** and the possible penalties." *Hooks*, 124 Nev. at 54, 176 P.3d at 1085; *see* SCR 253(3)(g) (directing that court may inquire into "[d]efendant's understanding of the possible penalties or punishments, and the total possible sentence the defendant could receive"). After the canvass, the district court must make specific findings concerning whether the defendant waives "the right to counsel freely, voluntarily and knowingly, and [with] a full appreciation and understanding of the waiver and its consequences." SCR 253(4)(b).

Ordinarily, "[w]e give deference to the district court's decision to allow the defendant to waive his right to counsel," no matter what specific questions the court asks. *Hooks*, 124 Nev. at 55, 176 P.3d at 1085. Other appellate courts have justified deference to the trial court by acknowledging the tension inherent in the simultaneous guarantees of a right to counsel and a right to represent oneself. *See, e.g.*, *United States v. Ziegler*, 1 F.4th 219, 226 (4th Cir. 2021); *United States v. Garey*, 540 F.3d 1253, 1265-66 (11th Cir. 2008). These appellate courts have been concerned that too searching an inquiry into the trial court's decision will lead to unworkable results. Once the trial court has conducted a canvass, it is put in an awkward position by the convergence of these two rights. The court risks reversal if it *allows* the defendant to self-represent, because the canvass might be found insufficient to show a knowing and voluntary waiver. But on the other hand, it risks reversal if it *refuses* the defendant's request, because the defendant has a right to self-represent and that right is not extinguished by an insufficient canvass over which the defendant has little to no control. This leaves trial courts "with the narrowest of channels along which to navigate the shoals of possible

error." *People v. Bush*, 7 Cal.App.5th 457, 213 Cal. Rptr. 3d 593, 609 (2017).

The canvass must show the defendant generally understood the risk of self-representation

When a defendant waives counsel and agrees to proceed to trial alone, the defendant is giving up an important and specifically enumerated constitutional right. "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights" like the right to counsel. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) (internal quotation marks omitted); *see* *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004). We have previously protected this presumption by requiring that a defendant seeking to waive counsel show that the decision was made "with a clear comprehension of the attendant risks." *Graves*, 112 Nev. at 124, 912 P.2d at 238. The decision must also be made with "a full understanding of the disadvantages." *Id.* Where the defendant does not generally understand the aggregate potential sentence posed by the charges collectively, we conclude that the defendant cannot be said to clearly comprehend the risks of waiving counsel. *See* *Arrendondo v. Neven*, 763 F.3d 1122, 1131 (9th Cir. 2014) (concluding that defendants must know the range of potential punishments to "understand the magnitude of the loss they face").[2]

[2] *But see* *Bush*, 213 Cal. Rptr. 3d at 605-07 (disagreeing with *Arrendondo* and holding that not even an advisement of the maximum sentence is constitutionally required in every case).

Here, Miles acknowledged that he faced a sentence of "[f]ive to life." On this basis, Miles could have reasonably believed that he would be eligible for parole after 5 years. The trial court did not ask Miles whether he understood that the minimum sentences could be ordered to run consecutively, nor did it explain that he might not have an opportunity to face the parole board for 12 years. The canvass thus did not show whether Miles understood that the potential aggregate sentence exceeded "[f]ive to life." When a defendant faces a maximum sentence of life in prison, a difference of years in parole eligibility can be dramatic. A sentence of 5 years to life and a sentence of 12 years to life are simply not the same sentence. A defendant who is willing to proceed without counsel when anticipating facing the parole board in a few years may well want a lawyer if it is known there may not be another chance to argue for his freedom for decades. We agree with Miles that this understanding was necessary to a knowing and voluntary ***1270** waiver of his right to counsel. Accordingly, we cannot conclude that the trial court's determination that Miles validly waived his right to counsel was reasonable in light of the inadequate inquiry into Miles' understanding of the sentences he faced if convicted.

The trial court should conduct the canvass carefully and address a defendant's lack of understanding, if such affirmatively appears

We turn now to the trial court's discussion of the elements of the crimes charged. This is a suggested area of inquiry under SCR 253(3)(f). The trial court was not required to discuss any particular topics under that rule. It did so, however, by asking Miles to state the elements of sex trafficking. Miles' answer—"Recruiting—recruiting, enticing a person to commit sex trafficking, conspiracy; it's a whole bunch, Your Honor—" showed a serious lack of understanding of the charge of sex trafficking. The trial court made no effort to address Miles' lack of understanding, but simply moved on, as if it had checked a box.

To be sure, we are mindful that Miles' "technical legal knowledge, as such, was not relevant to an assessment of his knowing exercise of the right to defend himself." *Graves*, 112 Nev. at 124, 912 P.2d at 237-38 (quoting *Faretta*, 422 U.S. at 836, 95 S.Ct. 2525). A *Faretta* canvass is not a law school exam that the defendant must pass or be denied the right to represent oneself, and Miles' inability to state the elements of sex trafficking—while no doubt injurious to his *ability* to defend himself—did not nullify his *right* to try to defend himself.

But a *Faretta* canvass is also not a list of questions to be asked without consideration of the answers. A canvass is a conversation. When the defendant's responses affirmatively indicate a lack of understanding, the trial court should follow up by pointing out the defendant's error. When the defendant's error involves the elements of the crime, the trial court can inform the defendant that this lack of understanding is one of the disadvantages of representing oneself. The trial court should seek to ensure that the defendant makes the decision with eyes open as to those disadvantages. The

defendant will be ill-suited to assess the wisdom of representing oneself if the defendant acts on incorrect information. Faced with the defendant's own mistakes, the defendant may well accept the assistance of counsel. If the defendant still insists upon proceeding pro se, it will have been done with the correct information.

Here, the trial court asked Miles to state the elements of sex trafficking, and Miles did not do so. This should have given the trial court pause. Instead, the trial court changed the subject and moved on without comment. We stress that the trial court was not obligated to delve into the elements of the charged crimes, *cf. Arajakis v. State*, 108 Nev. 976, 980, 843 P.2d 800, 802 (1992) (noting that *Faretta* "does not require the trial court to explain the elements of the charged offense"), but once it did, that inquiry revealed that Miles did not understand the sex trafficking charge and thus may not have appreciated the disadvantages of self-representation. And the inadequacy of the trial court's canvass appears again in its conclusion. Rather than specifically determining whether Miles understood the rights that he was waiving and the consequences of waiver, as SCR 253(4)(b) requires, the court simply noted that Miles answered the questions posed and indicated that he believed he could do a better job in the face of the court's efforts to dissuade him.

When these errors—i.e., the trial court's failure to address Miles' expressed lack of understanding about the potential sentences and the elements of sex trafficking—are taken together, we are unable to say with any confidence that Miles' waiver of the right to counsel was knowing and voluntary. As an invalid waiver of the right to counsel is not subject to harmless-error analysis, we reverse.[3]

[3] Miles also argues that (1) his sentence is cruel and unusual in violation of the state and federal constitutions; (2) NRS 176.035(1) is unconstitutionally vague in that it gives district judges unfettered discretion to order sentences to be served consecutively or concurrently, and the court of appeals' opinion to the contrary in *Pitmon v. State*, 131 Nev. 1334, 352 P.3d 655 (Ct. App. 2015), should be overruled; and (3) the court was required to sua sponte revoke Miles' right to self-representation when he allegedly abused that right. We have considered these arguments and find them without merit.

***1271** *The trial court should refrain from disparaging the defendant's choice to waive counsel*

Finally, we must note our strong disapproval of the trial court's tone in addressing Miles when he first sought to proceed pro se. The trial court warned Miles that self-representation was "a bonehead move," "the stupidest thing in the world," "so dumb and so stupid," and "a bad decision." The trial court also warned Miles that "[t]he State would love to have you represent yourself, because they know ... the only thing you're going to do is screw yourself." The trial judge has a duty to "maintain, especially in a jury trial, that restraint which is essential to the dignity of the court and to the assurance of an atmosphere of impartiality." *United States v. Allen*, 431 F.2d 712, 713 (9th Cir. 1970); *see also Holderer v. Aetna Cas. & Sur. Co.*, 114 Nev. 845, 850, 963 P.2d 459, 463 (1998) (finding judicial misconduct where trial judge trivialized the proceedings with facetious comments); *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 367, 892 P.2d 588, 589 (1995). The Nevada Code of Judicial Conduct specifically requires a judge to "be patient, dignified, and courteous to litigants," and the canvass here should have adhered to this obligation more stringently. NCJC 2.8(B); *cf. In re Disciplinary Proceeding Against Eiler*, 169 Wash.2d 340, 236 P.3d 873, 878-79 (2010) (upholding judicial suspension in part based on deriding pro se litigants' intelligence).

Although courts must impress on the defendant the risks of self-representation, the trial court should not disparage the defendant for his exercise of a constitutional right. We urge trial courts to remain objective in discussing the wisdom of a defendant's decision whether to forgo counsel and proceed pro se.

CONCLUSION

When a criminal defendant desires to waive the right to counsel, the trial court must ensure that decision is made knowingly and voluntarily. The trial court must conduct a careful canvass and ensure that a defendant understands the risks and disadvantages of self-representation. While no specific questions are constitutionally required, a trial court that learns during the canvass that the defendant may not understand the charges or the potential sentences should address that lack of understanding. In this instance, the court should have addressed Miles' errors and informed him that the court would not assist him in this regard and that his lack of understanding would put him at a disadvantage in representing himself. Because the trial court did not further address Miles' apparent lack of understanding of the potential aggregate sentence and the

elements of sex trafficking, we reverse the judgment of conviction and remand for proceedings consistent with this opinion.

We concur:

Hardesty, C.J.

Cadish, J.

Pickering, J.

Parraguirre, J.

Silver, J.

Herndon, J.

All Citations

500 P.3d 1263, 137 Nev. Adv. Op. 78

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499 P.3d 1178
Supreme Court of Nevada.

Gustavo RAMOS, Appellant,
v.
The STATE of Nevada, Respondent.

No. 79781
|
FILED DECEMBER 09, 2021

Synopsis
Background: Defendant was convicted in the District Court, Clark County, Douglas W. Herndon, J., of murder and sexual assault, and he appealed.

The Supreme Court, Silver, J., held that no statutory time limit on commencing prosecution applied to sexual assault charge.

Affirmed.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***1179** Appeal from a judgment of conviction, pursuant to a verdict following a bench trial, of two counts of murder with the use of a deadly weapon and one count of sexual assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Attorneys and Law Firms

Resch Law, PLLC, dba Conviction Solutions, and Jamie J. Resch, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Karen L. Mishler, Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

Appellant Gustavo Ramos was arrested and charged in 2010 for the sexual assault and murder of a woman 12 years earlier. When the offenses were committed, the statute of limitations for the sexual assault charge was 4 years unless the victim or a person authorized to act on the victim's behalf filed a written report of the assault with law enforcement, in which case NRS 171.083(1) removed the statute of limitations. In this appeal, we consider the applicability of the statutory exception in NRS 171.083(1) when the victim is both sexually assaulted and murdered. We conclude that under the facts here—where the persons who discovered the victim's body notified the police and law enforcement filed a written report concerning the sexual assault within the limitations period—the requirements of NRS 171.083(1) were satisfied. Thus, there was no statutory time limit in which the State was required to file the sexual assault charge, and the district court did not err in denying Ramos's motion to dismiss. Because the other issues raised on appeal also do not warrant relief, we affirm the judgment of conviction.

I.

In May 1998, two elderly victims were murdered in their apartments at a retirement facility. One of the victims was found bludgeoned to death in his apartment, and the other victim's body was discovered the next day in her apartment by her friend and her son, who immediately called the police. The police responded to the scene and collected evidence from the apartments, including a newspaper with a bloody palm print on it and a blood-stained t-shirt, but they were unable to identify a suspect. A month later, a detective filed a written report detailing the female victim's autopsy results and stating that she had been sexually assaulted and stabbed to death.

Approximately 11 years later, the State retested the evidence using more technologically advanced DNA testing and obtained a DNA profile from the t-shirt. The DNA profile was submitted into the national Combined DNA Index System (CODIS), which returned a match for Ramos. The palm print on the newspaper matched

Ramos's as well. Subsequently, in 2010, the State charged Ramos with murdering both victims and sexually assaulting the female victim.

Ramos moved to dismiss the sexual assault charge, arguing that because the statute of limitations when the sexual assault took place was 4 years, the State's prosecution was time-barred. The district court denied Ramos's motion, finding that there was no limitations period for the offense pursuant to NRS 171.083 because the victim's friend and son, who had discovered the victim's body and reported her death to the police, were authorized to act on the dead victim's behalf and provided information to the police that was incorporated into various written reports setting forth the murder and sexual assault ***1180** offenses. Following a bench trial, Ramos was found guilty of all three charges and was sentenced to an aggregate sentence of life without the possibility of parole. This appeal followed.

II.

Ramos argues that the district court erred by denying his motion to dismiss the sexual assault charge because the charge was filed after the statute of limitations had expired and the exception to the statute of limitations in NRS 171.083(1) did not apply. We disagree.

The district court's application of NRS 171.083(1) presents an issue of statutory interpretation that we review de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011); *see also Bailey v. State*, 120 Nev. 406, 407, 91 P.3d 596, 597 (2004). Our primary goal in construing a statute is to give effect to the Legislature's intent in enacting it. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). Thus, we first look to the statute's plain language to determine its meaning, and we will enforce it as written if the language is clear and unambiguous. *Id.* We will look beyond the statute's language only if that language is ambiguous or its plain meaning was clearly not intended or would lead to an absurd or unreasonable result. *Newell v. State*, 131 Nev. 974, 977, 364 P.3d 602, 603-04 (2015); *Sheriff, Clark Cty. v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008). In interpreting an ambiguous statute, "we look to the legislative history and construe the statute in a manner that is consistent with reason and public policy." *Lucero*, 127 Nev. at 95, 249 P.3d at 1228.

NRS 171.083(1) provided that if the "victim of a sexual assault or a person authorized to act on behalf of a victim of a sexual assault files with a law enforcement officer a written report concerning the sexual assault" within the applicable limitations period,[1] then there is no statutory time limit for commencing prosecution of the sexual assault. 1997 Nev. Stat., ch. 248, § 1, at 891.

[1] The statute of limitations for sexual assault was 4 years at the relevant time. 1997 Nev. Stat., ch. 248, § 1, at 891 (NRS 171.085). In 2015, the Legislature extended the statute of limitations to 20 years, but the amendment did not apply here because the 4-year period had expired in 2002. *See* 2015 Nev. Stat., ch. 150, §§ 3, 5, at 583-84 (providing that the 20-year limitations period applies retroactively only if the applicable limitations period had commenced but not yet expired on October 1, 2015).

Ramos argues that because neither the victim's friend nor her son was a person "authorized to act on behalf of [the] victim," and neither the friend nor the son filed a "written report concerning the sexual assault," the district court erred in finding that NRS 171.083 applied. According to Ramos, because the victim died before the sexual assault was discovered, she could not have given anyone authority to file a police report on her behalf And neither the victim's son nor her friend, who were unaware when they discovered the victim's body that she had been sexually assaulted, filed "a written report *concerning the sexual assault*," as required by the plain language of NRS 171.083. (Emphasis added.) Thus, under Ramos's interpretation of the statute, the limitations period is removed only when a person who has been expressly authorized by the victim writes and files a report containing allegations of the sexual assault. Conversely, the State argues that the district court properly applied the statute because the deceased victim's son and friend were authorized to act on her behalf in reporting her death to the police and there was a written report prepared by law enforcement. The State further contends that Ramos's proposed interpretation would have the absurd result of allowing the statutory exception to apply only to surviving victims of sexual assault and not to victims who are murdered.

We agree with the State that Ramos's proposed interpretation of the statute is unreasonable. First, as to NRS 171.083(l)'s phrase "a person authorized to act on behalf of [the] victim," the plain language contains no requirement that the victim give the person express authorization. Moreover, such a requirement would have the perverse effect of allowing the exception in NRS 171.083(1) to apply only when the victim survives and is able to disclose the sexual assault, and not when the

victim is murdered during or immediately ***1181** after the sexual assault. This would mean that a perpetrator who sexually assaults and murders a victim could escape prosecution for the sexual assault if the perpetrator's identity is not discovered within the applicable limitations period even when the sexual assault is the subject of a written report filed with law enforcement within the limitations period. Ramos's proposed interpretation would not only produce this absurd result but would also hinder the statute's purpose, which, as expressed in its text, is to remove time limitations when the sexual assault is promptly reported to and documented by law enforcement. *See Houtz v. State*, 111 Nev. 457, 461, 893 P.2d 355, 358 (1995) ("The interpretation of a statute should be reasonable and should avoid absurd results."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012) ("A textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored."). Thus, we decline to read into the statute a requirement that an "authorized" person have express permission from the victim to act on the victim's behalf. Instead we agree with the district court that when the victim has been murdered, a person who discovers the victim's body is "authorized" within the meaning of NRS 171.083(1) to report the crime on the victim's behalf.[2] This interpretation both comports with the plain language of the statute and avoids unreasonable results.

[2] The parties' arguments on appeal regarding the meaning of "authorized" focus only on whether the victim's son and friend were "authorized" persons. We do not address whether the investigating officer who wrote the police report concerning the sexual assault, or the coroner who wrote the autopsy report, were "authorized" within the meaning of NRS 171.083(1), as the district court did not make such a finding and the parties provide no argument on it.

Next, as to NRS 171.083(l)'s phrase "files with a law enforcement officer a written report concerning the sexual assault," we conclude that the language is ambiguous. It can be interpreted as either requiring the authorized person to create a written report alleging sexual assault and file it with the police, or as requiring the authorized person to assist the police in writing and filing a report concerning the sexual assault. The former interpretation, which is proposed by Ramos, would require the authorized person to have knowledge of a sexual assault and report it in writing to law enforcement. Under this interpretation, if the victim is found murdered and it is not readily apparent to the person who finds the victim's body that he or she has been sexually assaulted, NRS 171.083(1) would not apply even if a law enforcement officer promptly files a written report about the sexual assault. We conclude that this interpretation fails to effectuate the Legislature's intent in enacting the statute. The legislative history indicates that the statute was intended to encourage the memorialization of sexual assault allegations as soon after the offense as practical so that an efficient and timely prosecution could occur and frivolous, vindictive, or false allegations could be avoided or deterred. *See* Hearing on A.B. 97 Before the S. Judiciary Comm., 69th Leg. (Nev., Apr. 22, 1997) (recognizing that one concern behind the statute of limitations is the difficulty in obtaining witnesses and prosecuting an offense after a certain time period, and thus the statutory exception was intended to "encourage authorities and victims to come forward" and promptly report a sexual assault so that it could be better prosecuted); Hearing on A.B. 97 Before the S. Judiciary Comm., 69th Leg. (Nev., May 19, 1997) ("Under the proposed amendment... the statute of limitations is tolled indefinitely as long as the complaint is reported within a certain time frame.").

It is clear to us that the Legislature intended the statutory time limitation on sexual assault to be removed as long as there was a written report of the allegations. Thus, construing the statute consistent with reason and public policy, we interpret it as allowing for the authorized person to assist the police in causing a written report to be filed. Here, the victim's son and friend both reported her murder to the police, with the friend submitting a written statement. Though neither the son nor the friend knew of or reported the sexual assault, an investigating police officer filed a written report several weeks later entitled "Murder with Deadly Weapon/Sexual Assault," detailing the autopsy results and the medical examiner's opinion that the victim had been sexually assaulted. We conclude ***1182** that this written report documenting the sexual assault satisfies NRS 171.083's written report requirement. Therefore, the district court correctly found that NRS 171.083 applied and did not err by denying Ramos's motion to dismiss.[3]

[3] Ramos also argues that (1) the district court erred in allowing the State to amend the information to include the sexual assault charge, (2) there was insufficient evidence to support the convictions, (3) his statements to the police should have been suppressed, (4) the district court erred in admitting testimony and a report from an unavailable witness, (5) the district court erred in denying his motion to dismiss for failure to collect evidence, (6) the district court erred in denying his motion to strike a sentence of life without the possibility of parole, and (7)

cumulative error requires reversal. We have considered each of these arguments and conclude that none warrants relief.

III.

We conclude that, under the circumstances here—where a victim was sexually assaulted and murdered, the individuals who discovered the victim's body notified the police, and law enforcement filed a written report detailing the sexual assault within the applicable limitations period—the requirements of NRS 171.083(1) were satisfied such that no statutory time limit on commencing prosecution applied to the sexual assault charge. Accordingly, we affirm the judgment of conviction.

We concur:

Parraguirre, J.

Stiglich, J.

All Citations

499 P.3d 1178, 137 Nev. Adv. Op. 74

498 P.3d 1278
Supreme Court of Nevada.

Curtis WILSON, an Individual, Appellant,
v.
LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a Governmental Agency; Police Officer E. Vonjagan, Badge No. 16098, an Employee of the Metropolitan Police Department; and Police Officer Tennant, Badge No. 9817, an Employee of the Metropolitan Police Department, Respondents.

No. 81940
|
FILED NOVEMBER 18, 2021

Synopsis

Background: Detainee, who was handcuffed after being stopped for an improper lane change, brought action against police department and officers, asserting claims for battery, false imprisonment, and negligence, after initially filing a citizen complaint with police department's citizen review board. The District Court, Clark County, Gloria J. Sturman, J., granted defendants' motion to dismiss as time-barred. Detainee appealed.

The Supreme Court, Silver, J., held that detainee's proceeding before citizen review board did not toll the two-year statute of limitations on his claims.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

***1279** Appeal from a district court order dismissing a complaint in a tort action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Attorneys and Law Firms

Brandon L. Phillips, Attorney at Law, PLLC, and Brandon L. Phillips, Las Vegas, for Appellant.

Kaempfer Crowell and Lyssa S. Anderson, Ryan W. Daniels, and Kristopher J. Kalkowski, Las Vegas, for Respondents.

BEFORE THE SUPREME COURT, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

In this appeal, we consider whether the district court erred in determining that a proceeding before a citizen review board does not warrant tolling the statute of limitations under our holding in *State, Department of Human Resources v. Shively*, 110 Nev. 316, 871 P.2d 355 (1994), or under equitable tolling principles. We conclude the review board proceeding does not toll the statute under *Shively* because participation in the proceeding was not mandatory. We also conclude that the doctrine of equitable tolling does not apply here because appellant failed to demonstrate that he acted diligently and ***1280** that an extraordinary circumstance prevented him from timely filing his civil complaint in district court. Accordingly, we affirm the district court's order dismissing his complaint.

FACTS AND PROCEDURAL HISTORY

On August 22, 2017, Las Vegas Metropolitan Police Department (LVMPD) Officers Vonjagan and Tennant stopped appellant Curtis Wilson for an improper lane change, Officer Vonjagan instructed Wilson to get out of his car and move to the front of the LVMPD vehicle, where Officer Vonjagan handcuffed him. Officer Tennant placed a second set of handcuffs around Wilson's wrists. Wilson, an African-American, alleges that the officers were motivated by racial animus and that they handcuffed him so forcefully that they permanently injured his hands and wrists. Wilson further alleges that the officers harassed him and made him wait outside in high temperatures for a long time. Wilson avers that the officers released him only after discovering that he is a retired firefighter.

Wilson filed a citizen complaint with the LVMPD Citizen Review Board (CRB) in October 2017. The CRB is an

advisory board to LVMPD. The CRB may refer citizen complaints against police officers to the LVMPD and make recommendations regarding discipline, as well as review LVMPD's internal investigations.[1] In the present case, the CRB referred Wilson's complaint to a hearing panel for further review. The CRB informed Wilson that if he was not satisfied with the panel's decision, he could "contact legal counsel to pursue any other legal remedies available." The LVMPD Internal Affairs Bureau simultaneously reviewed the matter, but it did not find a policy violation. At the CRB's initial hearing, the panel disagreed with the bureau's determination and scheduled an evidentiary hearing for March 14, 2018. That same day, following the evidentiary hearing, the CRB found that there was no policy violation but concluded that the officers had unnecessarily escalated the situation. On this basis, the CRB recommended additional officer training.

[1] We explained the CRB's purpose and function in *Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Judicial District Court*, 122 Nev. 230, 234, 130 P.3d 182, 186 (2006) (citing, inter alia, NRS 289.387(4)).

On November 13, 2019, Wilson filed a civil complaint in district court against LVMPD, Officer Vonjagan, and Officer Tennant (collectively, when possible, LVMPD respondents), asserting claims for battery, false imprisonment, and negligence. LVMPD respondents filed a motion to dismiss, arguing that Wilson's complaint was barred by the statute of limitations. Wilson countered that the statute of limitations was tolled while he sought administrative remedies and that equitable considerations favored tolling. The district court granted the motion to dismiss, finding that tolling the statute of limitations was not warranted.

DISCUSSION

Standard of review

We review a dismissal for failure to state a claim pursuant to NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant. *Id.* Dismissal of a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

The district court did not err in dismissing Wilson's complaint

NRS 11.190(4) provides a two-year limitations period for an action for battery or false imprisonment, or for "an action to recover damages for injuries to a person ... caused by the wrongful act or neglect of another." NRS 11.190(4)(c), (e). That period begins to run "when the wrong occurs and a party sustains injuries for which relief could be sought." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). When a plaintiff's ***1281** complaint is untimely and the statute of limitations is not tolled, dismissal of the complaint is proper. *See Fausto v. Sanchez-Flores*, 137 Nev. Adv. Op. 11, 482 P.3d 677, 683 (2021).

There is no dispute that Wilson filed his complaint more than two years after the incident and that the complaint is time-barred unless the statute was tolled. But Wilson argues that, under *Shively*, his pursuit of administrative remedies tolled the statute of limitations. Wilson further argues that *Shively* applies even when the exhaustion of administrative remedies is not mandatory and that Nevada's equitable tolling principles favor tolling the statute here. LVMPD respondents counter that *Shively* does not apply because CRB is neither an administrative agency nor an administrative court and filing a complaint with the CRB was not a prerequisite to filing a lawsuit. LVMPD respondents also contend that equitable tolling is not available because Wilson was not diligent and failed to demonstrate that extraordinary circumstances prevented him from timely filing his complaint. We address *Shively* and equitable tolling in turn.

Shively *is distinguishable*

As noted, Wilson primarily relies on *Shively*. There, the state welfare department initiated an administrative proceeding to terminate benefit payments to a Medicaid recipient who fraudulently obtained eligibility for the program. 110 Nev. at 317, 871 P.2d at 355. After the

hearing officer affirmed the department's right to terminate benefits, the department filed a complaint in district court to recover the benefits paid. *Id.* The defendant argued the statute of limitations barred the complaint, and the district court granted summary judgment. *Id.* at 317, 871 P.2d at 355-56. We reversed, explaining the department was *required* to participate in the administrative action before it could discontinue benefits or recoup expenses and thus should not be penalized for pursuing the requisite administrative remedy before seeking relief in court. *Id.* at 318, 871 P.2d at 356. We therefore concluded the statute of limitations was tolled during the pendency of the administrative process. *Id.*

Unlike the situation in *Shively*, Wilson was not required to bring his tort claims to the CRB. NRS 289.387(4), which sets forth the CRB's duties and powers, provides that the CRB "*may* ... [r]eview an internal investigation of a [police] officer ... and make *recommendations* regarding any disciplinary action against the [police] officer." (Emphases added.) Nothing in the statutes authorizing the creation of the CRB and defining its authority provide that participation in the CRB process is mandatory, a prerequisite to filing a lawsuit, or binding on the police officer's employer. *See, e.g.*, NRS 289.380; NRS 289.387. Moreover, correspondence from the CRB notified Wilson that he was free to pursue legal remedies. Thus, nothing prevented Wilson from filing his civil complaint before the completion of the CRB process. Accordingly, this case is not analogous to *Shively*.

To the extent Wilson invites us to expand *Shively* to toll the statute of limitations for administrative proceedings that are not mandatory, we decline to do so for three reasons. First, Wilson presents no arguments or authorities supporting his assumption that a CRB proceeding is an administrative proceeding. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court need not consider issues not adequately briefed, not supported by relevant authority, and not cogently argued); *see also Las Vegas Police Protective Ass'n Metro*, 122 Nev. at 234, 130 P.3d at 186 (explaining the CRB is an advisory body to the police department that reviews internal investigations and makes disciplinary recommendations). Second, we declined a similar invitation in *Siragusa v. Brown*, where we explained that *Shively's* holding is "limited to [its] facts and [has] no broader application." 114 Nev. 1384, 1394 n.7, 971 P.2d 801, 808 n.7 (1998). Third, carving out the ad hoc exception Wilson urges would undermine the Legislature's intent in enacting a statute of limitation such as NRS 11.190(4). *See Fausto*, 137 Nev. Adv. Op. 11, 482 P.3d at 680 (2021) ***1282** (explaining that statutes of limitations are intended to prevent stale claims and " 'to encourage the plaintiff to pursu[e] his rights diligently' " (alteration in original) (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 10, 134 S.Ct. 2175, 189 L.Ed.2d 62 (2014))). Accordingly, we conclude that the CRB proceeding did not toll the statute of limitations pursuant to *Shively*.

Equitable tolling does not apply

We recently established the threshold requirements for equitable tolling of NRS 11.190(4)(e)'s limitations period: (1) the plaintiff exercised diligence in pursuing his or her claims, and (2) some extraordinary circumstance prevented the plaintiff from bringing a timely action.[2] *See Fausto*, 137 Nev. Adv. Op. 11, 482 P.3d at 682. We address these factors in turn.

[2] If these threshold factors are met, the district court must consider the additional applicable factors set forth in *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983). *See Salloum v. Boyd Gaming Corp.*, 137 Nev. Adv. Op. 56, 495 P.3d 513 (2021).

Wilson was not diligent

When considering diligence, we evaluate, among other factors and circumstances, whether the plaintiff made prompt efforts to assert the claim. *See id.* (concluding that a plaintiff was not diligent, despite initially reporting a crime perpetrated against her, because she "did not seek counsel or assert her claims until two and a half years later"). In this case, Wilson waited over a year and half after the CRB made its decision before he filed his complaint in district court, and he provided no explanation for this delay. Therefore, we conclude that Wilson did not diligently pursue his claims.

No extraordinary circumstance prevented Wilson from timely asserting his claims

Extraordinary circumstances exist where some circumstance prevents the plaintiff from timely filing a complaint. *See id.* at 683 (concluding that the plaintiff did not show extraordinary circumstances where nothing prevented her from timely filing her complaint). Wilson does not point to any extraordinary circumstance beyond his control that prevented him from timely filing his complaint, and the record does not indicate that Wilson faced any such circumstance. At best, Wilson suggests that LVMPD encouraged him to participate in the CRB process. However, nothing in that correspondence indicated to Wilson that he was *required* to complete the CRB complaint process before filing a civil complaint or that the CRB process would provide the same remedies as a civil action.

Even assuming, *arguendo*, that Wilson was somehow discouraged from filing a claim while the CRB proceeding was ongoing, this does not explain why Wilson waited over 18 months after the CRB process concluded to file his complaint. Moreover, to the extent Wilson mistakenly believed the statute of limitations was tolled for the duration of his CRB complaint, that mistaken belief is not an extraordinary circumstance warranting equitable tolling. *See Salloum*, 137 Nev. Adv. Op. 56, 495 P.3d at 518 (rejecting the notion that this court should equitably toll "otherwise-expired claims because of [the plaintiffs] 'miscalculation of an amended statute' while represented by counsel"). Thus, we conclude that Wilson failed to establish that an extraordinary circumstance prevented him from timely asserting his claims and the district court properly determined that the statute of limitations barred Wilson's complaint.

CONCLUSION

Shively does not provide grounds for tolling the statute of limitations here, and Wilson additionally failed to establish grounds for equitable tolling. We therefore conclude that the district court properly dismissed his untimely complaint. Accordingly, we affirm the district court's dismissal order.

We concur:

Parraguirre, J.

Stiglich, J.

All Citations

498 P.3d 1278, 137 Nev. Adv. Op. 70

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497 P.3d 1187
Supreme Court of Nevada.

Osbaldo CHAPARRO, Appellant,
v.
The STATE of Nevada, Respondent.

No. 81352
|
FILED NOVEMBER 10, 2021

Synopsis

Background: Defendant was convicted in the District Court, Washoe County, Egan Walker, J., of sexual assault, battery with intent to commit sexual assault upon a victim age 16 or older, and open or gross lewdness. Defendant appealed.

Holdings: In a case of first impression, the Supreme Court, en banc, Stiglich, J., held that:

sentencing hearing via videoconferencing during COVID-19 pandemic did not violate defendant's right to be present;

evidence of prior conviction for battery with intent to commit sexual assault was admissible to show intent and propensity;

trial court acted within its discretion in limiting defendant's voir dire inquiries about specific evidence that would be presented at trial; and

inconclusive DNA evidence was relevant to show thoroughness of investigation and to complete story of evidence already presented.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection; Jury Selection Challenge or Motion.

***1189** Appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault, battery with the intent to commit sexual assault upon a victim age 16 or older, and open or gross lewdness. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Attorneys and Law Firms

John L. Arrascada, Public Defender, and Kathryn Reynolds, Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Christopher J. Hicks, District Attorney, and Jennifer P. Noble, Chief Appellate Deputy District Attorney, Washoe County, for Respondent.

BEFORE THE SUPREME COURT, EN BANC.

OPINION

By the Court, STIGLICH, J.:

It is well settled that a defendant has the right to be present at all critical stages of a criminal proceeding, including the sentencing hearing. In this opinion, we consider whether the defendant's right to be present was violated when the sentencing hearing was conducted by simultaneous audiovisual transmission over the Zoom videoconferencing platform due to administrative orders issued by the district court forbidding in-person hearings because of the COVID-19 pandemic. Appellant Osbaldo Chaparro was convicted ***1190** after a jury trial in February 2020. His sentencing hearing took place in May 2020. All contemporary readers of this opinion will instantly understand the import of those dates: the onset of the COVID-19 pandemic in March 2020 impacted nearly every area of life. The criminal justice system was no exception. While his trial occurred in person and in court, Chaparro was sentenced in a hearing conducted over Zoom. Because we conclude that Chaparro's sentencing hearing was fair and just considering the surrounding circumstances, he is not entitled to relief on this claim.

We also consider several challenges related to Chaparro's trial. We conclude that the district court properly admitted evidence of Chaparro's previous conviction for battery with intent to commit sexual assault. We further conclude that the district court did not err in limiting inquiry into Chaparro's prior conviction that the court had determined would be admitted as evidence, as a party may not pre-try its case with the jury during voir dire. Nevertheless, we

direct that district courts should not categorically limit questions about jurors' views concerning whether a defendant has prior convictions. And we recognize that inconclusive DNA evidence may be relevant and admissible where permitted by the rules of evidence, as here. Accordingly, we affirm.

BACKGROUND

In December 2016, L.L. and a friend stayed at a hotel in downtown Reno. In the early morning hours of December 17, L.L. was walking alone towards the Harrah's casino when Chaparro grabbed her. Chaparro groped L.L.'s buttocks and breasts, reached under her dress and inside her tights, and digitally penetrated her. L.L. struggled and yelled that she would call 9-1-1. Chaparro responded, "[W]ho are they going to believe, me or you?" When L.L.'s friend approached, Chaparro hurried off. L.L. reported the assault and underwent a sexual assault exam that same morning. Harrah's security system captured the incident along with footage.

The State charged Chaparro with sexual assault, battery with the intent to commit sexual assault upon a victim age 16 or older, and open or gross lewdness. Before trial, the State moved to admit evidence of Chaparro's 2011 conviction for battery with the intent to commit sexual assault. In that instance, Chaparro groped and accosted P.J. in the parking lot of the Nugget Casino Resort. Chaparro opposed the motion, arguing the evidence was unfairly prejudicial, but the district court granted the State's motion and allowed P.J. to testify at trial. At trial, Chaparro did not dispute that he was in the security footage or that he had committed open or gross lewdness. Rather, Chaparro argued that he neither penetrated L.L. nor intended to do so and was therefore innocent of sexual assault and battery with the intent to commit sexual assault upon a victim age 16 or older.

The jury convicted Chaparro of all charges on February 14, 2020. In March 2020, the COVID-19 crisis prompted courts across the country to consider alternatives to in-person hearings. The Second Judicial District Court originally hoped to proceed with in-person appearances for "essential case types and hearings," including criminal sentencings. *See In re Second Judicial District Court's Response to Coronavirus Disease (COVID-19)*, Administrative Order 2020-2 (Mar. 16, 2020).[1] But it soon ordered *all* hearings to "be conducted by alternative means to in-person hearings." *See In re Second Judicial District Court's Response to Coronavirus Disease (COVID-19)*, Administrative Order 2020-02(A) (Apr. 9, 2020). Chaparro's sentencing hearing was held on May 20, 2020, over Zoom. Chaparro joined the hearing from a jail courtroom and was able to communicate confidentially with counsel via a headset, as well as see and hear the other participants. The other participants could likewise see and hear Chaparro. Members of the public who chose to watch, including Chaparro's friends and family, could also see and hear Chaparro, the attorneys, and the judge, but they could not themselves be seen or heard by Chaparro. Chaparro objected to the ***1191** use of Zoom instead of an in-person hearing, stating that he would like to be able to see his supporters, but the district court overruled the objection and proceeded with the hearing. The district court sentenced Chaparro to an aggregate sentence of life with parole eligibility after 12 years. This appeal follows.

[1] The Second Judicial District Court's COVID-19 orders are available at https://www.washoecourts.com/main/covid19response.

DISCUSSION

Chaparro's due process challenge to the sentencing hearing over Zoom

We begin at the end, with Chaparro's sentencing hearing. Chaparro argues that the district court's decision that the hearing proceed over Zoom violated his due process right to be present.[2] Chaparro argued he did not think it was "fair ... that I have to do something by video and audio/visual because of a pandemic. That's not my fault. ... [T]his isn't what, you know, it should be like." The district court overruled Chaparro's objection, stating—

> I intend to proceed to sentencing today, because I cannot predict with any reasonable certainty when in the future we can conduct an in-person sentencing.
>
> And, in fact, it is more valuable to have resolution in your case for purposes of vesting jurisdiction for purposes of an appeal that I know you want to take, for example, for finality for the victims in this case and for a variety of reasons. It makes no sense to continue this to a date uncertain in the future, which we cannot predict....
>
> [U]nder the circumstances, it is the best option available.

[2] Chaparro also raises a violation of his confrontation rights. He raises this claim for the first time on appeal, and we accordingly decline to consider it. *See* *Rippo v. State*, 113 Nev. 1239, 1260, 946 P.2d 1017, 1030 (1997) (declining to consider appellate claim where objection was not made below). Insofar as Chaparro invokes *Lipsitz v. State*, that decision is distinguishable, as it concerned whether a *witness* could testify remotely *at trial*. *See* 135 Nev. 131, 442 P.3d 138 (2019); *cf. Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (concluding that right to confrontation does not apply in capital sentencing proceedings).

"A criminal defendant has the right under the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to be present at every stage of the trial." *Collins v. State*, 133 Nev. 717, 719, 405 P.3d 657, 661 (2017); *see also* *United States v. Gagnon*, 470 U.S. 522, 526, 105 S.Ct. 1482, 84 L.Ed.2d 486 (1985); *Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970); NRS 178.388(1). A sentencing hearing is a critical stage of the proceedings, *see Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978), and thus a defendant has the right to be present for sentencing. The right to be present is not absolute, however. *Gallego v. State*, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Gagnon*, 470 U.S. at 526, 105 S.Ct. 1482 (alteration in original) (quotation marks omitted); *see also* *Kirksey v. State*, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996) ("The due process aspect has been recognized only to the extent that a fair and just hearing would be thwarted by the defendant's absence.").

We thus consider whether Chaparro's hearing was fair and just despite its unorthodoxy and conclude that the sentencing hearing was appropriate considering the circumstances. Chaparro was able to be heard, to be seen, to confidentially communicate with counsel, and to speak on the record. *Cf.* *People v. Lindsey*, 201 Ill.2d 45, 265 Ill.Dec. 616, 772 N.E.2d 1268, 1276-79 (2002) (holding the due process right to be present was not violated where defendant participated in critical stages of arraignment and jury waiver by audiovisual transmission and "was able to interact with the court with relative ease," and noting similar holdings by other state supreme courts). Faced with an administrative order prohibiting in-person hearings, the district court balanced Chaparro's right to be sentenced without unreasonable delay, *cf.* NRS 176.015(1), his desire to appeal the conviction, and the risk of furthering the spread of a contagious disease with his right to be present at the hearing and the prospect of an ***1192** indefinite delay. *See Bonilla v. State*, 71 Misc.3d 235, 141 N.Y.S.3d 289, 291 (Ct. CL. 2021) (recognizing the Hobson's choice foisted on courts by the pandemic between exposing the public to a dangerous disease and delaying court proceedings and praising virtual proceedings as a safe way to provide access to courts during the crisis). Chaparro does not allege that he was prevented from presenting argument or evidence on his behalf because of the way in which the hearing was conducted. We note that the fairness and justness of a given proceeding cannot be divorced from the circumstances in which the proceeding takes place, and acknowledge the realities of this moment in assessing the district court's decision to conduct the sentencing hearing over Zoom. *See* *Snyder v. Massachusetts*, 291 U.S. 97, 116, 54 S.Ct. 330, 78 L.Ed. 674 (1934) ("Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results."). Given the limited possibilities created by unprecedented emergency circumstances, we conclude that a fair and just hearing was not thwarted by Chaparro's absence from the courtroom.[3]

[3] Chaparro also argues that he had a right to the in-person presence of friends and family, but he does not provide supporting authority for the expansion of the right to be present to third parties, and we therefore decline to consider this claim. *See* *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Similarly, Chaparro makes a single reference to his right to a hearing open to the public, *see* *United States v. Rivera*, 682 F.3d 1223, 1225 (9th Cir. 2012) (noting that the right to a public trial extends to sentencing), but he does not accompany this reference with supporting authority or cogent argument, and we decline to consider the claim. *See* *Maresca*, 103 Nev. at 673, 748 P.2d at 6.

The district court did not abuse its discretion in admitting testimony regarding the prior assault and conviction

We turn now from the sentencing hearing to the trial. Chaparro argues that the district court abused its discretion in admitting victim testimony regarding his 2011 conviction for battery with the intent to commit sexual assault. The victim in that battery, P.J., testified at this trial that Chaparro approached her in the parking lot of a casino. She testified that Chaparro shoved her into her own car, grabbed her breast, and laid on top of her such that she could feel his erection, all while saying "relax and let it happen." Chaparro left when she yelled and struggled.

"NRS 48.045(3) unambiguously permits the district court to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense." *Franks v. State*, 135 Nev. 1, 4, 432 P.3d 752, 755 (2019). And each count charged against Chaparro was a "sexual offense" under NRS 48.045(3) and NRS 179D.097, as was the conviction in the 2011 case. This court reviews a district court's decision to admit evidence "for an abuse of discretion or manifest error." *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). In determining whether to admit a prior sexual offense pursuant to NRS 48.045(3), the district court must (1) make a preliminary finding that the prior sexual offense is relevant, and (2) find "that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred." *Franks*, 135 Nev. at 5, 432 P.3d at 756. Finally, the district court should evaluate whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice by considering

> (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. at 6, 432 P.3d at 756-57 (quoting *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (quotation marks omitted)).

Chaparro does not dispute that his previous sexual offense was relevant or that a jury could find by a preponderance of the evidence that the offense occurred. Instead, he argues that evidence of the previous sexual offense was not necessary to the State's case and that the district court erred in evaluating whether the probative value of ***1193** his previous sexual offense was outweighed by the danger of unfair prejudice. We disagree. Initially, we note that the factors for evaluating whether the probative value is substantially outweighed by the danger of unfair prejudice are not elements to be met before evidence is admissible but considerations for the district court to weigh. Turning to the district court's evaluation of the factors, the court noted the similarities in the previous assault and the assault of L.L.—both occurred near casinos, when the women were alone, and Chaparro talked to both women during the attacks. The assaults occurred approximately five years apart, and nothing in the record shows intervening circumstances affecting the balance of the previous crime's probative value and the risk of prejudice. While the State had other evidence of Chaparro's guilt, including the security footage and Chaparro's concession to the open or gross lewdness charge, the previous conviction for battery with the intent to commit sexual assault was ''simply ... helpful or *practically necessary*" to show Chaparro's intent in assaulting L.L. and his propensity to commit the crime. *Franks*, 135 Nev. at 7, 432 P.3d at 757 (quotation marks omitted). Accordingly, we conclude the district court did not abuse its discretion in admitting this evidence at trial.

The district court did not err in limiting voir dire

By the time of voir dire, Chaparro was aware that the district court would allow trial testimony by P.J. regarding the 2011 battery with intent to commit sexual assault. Chaparro argues that he was improperly barred from asking prospective jurors questions regarding the effect evidence of that conviction might have on their deliberation in this case.

This matter was discussed in camera. The district court noted Chaparro's objection and barred his proposed questioning on the previous conviction. The court determined that such questions would "pre-try facts of [the] case" and that propensity evidence is significant enough that it "would be unnecessarily volatile with this or any other jury" "to ring the bell of Mr. Chaparro's conviction for battery to commit sexual assault when he stands accused of the same thing." Chaparro argued that a

fair trial required ensuring that the empaneled jury be able to deliberate only on the facts of this offense, despite knowing of his prior conviction for the same offense.

NRS 175.031 provides that "[t]he court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted." Voir dire serves to determine whether jurors "can and will, in accordance with their oath, render to the defendant and the state a fair and impartial trial on the facts allowed to be presented to them by the court." *Oliver v. State*, 85 Nev. 418, 422, 456 P.2d 431, 434 (1969). Both the scope and method of voir dire are within the district court's discretion, *Salazar v. State*, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991), and we review for an abuse of discretion or a showing that the defendant was prejudiced, *Leonard v. State*, 117 Nev. 53, 64, 17 P.3d 397, 404 (2001).

We conclude that the district court appropriately limited Chaparro from inquiring into specific evidence that would be presented at trial. *See* *Witter v. State*, 112 Nev. 908, 915, 921 P.2d 886, 892 (1996) (concluding that parties may not ask jurors about hypothetical facts that would reveal whether a potential juror would find the defendant guilty because such a question goes "beyond determining whether a potential juror would be able to apply the law to the facts of the case"), *abrogated on other grounds by Nunnery*, 127 Nev. 749, 263 P.3d 235. As noted by the district court here, that Chaparro was previously convicted of the same offense he stood accused of had significant potential to influence the jury. This posed a serious risk of causing jurors to prejudge the facts of the case.[4] *See Browning v. State*, 124 Nev. 517, 531 n.32, 188 P.3d 60, 70 n.32 (2008) (impliedly ***1194** recognizing that it is error to ask a potential juror to prejudge the merits of a case); 58 Am. Jur. 3d *Proof of Facts* § 21 (2021 Supp.) (observing that it is universally recognized that voir dire may not be used to pre-try the case). In doing so, this line of questioning risked depriving Chaparro of an impartial jury. See *People v. Carasi*, 44 Cal.4th 1263, 82 Cal.Rptr.3d 265, 190 P.3d 616, 632 (2008) (observing that voir dire seeks to uncover jurors' views in the abstract to ensure that they consider the facts with an open mind and that this aim is undermined by overly specific questions that expose the facts of the case). Rather, Chaparro could have protected his interest in ensuring that jurors apply the law to the facts of the case by voir dire questions regarding a potential juror's perspective on defendants with prior convictions, without specifically inquiring into his own previous conviction. The district court did not categorically obstruct inquiry into the general issue of potential jurors' views on defendants with previous convictions and thus did not err here. *See* *id.*, 82 Cal.Rptr.3d 265, 190 P.3d at 632-33 (recognizing that district courts err in categorically limiting inquiry into case-specific issues). Accordingly, we conclude that Chaparro has not shown that the district court abused its discretion or that he was prejudiced.

[4] This risk is exacerbated by the fact that this "evidence" would be received by the jury during voir dire without context or instruction from the court as to its proper use.

The district court did not abuse its discretion in allowing testimony on inconclusive DNA evidence

The pair of tights L.L. wore during the incident were examined for DNA evidence. The results were inconclusive, showing a mixture of DNA for which no person could be excluded. Chaparro argues that the district court abused its discretion in admitting the evidence because the results were inconclusive and could not have any effect on the probability that he digitally penetrated L.L.

Again, when reviewing a district court's decision to admit evidence, this court reviews 'Tor an abuse of discretion or manifest error." *Thomas*, 122 Nev. at 1370, 148 P.3d at 734. Evidence that is relevant is generally admissible. NRS 48.025(1). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Whether inconclusive DNA evidence is relevant is a question of first impression for this court.[5]

[5] Chaparro points us to *Valentine v. State*, 135 Nev. 463, 472, 454 P.3d 709, 718 (2019), the only instance where this court has addressed inconclusive DNA evidence. However, that matter involved an entirely different question. In *Valentine*, we found prosecutorial misconduct when the State encouraged jurors to look at an inconclusive DNA report and "[m]ake your own determination" as to what they, as untrained laypersons, believed it proved. *Id.* (emphasis omitted). But we did not address the admissibility of that evidence in the first place.

Other courts considering this question have concluded that such "evidence may be independently relevant to show that police conducted a thorough investigation." *People v. Marks*, 374 P.3d 518, 524 (Colo. App. 2015); *accord Commonwealth v. Cavitt*, 460 Mass. 617, 953 N.E.2d 216, 231 (2011) (providing that when the thoroughness of an investigation is challenged, "DNA test results, even those that are inconclusive, [are] relevant and probative to establishing the integrity and adequacy of the police investigation"). We find this conclusion balances the interests relevant to this question nicely. Inconclusive results may be of minimal probative value to a defendant's guilt or innocence, but they may be relevant to show the jury the thoroughness of the steps taken by law enforcement in order to investigate the victim's account.[6]

[6] We note that this determination does not alter our holdings on course-of-investigation evidence. *See, e.g., Collins*, 133 Nev. at 726, 405 P.3d at 666 ("Course-of-investigation testimony does not give carte blanche to the introduction of unconfronted hearsay, or evidence concerning matters irrelevant to guilt or innocence." (citations omitted)).

Independent from the relevance of showing a thorough investigation, inconclusive evidence may be relevant to the State's presentation of a complete story regarding a particular piece of evidence.[7] In ***1195** *Old Chief v. United States*, 519 U.S. 172, 188-89, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997), Justice Souter eloquently described this dynamic:

> [T]here lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about.... The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing.

This concern is greater today than when Justice Souter wrote for the Court in 1997, due to the so-called "CSI effect." *See generally* Clifford S. Fishman & Anne T. McKenna, 7 *Jones on Evidence* § 60:46(a) (7th ed. 2019) ("But evidence is also relevant if the absence of such evidence might lead a jury to make negative assumptions about the party with the burden of producing evidence."). Public fascination with forensic technology has led to increased juror expectations that every case involves forensic evidence and to the risk that jurors may make negative assumptions about the State's case when forensic evidence is not presented. *See id.*

[7] Our determination in this regard does not affect our previous holdings regarding the "complete story of the crime" doctrine. *See, e.g., Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (discussing the doctrine and providing that it must be construed narrowly).

Here, L.L. testified that Chaparro pulled down her tights and digitally penetrated her. A Sexual Assault Nurse Examiner testified that she collected the tights L.L. wore during the incident within hours of the assault. The DNA results from the tights were inconclusive as to possible contributors but showed the thoroughness of the investigation and completed the "story" of the evidence already presented regarding L.L.'s tights. Therefore, the inconclusive DNA evidence was relevant.

Chaparro also argues that the danger of undue prejudice substantially outweighed the probative value of the inconclusive DNA evidence. We disagree. As the video evidence showing that Chaparro was the man touching L.L. was not in dispute and the DNA evidence did not inculpate Chaparro, the risk of unfair prejudice did not outweigh the relevance of the inconclusive DNA evidence. *See* NRS 48.035(1). We conclude the district court did not abuse its discretion in admitting this evidence.

Cumulative error

Finally, Chaparro contends that cumulative error denied him a fair trial. Because we have rejected Chaparro's assignments of error, we conclude that his allegation of cumulative error lacks merit. *See United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

CONCLUSION

Unusual, historic circumstances can require unusual, temporary accommodations. We conclude that Chaparro was not denied a fair and just sentencing hearing where a pandemic made his physical presence at the hearing unsafe and he was provided with an appropriate alternative, in light of the extraordinary circumstances of the moment. We further apply the analysis set forth in *Franks v. State*, 135 Nev. 1, 432 P.3d 752 (2019), and conclude that the district court did not err in admitting evidence of Chaparro's prior conviction for battery with intent to commit sexual assault. And we determine that while district courts should not categorically limit inquiry during voir dire into jurors' views regarding defendants with prior convictions, the district court did not err in this regard here when it barred inquiry into their views as to Chaparro's prior conviction because that would have risked having jurors prejudge the evidence, depriving Chaparro of an impartial jury. Finally, we affirm the conviction ***1196** and clarify that inconclusive DNA evidence may be admitted where relevant and otherwise in accord with the rules of evidence.

We concur:

Hardesty, C.J.

Cadish, J.

Pickering, J.

Parraguirre, J.

Silver, J.

Herndon, J.

All Citations

497 P.3d 1187, 137 Nev. Adv. Op. 68

496 P.3d 592
Supreme Court of Nevada.

Henry Biderman APARICIO, Appellant,
v.
The STATE of Nevada, Respondent.

No. 80072
|
FILED OCTOBER 07, 2021

Synopsis
Background: Defendant pleaded guilty in the District Court, Clark County, Cristina D. Silva, Judge to two counts of driving under the influence resulting in death and one count of felony reckless driving.

Holdings: The Supreme Court, Hardesty, C.J., held that:

persons who wrote impact letters could only be considered "victims" if they were injured or directly and proximately harmed, or if they were family members;

following objection, district court could consider impact letters from nonvictims only if the court determined they were relevant and reliable; and

court's error in considering all submitted letters as victim impact statements was not harmless.

Conviction affirmed; sentence vacated; remanded for resentencing.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

***593** Appeal from a judgment of conviction, pursuant to a guilty plea, of two counts of driving under the influence resulting in death and one count of felony reckless driving. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Attorneys and Law Firms

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BEFORE THE SUPREME COURT, EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

***594** Article 1, Section 8A of the Nevada Constitution, also known as Marsy's Law, and NRS 176.015 both afford a victim the right to be heard at sentencing. The provisions differ, however, in their definitions of "victim." Marsy's Law defines "victim" as "any person *directly and proximately* harmed by the commission of a criminal offense under any law of this State." Nev. Const. art. 1, § 8A(7) (emphasis added). NRS 176.015(5)(d)(1)-(3) defines "victim" in part as any person or relative of any person "against whom a crime has been committed" or "who has been injured or killed as a direct result of the commission of a crime."

In this opinion, we clarify that the definitions of "victim" under Marsy's Law and NRS 176.015(5)(d) are harmonious, if not identical. Although "victim" under Marsy's Law may include individuals that NRS 176.015 does not, and vice versa, neither definition includes anyone and everyone impacted by a crime, as the district

court found here. Accordingly, when presented with an objection to impact statement(s) during sentencing, a district court must first determine if an individual falls under either the constitutional definition or the statutory definition of "victim." If the statement is from a nonvictim, a district court may consider it only if the court first determines that the statement is relevant and reliable. *See* NRS 176.015(6). Because the district court here wrongly concluded that Marsy's Law broadly applies "to anyone who's impacted by the crime" and thus considered statements, over objection, from persons who do not fall under either definition of victim without making the required relevance and reliability findings, we affirm the judgment of conviction, vacate the sentence, and remand for resentencing in front of a different district court judge.

FACTS AND PROCEDURAL HISTORY

After an evening of drinking with his girlfriend, appellant Henry Biderman Aparicio rear-ended Christa and Damaso Puentes's vehicle at the intersection of Sahara Avenue and Hualapai Way in Las Vegas. At the time of impact, the Puentes's vehicle was stopped, while Aparicio's vehicle was traveling roughly 100 miles per hour. Both Christa and Damaso died from their injuries before or near the time first responders arrived.[1]

[1] Aparicio's girlfriend was a passenger in his vehicle at the time and also sustained injuries. However, the charges related to her were dismissed pursuant to the plea agreement.

The State charged Aparicio with two counts of driving under the influence resulting in death, three counts of felony reckless driving, and one count of driving under the influence resulting in substantial bodily harm. Aparicio pleaded guilty to two counts of driving under the influence resulting in death and one count of felony reckless driving, naming Christa and Damaso as the victims. The State agreed to recommend concurrent prison time on the reckless driving charge.

Shortly before sentencing, the State provided the district court and Aparicio with approximately 50 victim impact letters written by family, friends, and coworkers of the deceased victims. Aparicio filed a written objection to the admission of 46 of the victim impact letters, arguing that the individuals who drafted those letters did not qualify as victims under NRS 176.015(5)(d).[2] Aparicio also voiced multiple objections during the ***595** sentencing hearing in response to various in-court witnesses' statements because the testimony exceeded the bounds of victim impact information. Aparicio presented mitigating evidence, including that he had no prior criminal record. The district court overruled the objections and sentenced Aparicio to an aggregate prison term of 15 to 44 years. Aparicio timely appealed, challenging various aspects of his sentencing hearing. A divided court of appeals vacated and remanded for resentencing. We granted review, thereby vacating the decision by the court of appeals.

[2] Although an amended version of NRS 176.015 went into effect in July 2020, we cite to the prior version that was in effect at the time of the relevant proceedings in the district court. *See* 2017 Nev. Stat., ch. 484, § 1, at 3018. Additionally, the sections of the statute that were amended are not relevant to this appeal.

DISCUSSION

The crux of Aparicio's argument on appeal is that the district court abused its discretion by overruling his objection to the admission of dozens of improper impact letters because they were written almost entirely by nonvictims and relied upon when determining his sentence. Accordingly, Aparicio contends that he is entitled to a new sentencing hearing before a different judge. The State argues that the district court properly considered the impact statements, as their authors were victims under Nevada law, specifically NRS 176.015(5)(d) and Article 1, Section 8A(7) of the Nevada Constitution. The State contends further that even if the district court did err, any such error was harmless. We agree with Aparicio and therefore vacate the sentence and remand for a new sentencing hearing before a different district court judge.[3]

[3] Aparicio also argues that the district court improperly permitted witnesses to make in-court statements that were disparaging to him, the criminal justice system, and the Nevada Division of Parole and Probation and that the manner in which the letters were submitted to the district court was improper. In light of our disposition, however, we need not address these claims.

The district court erred when it summarily overruled Aparicio's objection to 46 of the approximately 50 victim impact letters

NRS 176.015(5)(d) defines "victim" as "(1) A person, including a governmental entity, against whom a crime has been committed; (2) A person who has been injured or killed as a direct result of the commission of a crime; and (3) A relative of a person described in subparagraph (1) or (2)." Under NRS 176.015(5)(b)(l)-(4), a "relative" includes "[a] spouse, parent, grandparent or stepparent," "[a] natural born child, stepchild or adopted child," "[a] grandchild, brother, sister, half brother or half sister," and "[a] parent of a spouse."

Under Marsy's Law, "victim" is defined as "any person *directly and proximately* harmed by the commission of a criminal offense under any law of this State." Nev. Const. art. 1, § 8A(7) (emphasis added). The clause states further that "[i]f the victim is ... deceased, the term [victim also] includes the legal guardian of the victim or a representative of the victim's estate, *member of the victim's family* or any other person who is appointed by the court to act on the victim's behalf." *Id.* (emphasis added).

The constitutional and statutory definitions of "victim" are similar, in particular, they both recognize that a victim is the person (or persons) who is legally injured or harmed as a direct result of the defendant's criminal conduct—i.e., the person who was the target or object of the offense, or one who was directly and proximately harmed as a result of the criminal act—as well as certain close family members. Neither definition for "victim," however, includes anyone and everyone who was affected by the crime. Under either definition, a "victim" must still be injured or directly and proximately harmed.

Here, the prosecutor submitted approximately 50 impact letters to the district court and characterized all of them as "victim" impact statements. The district court accepted all of the letters and relied on them in making its sentencing decision. However, the district court reviewed the letters in their entirety based upon an erroneous interpretation of Marsy's Law—that "the Nevada Constitution broadly defines victim [as] anyone who's impacted by the crime." We conclude that the district court erred in admitting these letters based upon its erroneous interpretation of Marsy's Law. Once an objection had been lodged, the district court was required to determine, on the record, how each author of the impact statements was "directly and proximately harmed." Nev. Const. art. 1, § 8A(7). In the future, upon objection, ***596** district courts must determine on the record whether each individual is a "victim" as defined in Marsy's Law or NRS 176.015(5)(d), and why.

This is not to say that only letters written by victims may be considered at sentencing. As the State correctly points out, NRS 176.015(6) specifically states that "[t]his section does not restrict the authority of the court to consider *any reliable and relevant evidence* at the time of sentencing." (Emphasis added.) Therefore, that the district court considered letters from nonvictims was not, in and of itself, a reversible error. *See Wood v. State*, 111 Nev. 428, 430, 892 P.2d 944, 946 (1995) (holding that NRS 176.015 "does not limit in any manner a sentencing court's existing discretion to receive other admissible evidence" from a nonvictim so long as the evidence is relevant and reliable). However, based on the record before this court, it is clear that the district court treated the objected-to *nonvictim* impact letters the same as victim impact letters and did not determine whether they were relevant and reliable.

Upon objection, a district court is required to examine each statement and determine, in the first instance, whether it is from an individual who is a "victim" under either Marsy's Law or NRS 176.015(5)(d). If the statements are not from "victims," then a district court may still examine the statements, but only after a finding that they are relevant and reliable. The district court here adopted all of the impact statements as "victim" impact statements under an erroneous interpretation of Marsy's Law and did not otherwise determine whether the nonvictim letters were relevant and reliable. We thus conclude that the district court erred.

The district court's error was not harmless

This court will not vacate a judgment of conviction or sentencing decision unless the error affected the defendant's substantial rights. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Accordingly, the State urges this court to affirm Aparicio's sentence, arguing that "[a]ny error due to the district court considering the victim impact statements ... would be harmless."

When determining whether a sentencing error is harmless, reviewing courts "look to the record ... to determine whether the district court would have imposed the same sentence absent the erroneous factor." *United States v. Collins*, 109 F.3d 1413, 1422 (9th Cir. 1997) (internal quotation marks omitted). Generally, a reviewing court

will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

In this case, the district court erred in a manner that cannot be considered harmless. In misconstruing Marsy's Law as including "anyone who's impacted by the crime," the district court mistakenly believed that it had to consider all of the submitted letters as victim impact statements. The district court made clear that it fully considered each of those impact statements, explaining that "I'm accepting those victim impact statements and I have read each and every one of them that was submitted to me," Additionally, the district court stated that it "accept[ed] everything and considered that in rendering my sentence here today."

In doing so, the district court did not exercise its discretion, believing that all of the statements constituted victim impact statements. *Cf. Clark v. State*, 109 Nev. 426, 429, 851 P.2d 426, 428 (1993) (remanding for resentencing where it appeared the trial court believed it was required to adjudicate a defendant as a habitual offender, although the adjudication was discretionary). Of the approximately 50 letters submitted, fewer than five came from individuals clearly meeting the statutory or constitutional definition of "victim." The district court's consideration, over Aparicio's objection, of all of the statements without determining whether each one was from an individual directly and proximately impacted, Nev. Const. art. 1, § 8A(7), fell within NRS 176.015(5)(d), or was relevant ***597** and reliable, NRS 176.015(6), makes it impracticable for this court to know, with any degree of certitude, whether the district court's sentencing decision was based upon relevant and reliable evidence or on impalpable or highly suspect evidence. *See Silks*, 92 Nev. at 94, 545 P.2d at 1161. This uncertainty precludes us from determining that the error was harmless as the State argues. The fact that the district court based its decision to consider the statements, at least in part, on a mistaken interpretation of the law, requires us to conclude that these errors were not harmless.

CONCLUSION

Critical to our system of criminal justice is the importance of protecting victims' rights during sentencing. The passage of Marsy's Law supports such protection, giving victims a voice during that process. Nothing in this opinion should be read to suggest otherwise.

When a district court is faced with an objected-to impact statement at sentencing, it is required to determine whether that statement is from an individual who is a "victim" under Marsy's Law or NRS 176.015(5)(d). A "victim" under Marsy's Law must be directly and proximately harmed; the term does not include anyone and everyone incidentally impacted by the crime. If the district court determines the statement is from a nonvictim, the district court may nonetheless examine the statement so long as it determines that the statement is relevant and reliable. Here, the district court examined all of the letters under an erroneous belief that they were from "victims" as defined in Marsy's Law. Thus, we are required to vacate the sentence and remand this case, despite the inevitable pain and distress this will cause the surviving family members to again participate in a sentencing hearing, because it is not clear that the district court would have imposed the same sentence absent these errors.

Accordingly, we affirm the judgment of conviction, vacate Aparicio's sentence, and remand to the district court for resentencing before a different district court judge.

We concur:

Parraguirre, J.

Stiglich, J.

Cadish, J.

Silver, J.

Pickering, J.

Herndon, J.

All Citations

496 P.3d 592, 137 Nev. Adv. Op. 62

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496 P.3d 572
Supreme Court of Nevada.

Wilber Ernesto MARTINEZ GUZMAN, Petitioner,
v.
The SECOND JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR the COUNTY OF WASHOE; and the Honorable Connie J. Steinheimer, District Judge, Respondents,
and
The State of Nevada, Real Party in Interest.

No. 81842
|
FILED SEPTEMBER 30, 2021

Synopsis

Background: Defendant was charged with several counts of burglary and murder. The District Court, Washoe County, Connie J. Steinheimer, J., denied defendant's motion to dismiss some charges for lack of territorial jurisdiction. Defendant filed petition for writ of mandamus.

The Supreme Court, Stiglich, J., held that as a matter of first impression, charging county, in which defendant obtained firearm used to commit murders and burglaries in another county, was not the proper venue in which to bring charges.

Petition granted.

Pickering, J., filed dissenting opinion in which Parraguirre, J., joined.

Procedural Posture(s): Appellate Review; Preliminary Hearing or Grand Jury Proceeding Motion or Objection.

***573** Original petition for a writ of mandamus challenging a district court order denying a motion to dismiss counts of an indictment.

Attorneys and Law Firms

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BEFORE THE SUPREME COURT, EN BANC.

OPINION

By the Court, STIGLICH, J.:

This is the second time this court has considered the scope of a grand jury's authority to return an indictment for offenses committed by petitioner Wilber Ernesto Martinez Guzman. Last year, we held that a grand jury may inquire into an offense as long as venue is proper for that offense in the district court where the grand jury is impaneled. *Martinez Guzman v. Second Judicial Dist. Court*, 136 Nev. 103, 110, 460 P.3d 443, 450 (2020). Today, we consider whether venue is proper.

***574** Martinez Guzman has been charged with committing three burglaries and two murders in Washoe County, and two burglaries and two murders in Douglas County. A Washoe County grand jury indicted him for all these offenses. Upon Martinez Guzman's motion to dismiss the Douglas County charges for lack of territorial jurisdiction, the district court found that venue was proper in Washoe County for each charge. We disagree. The State advanced several theories for why venue was proper in Washoe County, and venue for the Douglas County charges need only be proper under one justification for the Washoe County grand jury to have authority to indict Martinez Guzman. But the State's theories supporting venue were too speculative and unsupported by the evidence to make venue proper for any of the Douglas County charges. In particular, we conclude there was no act or effect requisite to the consummation of the Douglas County offenses that occurred in Washoe County to justify venue there under NRS 171.030. We also determine there was insufficient evidence that property taken from Douglas County had been brought into Washoe County to justify venue there under NRS 171.060. We therefore hold that the district court manifestly abused its discretion in denying Martinez

Guzman's motion to dismiss the Douglas County charges for lack of venue.

BACKGROUND

Crimes and indictment

Martinez Guzman, a Carson City resident, is accused of committing five burglaries and four murders in three households between January 3 and January 16, 2019. First, according to the State, Martinez Guzman burglarized the David home in Reno (Washoe County) on two consecutive nights. There, among numerous other items, he stole the gun and ammunition that he went on to use in the subsequent crimes. Around five days later, the night of January 9, he burglarized the Koontz home and killed Constance Koontz in Gardnerville (Douglas County). That same week, he burglarized the Renken home in Gardnerville, killing Sophia Renken. He then returned to the David home the night of January 15, burglarizing it and killing Gerald and Sharon David. In a police interview following his arrest on January 19, Martinez Guzman confessed to the crimes, told police he had observed the homes while working for a landscaping business, and directed police to a location in Carson City where he had buried other weapons taken from the David home. Martinez Guzman stated he drove the same car to each of the homes. When officers searched his car after his arrest in Carson City, they discovered a .22 caliber revolver and ammunition, a small pendant and an airline document from the Koontz home, and a name tag from the David home.

In March 2019, a grand jury returned an indictment with ten felony counts in the Second Judicial District Court in Washoe County. The evidence consisted mostly of Martinez Guzman's police interview. Counts I, II, and IX charge the burglaries of the David home in Washoe County, and counts VII and VIII charge the murders of the Davids. Counts III, IV, V, and VI (collectively, the Douglas County charges) charge the burglaries and murders at the Koontz and Renken homes in Douglas County. Count X charges possession of the stolen firearms in Washoe County and/or Douglas County and/or Carson City. The State subsequently filed a notice of intent to seek the death penalty.

Past matter before this court

Martinez Guzman moved to dismiss the Douglas County charges on the ground that the Washoe County grand jury lacked jurisdiction under NRS 172.105, which allows grand juries to "inquire into all public offenses triable in the district court or in a Justice Court, committed within the territorial jurisdiction of the district court for which it is impaneled." The district court denied the motion to dismiss after concluding that the court's territorial jurisdiction extended statewide. *Martinez Guzman*, 136 Nev. at 105, 460 P.3d at 446.

This court reviewed that issue on a writ petition and held that the district court had interpreted NRS 172.105 too expansively, because a grand jury may indict a defendant only "so long as the district court that empaneled the grand jury may appropriately ***575** adjudicate the defendant's guilt for that particular offense" under the applicable venue statutes. *Id.* at 110, 460 P.3d at 450. We vacated the district court's order and remanded the matter for reconsideration of the motion to dismiss, providing that

> In doing so, the district court shall review the evidence presented to the Washoe County grand jury to determine whether there is a sufficient connection between the Douglas County offenses and Washoe County. *To do so, the district court must determine whether venue would be proper in Washoe County for the Douglas County offenses.*

Id. at 104, 460 P.3d at 445 (emphasis added). If venue was improper, we explained, "then the Washoe County grand jury does not have the authority to inquire into the Douglas County offenses, and the district court must grant Martinez Guzman's motion to dismiss." *Id.* at 104, 460 P.3d at 446.

Proceedings on remand

The district court reheard the motion to dismiss after supplemental briefing. Martinez Guzman argued that only two venue statutes—NRS 171.030 and NRS 171.060—were applicable, and they did not support venue in Washoe County for the Douglas County charges.

The State countered that venue was appropriate in Washoe County under the applicable venue statutes and that the district court could also consider other statutes like NRS 173.115 (concerning joinder of offenses) and NRS 171.020 (concerning Nevada's jurisdiction over offenses committed outside the state). The district court again denied the motion to dismiss, finding that venue was proper in Washoe County for all charges and, thus, the grand jury had authority to indict Martinez Guzman on the Douglas County charges.

Martinez Guzman again petitioned this court for a writ of mandamus on the ground that the district court manifestly abused its discretion in finding venue proper in Washoe County.

DISCUSSION

We choose to entertain this writ petition

Whether a writ of mandamus will be considered is within this court's sole discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ of mandamus is available to "compel the performance of an act that the law requires" or "to control a manifest abuse or arbitrary or capricious exercise of discretion." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 779 (2011). Mandamus may be appropriate "when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *State v. Second Judicial Dist. Court (Ducharm)*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002). However, the writ will not be issued if the petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170.

Here, the petition touches on an important and largely unsettled legal question in Nevada: what nexus between where a crime is committed and where it is charged must exist to make venue proper. If this matter were to proceed to a complex capital trial on all of these charges, only for this court to find on appeal that the Washoe County grand jury lacked authority to indict on the Douglas County charges, much time and judicial resources would be wasted. Thus, the interests of sound judicial administration and clear law favor our consideration of this petition.

Generally, venue is only proper in the county where the crime is committed

In our first *Martinez Guzman* opinion, we tasked the district court to analyze venue "under the applicable statutes." *Martinez Guzman*, 136 Nev. at 110, 460 P.3d at 450. We take this opportunity to note that, in many instances, no specific venue statute applies and the general common law rule that "each county will have independent jurisdiction over a criminal offender for conduct occurring in that county" governs. *Zebe v. State*, 112 Nev. 1482, 1484-85, 929 P.2d 927, 929 (1996). This makes sense—when it is clear where a crime has been committed, community interest weighs towards prosecution in the county where that crime has been committed. However, there are statutory exceptions ***576** that allow some crimes to be prosecuted in more than one county. Whether the Washoe County grand jury had authority to indict Martinez Guzman on the Douglas County charges—burglaries and murders that no one disputes happened in Douglas County homes—depends on whether venue to try those crimes in Washoe County is proper under any of those statutory exceptions.

Venue was not proper in Washoe County under NRS 171.030 for the Douglas County offenses

NRS 171.030 governs venue over criminal offenses committed in more than one county:

> When a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the venue is in either county.

The State argues that Washoe County is a proper venue under NRS 171.030 on two grounds. First, it asserts that venue is proper because intent is an "act or effect" integral to committing the charged Douglas County offenses and Martinez Guzman's intent *could* have been formed in Washoe County. Second, the State contends that venue is proper because preparatory acts (namely, obtaining the gun in Washoe County) are acts "constituting or requisite to the consummation of' the Douglas County offenses. Martinez Guzman counters that

there was no evidence that intent was formed in Washoe County or that he obtained the gun in preparation for the Douglas County offenses.

Questions of statutory interpretation are questions of law and are reviewed de novo, even in the context of a writ petition. *Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009); *see also Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 40, 175 P.3d 906,908 (2008). "This court will attribute the plain meaning to a statute that is not ambiguous." *Mendoza-Lobos*, 125 Nev. at 642, 218 P.3d at 506. "A statute is ambiguous when its language lends itself to two or more reasonable interpretations." *Id.* (internal quotation marks omitted). Because venue does not involve an element of the crime or relate to guilt or innocence, the State need only prove venue by a preponderance of the evidence. *Cf. McNamara v. State*, 132 Nev. 606, 615-16, 377 P.3d 106, 113 (2016). "[V]enue may be established by circumstantial evidence." *James v. State*, 105 Nev. 873, 875, 784 P.2d 965, 967 (1989).

Neither formation of intent alone nor preparatory acts alone are sufficient to make venue proper in a charging county

The district court's finding of proper venue under this statute depended in part on its finding that intent alone or a preparatory act alone could meet the requirements of that language. We hold that this conclusion was incorrect.

First, the nebulous formation of intent, without acts furthering that intent, does not constitute an "act" under NRS 171.030. The difference between a crime's *actus reus* and *mens rea* is centuries-old. We cannot say that the Legislature—in using the language "*acts* or effects"—meant to include the formation of *intent* alone, despite the fact that intent is certainly requisite to the consummation of many offenses. The State's argument assumes that, since intent is an element of the charges, *see* NRS 200.010; NRS 205.060, it is an act or effect constituting or requisite to the consummation of the burglaries and murders. But NRS 171.030 does not refer to elements of the offense, but rather to "acts or effects," and intent standing alone is neither.

Second, whether acts done in preparation for the relevant offense are "acts ... requisite to the consummation" of an offense under NRS 171.030 is an issue of first impression for this court, which is not answered by the plain language of the statute. Below, both the district court and the parties were guided by California courts' interpretations of that state's analogous statute, which is almost identical to NRS 171.030. *See City of Las Vegas Downtown Redev. Agency v. Crockett*, 117 Nev. 816, 824, 34 P.3d 553, 559 (2001); *compare* Cal. Penal Code § 781 (West 2020), ***577** *with* NRS 171.030.[1] Notably, California has said that the statute "must be given a liberal interpretation to permit trial in a county where only preparatory acts have occurred." *People v. Simon*, 25 Cal.4th 1082, 108 Cal.Rptr.2d 385, 25 P.3d 598, 617 (2001). California has, for example, held that where a defendant was part of a conspiracy to commit a murder and traveled to one county to obtain a gun for subsequent use in committing that murder in another county, venue for the murder was proper in the county where he obtained the gun. *People v. Price*, 1 Cal.4th 324, 3 Cal.Rptr.2d 106, 821 P.2d 610, 640 (1991). In California, even a "telephone call for the purpose of planning a crime received within [a] county is an adequate basis for venue, despite the fact the call was originated outside the county," albeit at the outer limits of adequacy. *See People v. Posey*, 32 Cal.4th 193, 8 Cal.Rptr.3d 551, 82 P.3d 755, 773 (2004) (alteration in original) (internal quotation marks omitted). California not only allows venue to be based on preparatory acts, but also "on the *effects* of preparatory acts," such as the person in the charging county *receiving* the defendant's call from another county, as discussed in *Posey*. *People v. Thomas*, 53 Cal.4th 1276, 140 Cal.Rptr.3d 184, 274 P.3d 1170, 1176 (2012).

[1] "Although [California Penal Code § 781] speaks in terms of jurisdiction, it is actually a venue statute." *People v. Britt*, 32 Cal.4th 944, 12 Cal.Rptr.3d 66, 87 P.3d 812, 818 (2004), *disapproved on other grounds by People v. Correa*, 54 Cal.4th 331, 142 Cal.Rptr.3d 546, 278 P.3d 809 (2012).

Other states with similar statutes have roundly rejected an interpretation making purely preparatory actions sufficient for venue, however. Florida, for example, has ruled that "preparation is not one of the elemental acts 'constituting' or 'requisite to the commission' of premeditated first degree murder," even if certain acts of preparation may be necessary to complete a particular murder. *Crittendon v. State*, 338 So. 2d 1088, 1090 (Fla. Dist. Ct. App. 1976). Montana, under its previous statute, held that "[a]cts preparatory to the commission of an offense but which are not essentials of the crime, provided no basis for venue." *State v. Preite*, 172

Mont. 318, 564 P.2d 598, 601 (1977), *overruled on other grounds by City of Helena v. Frankforter*, 392 Mont. 277, 423 P.3d 581 (2018). The Montana court held that venue could not rest on acts like buying a pistol or traveling through a county to where the crime was committed, even though the crime could not be committed without these acts. *Id.*

We reject both extremes in our construction of NRS 171.030 with respect to preparatory acts. We hold that in Nevada, venue cannot be based on supposedly preparatory acts unless the evidence shows that those acts were undertaken with the intent to commit the charged crime and in furtherance of that crime. Many crimes involve countless acts which lead to the ultimate criminal act being possible. But it is obvious that not every action undertaken by a defendant which puts them in the particular place, time, and circumstances of an offense was done with the intent to commit that offense.

We therefore conclude that neither intent nor a supposedly preparatory act, standing alone, is sufficient to make venue proper in a charging county. However, when there is evidence of a preparatory act *plus* intent in that county, an act requisite to the consummation of the charged offense has occurred there, and a grand jury may indict a defendant of that offense.

Insufficient evidence was presented to the grand jury that a preparatory act with the intent to commit the Douglas County charges occurred in Washoe County

So, we turn to this matter's facts to determine if the Washoe County grand jury was presented with evidence of a preparatory act plus intent with respect to the Douglas County offenses.

The State argues, and the district court accepted, that Martinez Guzman had an original plan to rob outbuildings and garages on the three properties and then changed his intent after finding the Davids' firearm in Washoe County. The State argues there is a "very clear triggering event for the Douglas County offenses: [Martinez] Guzman's procurement of the revolver and ammunition from Washoe County," after which Martinez Guzman decided to "abandon his earlier plan ***578** and, instead, enter the living quarters of the victims in this case." The State acknowledges that Martinez Guzman could have formed the intent after obtaining the revolver, but argues that because intent could have been formed in Washoe County, Carson City, or Douglas County, venue is proper in Washoe County.

This argument relies on this court's decision in *Walker v. State*, 78 Nev. 463, 376 P.2d 137 (1962), one of our only opinions interpreting the "acts or effects" portion of NRS 171.030. In *Walker*, a hitchhiker murdered the driver who picked him up. The killing took place *somewhere* between Elko and Reno, but the State could not pinpoint the county where the murder occurred. *Id.* at 470, 376 P.2d at 140. This court concluded that venue was proper in Washoe County because "[w]ith the uncertainty existing in this case ... 'the acts or effects thereof constituting or requisite to the consummation of the offense' could have occurred in two or more counties, one of which was Washoe County." *Id.* at 471, 376 P.2d at 141 (quoting NRS 171.030).

That concept from *Walker*—that venue is proper if an act constituting or requisite to the offense *could have* happened in the county claiming venue—was crucial to the district court finding venue proper under the State's change-in-intent theory. But the State's theory is too attenuated from the evidence presented to the grand jury. It was clear that Martinez Guzman had seen the David, Renken, and Koontz homes while working for a landscaping business in 2018 and identified those homes as potential targets for theft. From these bare statements and the fact that Martinez Guzman first went into the Davids' outbuildings, the State paints Martinez Guzman's supposed initial intent as to steal from these properties—but not from their living quarters. But the State places too much weight on the difference between burglarizing a garage or shed, and the rest of a home—a difference that Martinez Guzman never discussed. The evidence shows that Martinez Guzman formed the intent to steal from the Koontz and Renken properties before he ever knew he would acquire a firearm in Washoe County. This belies the State's venue theory, which completely hinges on the finding of the firearm. There is no evidence of any supposed "clear triggering event" that caused Martinez Guzman to commit the offenses in Douglas County.

Likewise, there is no evidence that Martinez Guzman took the firearm in preparation for the burglaries and murder in Douglas County. During his second consecutive burglary of the David property, Martinez Guzman took a bag from a trailer, which contained the revolver and several fishing poles. No evidence was presented that he even was aware the bag contained a firearm when he took it from the property. The fact that Martinez Guzman brought the revolver to the Koontz and Renken homes days later, and then back to the Davids', is

insufficient evidence that his act of taking the revolver was done in furtherance of his long-existing intent to burglarize the Douglas County homes, rather than just the consummation of the offense of burglarizing the Davids. We decline to interpret NRS 171.030 so that actions which *may* have been preparatory for another offense are sufficient to make venue lie in one county for a crime entirely committed within another. In this matter, had there been any nonspeculative evidence that Martinez Guzman obtained the revolver in Washoe County with the goal of committing burglary and murder in Douglas County, our holding may have been different.

Venue was not proper in Washoe County for the Douglas County charges under NRS 171.060

The State also argues that venue was proper under NRS 171.060, which governs offenses in which property is taken from one county and brought to another. NRS 171.060 reads, in part, as follows:

> When property taken in one county by burglary, robbery, larceny or embezzlement has been brought into another, the venue of the offense is in either county.

Thus, to make venue proper under this statute, the State must have shown the grand jury that property taken in Douglas County was at some point brought into Washoe County.

***579** The arguments under this statute hinge on the fact that Martinez Guzman's vehicle was found upon his arrest in Carson City with two items from the Koontz home in it: an airline document and a small piece of jewelry. Of the four charges at issue—the Koontz murder, Koontz burglary, Renken murder, and Renken burglary—we find that the statute only arguably applies to the Koontz burglary and that venue in Washoe County was not proper for even that charge.

Martinez Guzman took property from the Koontz home in Douglas County days before returning to the David home in Washoe County and drove the same car to each of the crime scenes. Thus, the State alleges that the presence of the two items in Martinez Guzman's car in Carson City is circumstantial evidence that the items were in the car from the time of the Koontz burglary on January 9 or 10, through Martinez Guzman's return to Washoe County on January 15 or 16, and until his arrest on January 19, such that he brought stolen property into the venue county, establishing venue under NRS 171.060. The district court agreed and found that *all* the Douglas County charges could be brought in Washoe County under NRS 171.060. We conclude that the district court's determination constitutes a manifest abuse of discretion.

As a threshold matter, NRS 171.060 cannot establish Washoe County as the proper venue for the Koontz or Renken murders or the Renken burglary. NRS 171.060 provides that "burglary, robbery, larceny or embezzlement" may be charged in a county where property taken in the commission of one of those offenses is later brought. The statute does not expand venue for murder, which is not one of the enumerated crimes, even if the murder occurred at the time the property was taken. And there was absolutely no evidence presented to the grand jury to suggest that Martinez Guzman took property from the Renken home to Washoe County.

Nor does NRS 171.060 support the conclusion that Washoe County was a proper venue for the Koontz burglary, as the grand jury was not presented with evidence that the stolen items were in the vehicle when Martinez Guzman went to Washoe County. The only evidence the State points to in support of this argument is that Martinez Guzman drove the same car to the David home. We conclude that the mere possibility that the property found in Martinez Guzman's car at the time of arrest was transported everywhere inside the car for days after it was stolen is insufficient to show proof by a preponderance of the evidence. Accordingly, the district court manifestly abused its discretion in concluding that venue was proper on this basis.

The district court should not have hinged its decision on NRS 171.020 or NRS 173.115 for this intercounty venue issue

Below, the district court relied on NRS 171.020 and Nevada's joinder statute, NRS 173.115(1), to support its conclusion that venue was proper in Washoe County for the Douglas County charges. NRS 171.020 provides that a person who commits an act in Nevada, which executes an intent to commit a crime and results in the commission of a crime, may be punished for that crime as though the crime were committed entirely in Nevada. NRS 173.115(1)[2] allows the joinder of multiple offenses against a defendant where the offenses are based on "the same act or transaction" or "two or more acts or

transactions connected together or constituting parts of a common scheme or plan."

[2] This statute was amended by 2021 Nev. Stat., ch. 253, § 1. Any reference to NRS 173.115 throughout this opinion refers to the prior version, put in place by 2017 Nev. Stat., ch. 235, § 1.

We conclude the district court erred in relying on these statutes. First, NRS 171.020 does not apply here because it deals with interstate jurisdiction, not intercounty venue. Second, NRS 173.115(1) is not a venue statute and finding that the offenses are part of a "common scheme or plan" does not confer venue. The statutes governing these particular intercounty offenses are NRS 171.030 and NRS 171.060, as discussed above. Therefore, the district court abused its discretion in resting its decision on NRS 171.020 and NRS 173.115.

***580** *CONCLUSION*

Despite many statutory exceptions which expand venue, the common law principle that a person should only be charged in a location with sufficient connections to the crime remains. *See Zebe*, 112 Nev. at 1484-85, 929 P.2d at 929.

Under the statutes governing venue for the offenses Martinez Guzman allegedly committed, it is not enough to present evidence that may have allowed the grand jury to speculate that intent could possibly have been formed in the charging county, or that an action in the charging county may have been preparatory for the disputed charges. NRS 171.030's reference to "acts or effects thereof constituting or requisite to the consummation of the offense" does not refer to intent or potentially preparatory acts standing alone. If, however, intent is coupled with an act in furtherance of that intent, venue may be proper. But there is simply no nonspeculative evidence of that in this matter. Likewise, there is no evidence besides bare speculation that stolen property was taken to the charging county as required by NRS 171.060.

This court has described venue as "a matter so pliant that it would expand under the slight pressure of convenience." *Walker*, 78 Nev. at 472, 376 P.2d at 141 (quoting *State v. Le Blanch*, 31 N.J.L. 82, 85 (1864)). In this case, we come up against the limits of venue's pliancy. We decline to hand-wave, solely for convenience's sake, around the principle that crimes should be tried where they are committed in the absence of a statutory exception. Consequently, we grant Martinez Guzman's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Martinez Guzman's motion to dismiss and to enter an order granting the motion as to Counts III, IV, V, and VI.

We concur:

Hardesty, J.

Cadish, J.

Silver, J.

Herndon, J.

PICKERING, J., with whom PARRAGUIRRE, J., agrees, dissenting:

Countervailing policy interests are at play when determining criminal venue—on the one hand, the constitutionally founded interests of fairness and convenience to the accused, and on the other, the interests of the local justice system in demonstrating its ability to render justice, as well as the community's interests in witnessing prosecution of the wrong from which they suffered. *See* *United States v. Reed*, 773 F.2d 477, 480-82 (2d Cir. 1985) (discussing interests involved in determining constitutional venue in criminal prosecutions). Where "witnesses and relevant circumstances surrounding the contested issues" can be gathered with equal ease in competing venues, the interests of one venue may offset those of the other; therefore, "there is no single defined policy or mechanical test" to determine criminal venue in such cases. *Id.* at 480-81 (internal quotation marks omitted). But nearly all courts, including this court, agree that the "site of the defendant's acts" is a proper venue "because the alleged criminal acts provide substantial contact with the district" to satisfy the interests laid out above. *Id.* at 481; *see also Martinez Guzman v. Second Judicial Dist. Court* (*Martinez Guzman I*), 136 Nev. 103, 109-10, 460 P.3d 443, 449 (2020) (holding that "territorial jurisdiction ... depends on whether the *necessary connections*, as identified in Nevada's statutes, to the location of the court exist") (emphasis added). Under this standard, "necessary connections" exist under NRS 171.030 sufficient to lay venue in Washoe County for the Douglas County offenses

because Martinez Guzman's Washoe acts predicated the Douglas offenses. *Martinez Guzman I*, 136 Nev. at 109-10, 460 P.3d at 449. Accordingly, I dissent.

I.

NRS 171.030 provides that "[w]hen a public offense is committed in part in one county and in part in another or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more counties, the venue is in either county." ***581** California's analogous intercounty venue statute is nearly identical to NRS 171.030. *See* Cal. Penal Code § 781 ("[W]hen a public offense is committed in part in one jurisdictional territory and in part in another jurisdictional territory, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction for the offense is in any competent court within either jurisdictional territory."). California caselaw is therefore persuasive when interpreting NRS 171.030. *City of Las Vegas Downtown Redev. Agency v. Crockett*, 117 Nev. 816, 824-25, 34 P.3d 553, 558-59 (2001) (looking to California law as persuasive authority when interpreting an analogous Nevada statute).

In California, venue is governed by statute, and whether venue is proper under a particular statute is a question of law reserved to the court. *People v. Posey*, 32 Cal.4th 193, 8 Cal.Rptr.3d 551, 82 P.3d 755, 765 (2004). As is relevant here, California courts have interpreted Section 781 to "permit trial in a county where only preparatory acts have occurred." *E.g.*, *People v. Simon*, 25 Cal.4th 1082, 108 Cal.Rptr.2d 385, 25 P.3d 598, 617 (2001). These preparatory acts need not constitute an element of the offense (e.g., criminal intent) to justify venue under the statute. *People v. Thomas*, 53 Cal.4th 1276, 140 Cal.Rptr.3d 184, 274 P.3d 1170, 1175 (2012). Thus, venue was proper under Section 781 where (1) criminal conduct in the forum county was preparatory to later assault of an officer during a police chase in another county, *Simon*, 108 Cal.Rptr.2d 385, 25 P.3d at 603, 617; (2) loading the victim and her belongings into defendant's car in the forum was preparatory to murder in another county, *People v. Crew*, 31 Cal.4th 822, 3 Cal.Rptr.3d 733, 74 P.3d 820, 834 (2003); and (3) kidnapping in the forum was preparatory to subsequent murder in another county, *People v. Abbott*, 47 Cal.2d 362, 303 P.2d 730, 735-36 (1956). Most analogous to this case is *People v. Price*, wherein the defendant burglarized a home in Humboldt County, California, and stole a revolver. 1 Cal.4th 324, 3 Cal.Rptr.2d 106, 821 P.2d 610, 634-35 (1991). He then drove to Los Angeles County and used that stolen revolver to shoot and kill the victim, before returning to Humboldt County to commit another burglary, robbery, and murder. *Id.* The court held that venue was proper in Humboldt County for the Los Angeles County murder under Section 781 because "the jury could reasonably infer from the[ ] facts that defendant committed acts in Humboldt County that were preparatory to the murder [in Los Angeles County]." *Id.*, 3 Cal.Rptr.2d 106, 821 P.2d at 640.

As the majority notes, most jurisdictions hold otherwise and require that an essential element or "overt act" of the charged offense must have occurred in the forum to lay proper venue there. *Addington v. State*, 199 Kan. 554, 431 P.2d 532, 540 (1967). But the majority ignores the key distinction between those jurisdictions and California—states following the majority approach have a constitutional guarantee limiting venue in criminal cases, while California does not. *Posey*, 8 Cal.Rptr.3d 551, 82 P.3d at 765 (reasoning that the California Constitution does not govern venue); *Addington*, 431 P.2d at 542. And, like California, the Nevada Constitution does not limit criminal venue. *Walker v. State*, 78 Nev. 463, 472, 376 P.2d 137, 141 (1962) (noting that Nevada is not tied down by a constitutional venue guarantee). Criminal venue is therefore governed by Nevada's statutes. *Id*. And in the principal case interpreting venue under modern-day NRS 171.030, *Walker v. State*, this court deemed venue proper in Washoe County because police found the victim's body, jewelry, and murder weapon there, even though the murder could have occurred in any one of four counties, including Washoe. 78 Nev. at 470-71, 376 P.2d at 141. This court reasoned that even if it knew where the murder occurred, or if the murder occurred partially in Washoe and partially in another county, venue would *still* be proper in Washoe based on the objective connections to that forum. *Id.* at 471, 376 P.2d at 141 ("Even if [the jury] determined that acts resulting in death were committed ... in two or more counties, of which Washoe County was one, then, under NRS 171.030, venue was properly laid in Washoe County.").

Side-stepping this court's holding in *Walker* and NRS 171.030's plain language, the majority holds that venue is only proper ***582** under NRS 171.030 if the State can

conclusively show that the defendant *intended* to further the charged offense when he or she took preparatory acts in the proposed forum. This standard is misguided for several reasons. First, a court may never be able to pinpoint the precise moment a criminal defendant formed the intent to commit the crime at issue; instead, the most concrete measures available are the acts themselves. *People v. Carrington*, 47 Cal.4th 145, 97 Cal.Rptr.3d 117, 211 P.3d 617, 650 (2009) (holding that it did not matter whether the defendant took preparatory acts with intent to commit the target offense for purposes of venue under Section 781). Our contacts analysis can only practically derive therefrom, without speculating as to the defendant's intent when taking subject acts. *Id.* (holding that "if preparatory acts occur in one county, those acts vest jurisdiction over the crime [under Section 781] 'even though the intent may have arisen in another county' " (quoting *People v. Bismillah*, 208 Cal.App.3d 80, 256 Cal. Rptr. 25, 28 (1989))). Accordingly, our existing caselaw on this point remains the most workable and well-reasoned standard, *see Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947) (noting that stare decisis is "indispensable to the due administration of justice"), and I would follow *Walker* to hold that the court need only conclude that a sufficient connection exists between the offense and the forum county based on the defendant's acts to satisfy NRS 171.030.

Second, any inquiry into the defendant's criminal intent poses a substantive question of guilt, based in fact, that should be asked of the jury at trial, *see Valdez v. State*, 124 Nev. 1172, 1197, 196 P.3d 465, 481 (2008) (noting that the *jury* must find that the defendant had the requisite intent to commit the subject offense); 22 C.J.S. *Criminal Law: Substantive Principles* § 37 (Supp. 2021) (noting that criminal intent is a question of fact and "intent is therefore a question for the jury"), thus rendering the majority's standard in conflict with Nevada law, under which criminal venue is a legal question. *See Martinez Guzman I*, 136 Nev. at 110, 460 P.3d at 450 (holding that venue is a question of law for the court); *Shannon v. State*, 105 Nev. 782, 791, 783 P.2d 942, 948 (1989) (holding that venue under sister-statute NRS 171.020 is a question of law). Posing such an early inquiry into criminal intent also risks an unwarranted acquittal later based solely on improper venue. *Posey*, 8 Cal.Rptr.3d 551, 82 P.3d at 762. Under the majority's factual standard, if a jury returns a conviction, while also concluding that venue is improper—for example, by finding that the defendant formed intent at a different point in time—then jeopardy has attached and an acquittal is won on a procedural technicality. *Shuman v. Sheriff of Carson City*, 90 Nev. 227, 228, 523 P.2d 841, 842 (1974) (noting that jeopardy attaches when "the accused has been placed upon trial, upon a valid indictment, before a competent court, and a jury duly impaneled, sworn, and charged with the case") (quoting *Ex Parte Maxwell*, 11 Nev. 428, 434 (1876)); *see also Posey*, 8 Cal.Rptr.3d 551, 82 P.3d at 762 ("[U]nless the jury is instructed to return a separate [finding] on the issue of venue before returning a ... verdict, a [jury] finding that the proceeding has been brought in an improper venue can result in an unwarranted acquittal, rather than in a new trial in an authorized venue." (second alteration in original) (quoting *Simon*, 108 Cal.Rptr.2d 385, 25 P.3d at 618 n.18)).

Third, unlike its sister-statute NRS 171.020, NRS 171.030 does not include an intent requirement, *cf.* NRS 171.020 ("Whenever a person, *with intent to commit a crime*, does any act within this State in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this State, such a person is punishable for such crime in this State ....") (emphasis added); well-worn canons of construction establish that the expression of this requirement in a statute that is *in pari materia* necessarily implies the absence of the same in NRS 171.30. Finally, the majority's approach is unworkable with and contrary to the Legislature's purpose in enacting criminal laws with territorial reach ending only at state lines. *See Shannon*, 105 Nev. at 792, 783 P.2d at 948 (interpreting NRS 171.020 to vest Nevada with jurisdiction over crimes "whenever the criminal intent is formed and *any act* is accomplished in this state"). The Legislature enacted ***583** NRS 171.030 to enable venue in multiple counties within Nevada because no practical reason exists to conduct multiple trials and risk inconsistent results when an offense(s) is sufficiently connected to a single forum to lay venue there. *See* 1873 Nev. Stat., ch. LIII, § 1714, at 471; *Martinez Guzman I*, 136 Nev. at 109-10, 460 P.3d at 449 (noting that "Nevada's statutes," including NRS 171.030, modified the former common law rule against prosecuting a crime unless it occurred entirely within the forum). This is to say nothing of the level of extreme anguish communities, victims, victims' families, and criminal defendants face at the prospect of the sort of duplicative proceedings the majority's approach would foster. *See People v. Gholston*, 124 Ill.App.3d 873, 80 Ill.Dec. 196, 464 N.E.2d 1179, 1191 (1984) (noting the "extreme trauma" that a victim must undergo by testifying at multiple court appearances spread over months or years).

There is no legal or practical demand for such a result here because sufficient connections exist between the Douglas offenses and Washoe to lay venue in the latter county under NRS 171.030. Martinez Guzman confessed

to committing burglary and murder in Douglas using a revolver that he stole in Washoe. But for obtaining the revolver in Washoe, he could not have committed the Douglas offenses. Then, after perpetrating two residential burglaries in Douglas with the gun that he obtained during his second Washoe burglary—which firearm he stole only after surveying the Davids' property during his first burglary—Martinez Guzman returned to Washoe where he replicated the Douglas offenses by burglarizing the Davids' home a third time and killing both its occupants. All the while, Martinez Guzman drove the same BMW sedan to and from Washoe and Douglas counties to commit this veritable crime spree. Martinez Guzman's preparatory acts to the Douglas offenses occurred almost entirely in Washoe, but the majority demands that the court dice this continuous crime spree into distinct pieces fit for two trials in two separate counties. This is legally unnecessary and an unfair imposition on the victims' families and the court system; Martinez Guzman's Washoe acts suffice to satisfy NRS 171.030's requirements and lay venue in Washoe for the Douglas offenses.

II.

In any case, even under the majority's purported standard, venue in Washoe is appropriate here. As a threshold matter, it is unclear whether the majority fashioned its standard for the court or the jury to apply, because, as noted above, although venue is a question of law, a defendant's alleged criminal intent is a question of fact. *See Valdez*, 124 Nev. at 1197, 196 P.3d at 481; 22 C.J.S. *Criminal Law: Substantive Principles* § 37 (Supp. 2021). But even applying this tenuous standard, the State alleged sufficient facts for a reasonable jury to find that Martinez Guzman had intent to further the Douglas offenses when he acted in Washoe and thus satisfied the majority's interpretation of NRS 171.030's requirements.

The State must prove venue by a preponderance of the evidence, and it may do so with circumstantial evidence. *Dixon v. State*, 83 Nev. 120, 122, 424 P.2d 100, 101 (1967); *cf.* *Grant v. State*, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (holding that criminal intent can be inferred from conduct). The preponderance of the evidence standard requires the trier of fact "to find that the existence of the contested fact is more probable than its nonexistence." *Abbott v. State*, 122 Nev. 715, 734, 138 P.3d 462, 475 (2006) (internal quotation marks omitted). Here, Martinez Guzman identified the David, Renken, and Koontz properties as potential targets for theft while working for his uncle's landscaping company, which operated in both Washoe and Douglas Counties. Later, Martinez Guzman twice burglarized outbuildings on the Davids' property in Washoe—first a shed and then a trailer—without entering the primary residence and without using a weapon. After auditing the Davids' property during his first burglary, Martinez Guzman returned and burglarized the Davids' trailer; he specifically identified and stole fishing poles and a firearm case, which contained the revolver. Upon stealing the revolver, Martinez Guzman took it to the Renken and Koontz properties in Douglas, burglarized the primary residences, and shot and killed the occupants. A reasonable jury ***584** could infer from these facts that it is more likely than not that Martinez Guzman stole the firearm with intent to move beyond burglary of trailers and sheds and enable entry into the Renken and Koontz primary residences.

But the majority demands more. Indeed, it appears that nothing short of a confession pinpointing Martinez Guzman's motive for stealing the revolver, at the moment he stole it, will satisfy NRS 171.030's requirements under the majority's reasoning. Such an exacting standard swallows the statute whole, and in its absence, the majority provides the common law rule as its substitute. But this conclusion offends the Legislature's power to define and expand venue with its enactment of NRS 171.30, *see Martinez Guzman I*, 136 Nev. at 109, 460 P.3d at 449 (noting that NRS 171.030 modified the common law rule as to intercounty territorial jurisdiction); *Walker*, 78 Nev. at 472, 376 P.2d at 141 (noting that Nevada is not tied down by a constitutional venue guarantee when interpreting NRS 171.030), and increases the potential for inconsistent results in unwarranted separate trials because the State must prosecute the same facts twice. *See* *In re Rolls Royce Corp.*, 775 F.3d 671, 680 (5th Cir. 2014) (holding that the court must focus on judicial efficiency more when considering a motion to sever claims alongside a motion to transfer partial venue).

Sufficient evidence exists to show that Martinez Guzman acted in Washoe to prepare for the Douglas offenses, and applying either of the above standards, venue is therefore proper in Washoe under NRS 171.030. For these reasons, I respectfully dissent.

I concur:

Parraguirre J. 496 P.3d 572, 137 Nev. Adv. Op. 61

All Citations

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495 P.3d 500
Supreme Court of Nevada.

NUVEDA, LLC, Petitioner,
v.
The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR the COUNTY OF CLARK; and the Honorable Elizabeth Gonzalez, District Judge, Respondents,
and
Shane Terry; Phil Ivey; and Dotan Y. Melech, Receiver for CWNevada, LLC, a Nevada Limited Liability Company, Real Parties in Interest.

No. 82649
|
FILED SEPTEMBER 23, 2021

Synopsis

Background: Cannabis establishment operator filed petition for writ of prohibition and/or mandamus, challenging order of the District Court, Clark County, Elizabeth Gonzalez, J., denying its motion to transfer indirect contempt proceedings to another judge.

Holdings: The Supreme Court, Stiglich, J., held that:

interests of sound judicial economy and administration favored the Court's consideration of the writ petition;

as a matter of first impression, a party may waive its right to a peremptory challenge to the judge in indirect contempt proceedings by failing to make a motion for new judge in a reasonably timely fashion, without undue delay, after ground for such motion is ascertained; and

petitioner's delayed motion for new judge was unreasonable such that its peremptory challenge was deemed waived.

Petition denied.

Procedural Posture(s): Original Jurisdiction; Petition for Writ of Mandamus; Petition for Writ of Prohibition.

Attorneys and Law Firms

***501** Law Office of Mitchell Stipp and Mitchell Stipp, Las Vegas, for Petitioner.

Mushkin & Coppedge and Michael R. Mushkin and L. Joe Coppedge, Las Vegas, for Real Parties in Interest.

BEFORE THE SUPREME COURT, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

***502** Original petition for a writ of prohibition or, in the alternative, mandamus challenging a district court order denying a motion to transfer indirect contempt proceedings to another judge under NRS 22.030(3).

NRS 22.030(3) provides that in cases of indirect contempt, "the judge of the court in whose contempt the person is alleged to be shall not preside at the trial of the contempt over the objection of the person." This statute gives accused contemnors a peremptory challenge, which must be granted if the objection is timely and properly made. Here, petitioner NuVeda, LLC, moved for a change of judge under NRS 22.020(3) 37 days after the court set a date for the contempt trial. The district court denied this motion as untimely, and NuVeda petitioned this court for extraordinary writ relief. We hold that motions for a change of judge under NRS 22.030(3) must be made with reasonable promptness under the circumstances, and here, the district court did not err by determining the motion was untimely. Accordingly, we deny the petition.

FACTS AND PROCEDURAL HISTORY

This contempt case arises out of a relatively complex business dispute. Petitioner NuVeda, in conjunction with CWNevada, LLC, formed CWNV as a joint venture in 2017 for the purpose of building and operating cannabis establishments. CWNevada was later placed under receivership. NuVeda and its managing member, Dr. Pejman Bady, allegedly dissolved CWNV and later created a new entity with the same name. This act not only created difficulties for the receiver, but it also is alleged to violate a court order, constituting contempt. NuVeda denies that it committed contempt, and many of

the facts remain disputed. Most of the details of the supposed contempt and the situation underlying it are immaterial to this writ petition.

For our purposes, the critical facts are these. On February 1, 2021, during a hearing on a motion for an order to show cause concerning the alleged contempt, the district court (Judge Elizabeth Gonzalez) found that a show cause order was warranted and scheduled a contempt hearing for March 1. But Dr. Bady had a previously scheduled medical appointment and could not attend on that date. On or around February 22, the district court rescheduled the hearing to April 5. On March 10, NuVeda for the first time invoked NRS 22.030(3) and objected to Judge Gonzalez presiding over the contempt hearing. At a hearing on March 17, the district court stated that while it might have granted the request for a new judge if NuVeda had made such a request sooner, NuVeda had waived any objection when it failed to include one in its prior motion for a continuance. NuVeda denied that it had ever moved for a continuance, pointing out that it had previously stated it was willing to go forward without Dr. Bady. NuVeda renewed its objection under NRS 22.030(3), but the district court overruled the objection.

NuVeda now petitions this court for a writ of prohibition and/or mandamus. It asks us to disqualify Judge Gonzalez from presiding over the contempt hearing and to order the Chief Judge of the Eighth Judicial District Court to randomly reassign that hearing to another judge. We stayed the contempt hearing pending resolution of this writ petition.

DISCUSSION

We will entertain this writ petition

"Because both writs of prohibition and writs of mandamus are extraordinary remedies, we have complete discretion to determine whether to consider them." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008); *see Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). This court may exercise its discretion to entertain a petition for extraordinary writ relief when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of [considering] the petition." ***503** *Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 820, 407 P.3d 702, 706 (2017) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197-98, 179 P.3d 556, 559 (2008)). We conclude that our consideration of this writ petition is warranted. NRS 22.030(3) is a procedural rule that is potentially implicated in every indirect contempt hearing, no matter the underlying substantive issues. Just this year, we addressed the timeliness of a motion under NRS 22.030(3), yet that case left open the precise issue presented by this case. *See Detwiler v. Eighth Judicial Dist. Court*, 137 Nev. ——, —— & n.4, 486 P.3d 710, 717 & n.4 (2021). "[B]ecause this petition involves a question of first impression that arises with some frequency, the interests of sound judicial economy and administration favor consideration of the petition." *See Cote H.*, 124 Nev. at 39-40, 175 P.3d at 908.

Standard of review

Here, NuVeda seeks both mandamus and prohibition. It seeks mandamus to the extent it asks us to direct the district court to grant its motion to transfer the contempt proceedings to a new judge, and it seeks prohibition to the extent it asks us to direct Judge Gonzalez *not* to preside at the contempt hearing. NuVeda appears to argue that Judge Gonzalez was automatically recused, by operation of law, when it filed its objection and therefore she would exceed her legal authority if she were to preside over the hearing.

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse of discretion." *Agwara v. State Bar of Nev.*, 133 Nev. 783, 785, 406 P.3d 488, 491 (2017) (internal quotation marks omitted). "A writ of prohibition is the counterpart to a writ of mandamus and may be issued to compel a person or body exercising judicial functions to cease performing beyond its legal authority." *Id.* (internal quotation marks omitted). Specifically, "[w]hen the district court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extrajurisdictional act." *Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 250, 464 P.3d 114, 119 (2020) (internal quotation marks omitted).

"When considering a writ of mandamus, we generally apply a manifest abuse of discretion standard ...." *Stephens Media, LLC v. Eighth Judicial Dist. Court*, 125 Nev. 849, 860, 221 P.3d 1240, 1248 (2009). In contrast, where a party contends in a petition for a writ of prohibition that the district court has exceeded or is about to exceed its jurisdiction, we review that issue de novo.

See *Fulbright & Jaworski LLP v. Eighth Judicial Dist. Court*, 131 Nev. 30, 35, 342 P.3d 997, 1001 (2015). Because NuVeda seeks both types of relief arising out of the same alleged procedural error, we will review the jurisdictional facts de novo, making separate review for manifest abuse of discretion unnecessary. Still, even when challenging the district court's jurisdiction, "[p]etitioners bear the burden of showing that this court's extraordinary intervention is warranted." *Nev. State Bd. of Architecture, Interior Design & Residential Design v. Eighth Judicial Dist. Court*, 135 Nev. 375, 377, 449 P.3d 1262, 1264 (2019).

A motion for a new judge under NRS 22.030(3) must be made reasonably promptly

NuVeda argues that the district court was required to grant its request for a new judge because—in its view—a party can object under NRS 22.030(3) at *any time* before commencement of the trial on contempt. NuVeda contends that disqualification is automatic upon lodging the objection and that objections cannot be waived. Reviewing this matter of statutory interpretation de novo, *see* *Fulbright*, 131 Nev. at 35, 342 P.3d at 1001, we hold that objections can be waived if not asserted reasonably promptly.

NRS 22.030(3) provides accused contemnors with a peremptory challenge that serves to "eliminate the possibility of a reasonable apprehension that a judge might not be entirely free from bias in enforcing the orders and decrees of the court of which [s]he is the judge." *McCormick v. Sixth Judicial Dist. Court*, 67 Nev. 318, 331-32, 218 P.2d 939, 945 (1950). We have described NRS 22.030(3) as "an automatic recusal." *Awad v. Wright*, 106 Nev. 407, 411, 794 P.2d 713, 715 (1990), *abrogated* ***504** *on other grounds by* *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000). At the same time, we emphasized that the objection in that case was "timely and properly made." *Id.* at 410, 794 P.2d at 715. Thus, recusal is not truly "automatic." Rather, the accused contemnor must request recusal, and must do so in a timely fashion.[1]

[1] In many cases, the accused contemnor might prefer *not* to change judges. Especially in a complex case with disputed facts, a party may well prefer to explain itself to the judge who is most familiar with the factual background and with the context of the order allegedly violated.

We have recently reaffirmed in *Detwiler v. Eighth Judicial District Court* that "timeliness is essential, as '[g]rounds for disqualifying a judge can be waived by failure to timely assert such grounds.' " 137 Nev. at ——, 486 P.3d at 717 (alteration in original) (quoting *City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 651, 940 P.2d 134, 139 (1997)). The petitioner in *Detwiler* did not invoke his rights under NRS 22.030(3) until after the hearing had already taken place, which we explained was "untimely under any possible standard." *Id.* at 717 n.4. Accordingly, we had no reason to consider in detail what would make a motion for a change of judge "timely." We simply held that such a motion made after the contempt trial is untimely. Nevertheless, we "encourage[d] litigants to act without undue delay in exercising peremptory challenges to judges." *Id.* at 713.

We must now reach the issue we left open in *Detwiler*: Can a court deny a motion for a new judge under NRS 22.030(3) as untimely if the motion is made *before* the contempt trial, but nevertheless after a significant delay? We conclude the answer is yes. Although "NRS 22.030(3) contains no express deadline," *Detwiler*, 137 Nev. at ——, 486 P.3d at 717, that fact does not provide license for undue delay. Courts routinely imply timely filing requirements for recusal motions "despite the text's silence." *See Kolon Indus. Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 168-69 (4th Cir. 2014). "While there is no *per se* rule that recusal motions must be made at a fixed point in order to be timely, such motions should be filed with reasonable promptness after the ground for such a motion is ascertained." *United States v. Mikhel*, 889 F.3d 1003, 1026 (9th Cir. 2018) (quoting *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992)). For example, when a party discovers new grounds for disqualifying a judge under Nevada Code of Judicial Conduct Canon 3E, the party must move for disqualification "as soon as possible after becoming aware of the new information." *Towbin Dodge, LLC v. Eighth Judicial Dist. Court*, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005). We hold that disqualifications under NRS 22.030(3) are no different, and a party must move for such disqualification with reasonable promptness.

NuVeda's proposal that such objections may be made at any time before the commencement of the hearing, simply because the statute provides no express deadline, is both an incorrect and an unrealistic standard. Not requiring some reasonable measure of promptness "would result in increased instances of wasted judicial time and resources

and a heightened risk that litigants would use recusal motions for strategic purposes." *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991) (internal citations omitted). To be sure, if a party learns of *new* grounds for disqualification, those grounds may be raised reasonably promptly after learning the new information. *Towbin Dodge*, 121 Nev. at 260, 112 P.3d at 1069; *see* *Preston*, 923 F.2d at 733 (finding motion to disqualify judge was timely when filed 18 months after case was transferred, but 10 days after learning of grounds for disqualification). But as this court has noted, a party accused of contempt should be aware that a peremptory challenge is available under NRS 22.030(3) "as soon as he or she receives the order to show cause." *Detwiler*, 137 Nev. at ——, 486 P.3d at 717. When the party raises a peremptory challenge after substantial delay, that is evidence of inattention at best and of intent to delay the proceedings at worst. *See* *Mikhel*, 889 F.3d at 1026 (noting that "unexplained delay in filing a recusal motion suggests that the recusal statute is being misused" (internal quotation marks omitted)).

***505** Accordingly, we hold that litigants are not only "encourage[d] ... to act without undue delay in exercising peremptory challenges to judges," *see Detwiler*, 137 Nev.at ——, 486 P.3d at 713, but are in fact required to do so. A motion under NRS 22.030(3) must be made with "reasonable promptness after the ground for [the] motion is ascertained," *see* *Mikhel*, 889 F.3d at 1026, and these grounds are typically ascertained when the party receives notice that it is facing a contempt hearing, *Detwiler*, 137 Nev. at ——, 486 P.3d at 717. Undue delay may result in the motion being denied.

The district court did not err by finding this motion was untimely

Having rejected NuVeda's argument that a motion for recusal is necessarily timely at *any* time before the hearing, we must decide whether the district court erred by concluding *this* motion was untimely. NuVeda argues that the district court found NuVeda waived its rights under NRS 22.030(3) *solely* because it moved for a continuance on February 22 and that this was error because NuVeda did *not* in fact move for a continuance. NuVeda reads the district court's reasoning too narrowly. The district court properly found that NuVeda's motion was untimely when it was filed on March 10—37 days after NuVeda was notified of the contempt hearing on February 1—whether or not NuVeda moved for a continuance on February 22.

It is true that a party does not necessarily waive its right to request a new judge simply because it moves for a continuance first. Certain objections, like objections to personal jurisdiction or service of process, "must be raised at the first available opportunity" or be waived. *See* *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106 (9th Cir. 2000); *see also* NRCP 12(g)(2), (h)(1). Nothing indicates that objections under NRS 22.030(3) are of this type. A court determining whether an NRS 22.030(3) motion is timely should not look mechanically at whether the objection was raised at the first opportunity; rather, it should consider whether the party objected reasonably promptly under the circumstances.

But our agreement with NuVeda ends there. While the record is unfortunately unclear as to whether NuVeda in fact moved for a continuance on February 22, the record does show that NuVeda had ample opportunity after February 1 to move for a change of judge, yet did not do so for 37 days. When the district court asked NuVeda's counsel why he did not invoke the statute before February 22—the date the court first continued the hearing—counsel replied only that it was not clear to him whether he could make the objection at that time. Of course, that is not ordinarily good cause for a delay. Although the district court did refer to NuVeda's purported motion for a continuance, it is ultimately immaterial whether NuVeda in fact moved for a continuance or whether the district court continued the hearing sua sponte. Had the district court simply asked why NuVeda did not move for a new judge within three weeks after the hearing date was originally set, the result would have been the same.

Although we do not defer to the district court's reasonableness determinations when jurisdiction is at stake, *see* *Fulbright & Jaworski*, 131 Nev. at 35, 342 P.3d at 1001, petitioners must show why this court's extraordinary intervention is warranted, *Nev. State Bd. of Architecture*, 135 Nev. at 377, 449 P.3d at 1264. We conclude that the district court did not err, and thus NuVeda has failed to carry its burden. This court has held that an objection under NRS 22.030(3) was timely when it was made nine days after the party received an order to show cause. *See* *Awad*, 106 Nev. at 408, 410, 794 P.2d at 714, 715. NuVeda's 37-day delay was far longer, and NuVeda has offered no justification for that delay. Under these circumstances, we are concerned that the lateness of NuVeda's motion might have indicated a "misuse[ ]" of the recusal statute, *see* *Mikhel*, 889 F.3d at 1026, or would "waste[ ] judicial time and resources" by

necessitating a second continuance, *see* *Preston*, 923 F.2d at 733. In the absence of any reasonable justification for the delay, we hold that 37 days is too long. The district court properly found that NuVeda's delay was unreasonable and properly denied the motion to change judges.

***506** *CONCLUSION*

While a district court has no discretion to deny a timely and proper motion for a new judge under NRS 22.030(3), a party may waive its right to request a new judge by failing to make that request in a reasonably prompt manner. Because NRS 22.030(3) provides a peremptory challenge that does not depend on the facts of a particular case, a party that wishes to exercise its rights under that statute has the ability to do so promptly. Here, the district court properly found NuVeda's request was not made reasonably promptly when that request was made 37 days after the district court set the hearing date. Accordingly, we deny NuVeda's petition for writ relief. The stay this court granted on April 2, 2021, is lifted, and the district court may proceed with the contempt hearing.

We concur:

Parraguirre, J.

Silver, J.

All Citations

495 P.3d 500, 137 Nev. Adv. Op. 54

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499 P.3d 1200
Supreme Court of Nevada.

Jason J. BOLDEN, a/k/a Jason Jerome Bolen, Appellant,
v.
The STATE of Nevada, Respondent.

No. 79715
|
FILED SEPTEMBER 23, 2021

Synopsis

Background: Defendant was convicted in the District Court, Clark County, Richard Scotti, J., of attempted murder with use of deadly weapon, ownership or possession of firearm by prohibited person, discharging firearm at or into occupied structure, and battery with use of deadly weapon. Defendant appealed.

Holdings: On denial of rehearing the Supreme Court, Pickering, J., held that:

district court did not plainly err in considering State's motion for leave to proceed by information, which was supported by copy of preliminary hearing transcript, as substantially compliant with statute's affidavit requirement;

district court did not err in granting State's motion for leave to file information by affidavit; and

evidence was sufficient to support convictions.

Affirmed.

Opinion, 491 P.3d 19, amended.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***1201** Appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of attempted murder with the use of a deadly weapon; one count of ownership or possession of a firearm by a prohibited person; seven counts of discharging a firearm at or into an occupied structure; and one count of battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Attorneys and Law Firms

Law Office of Benjamin Nadig, Chtd., and Benjamin J. Nadig, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and John T. Niman, Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

AMENDED OPINION

By the Court, PICKERING, J.:

***1202** NRS 173.035(2) operates as a safeguard against the erroneous dismissal of criminal charges by a justice of the peace following a preliminary hearing. The statute allows the State to seek and obtain leave from the district court to proceed against the accused by information filed in district court, upon a showing that the justice court committed egregious error in dismissing the charges. To obtain such leave, the district attorney must file a motion in district court "upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person ... charged with the commission thereof." *Id.*

The principal question presented by this appeal is whether a preliminary hearing transcript can satisfy NRS 173.035(2)'s affidavit requirement. We hold that it can and that the district court did not err in granting the State's motion for leave to proceed by information in this case. For these reasons, and because substantial evidence supports the judgment of conviction, we affirm.

I.

Appellant Jason Bolden approached brothers Brenton and Bryston Martinez outside of a Las Vegas apartment

building. After briefly speaking to Brenton, Bolden fired seven shots, hitting Brenton and the exterior wall of an occupied apartment. Bryston's girlfriend, who lived in the apartment and had a child with Bolden, called 911. The girlfriend identified Bolden as the shooter, and when the police arrived, she gave them a picture of him. The police showed the picture to Brenton, who identified its subject as the shooter. Bryston told the police he saw the shooter and gave them a description that matched Bolden.

The State filed a criminal complaint against Bolden, and the matter proceeded to preliminary hearing injustice court. Both Brenton and Bryston testified, although Bryston's girlfriend did not. The brothers' preliminary hearing testimony contradicted their statements to the police. Bryston denied having seen the shooter, while Brenton testified that he did not recognize Bolden and could not remember what the shooter looked like. Both brothers testified they had been smoking marijuana and drinking before the shooting. The police officers who interviewed Bryston and Brenton testified about the brothers' statements shortly after the shooting in which they described Bolden and identified him as the shooter.

The justice of the peace questioned whether the evidence established that Bolden committed the crimes charged. Noting the inconsistency between the brothers' preliminary hearing testimony and their statements to the police, she found that the brothers lacked credibility. And their testimony about drinking and using drugs the day of the shooting undermined the reliability of their statements to the police, she concluded. For these stated reasons, the justice of the peace found that the evidence did not establish probable cause to believe Bolden was the shooter, and she sua sponte dismissed all charges against him.[1]

[1] Although Bolden challenged two of the charges against him injustice court, he acknowledged that "as to most of the charges the State has met [the] slight or marginal [evidence standard] so I'm not going to argue [lack of probable cause] as to those."

The State filed a motion under NRS 173.035(2), seeking leave to proceed against Bolden by information in district court. The State supported its motion by attaching a copy of the preliminary hearing transcript from justice court. Bolden did not file an opposition to the State's motion, and the district court granted it as unopposed.

The matter proceeded to trial in district court. At trial, Brenton identified Bolden as the shooter. Bryston's girlfriend's identification of Bolden in her 911 call and Bryston's ***1203** description matching Bolden also came into evidence. Ultimately, the jury convicted Bolden of illegal possession of a firearm, battery with the use of a deadly weapon, four counts of attempted murder with the use of a deadly weapon, and seven counts of discharging a firearm at or into an occupied structure. This appeal followed.

II.

Bolden argues that the district court erred in allowing the State to proceed by information, because the State based its motion for leave to do so on the preliminary hearing transcript, not the affidavit NRS 173.035(2) requires. Relatedly, Bolden argues that the State did not show that the justice court committed egregious error in dismissing the charges against him. Finally, Bolden argues that insufficient evidence supports his conviction.

A.

Bolden failed to oppose the State's motion for leave to proceed by information in district court. He thereby forfeited all but plain error review of the order granting the motion. Before this court will correct a forfeited error, "an appellant must demonstrate that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). Bolden's claims of error under NRS 173.035(2) potentially affect his substantial rights; this court has reversed a defendant's conviction upon finding that the district court erred in allowing the State to proceed by information after the justice court dismissed the charges. *See, e.g.*, *Parsons v. State*, 116 Nev. 928, 938, 10 P.3d 836, 842 (2000); *Feole v. State*, 113 Nev. 628, 632, 939 P.2d 1061, 1064 (1997), *overruled on other grounds by State v. Sixth Judicial Dist. Court (Warren)*, 114 Nev. 739, 743, 964 P.2d 48, 50-51 (1998). We therefore undertake plain error review of Bolden's challenges to the order granting the State's NRS 173.035(2) motion to determine whether it involved error and, if so, whether the error was plain. *Cf. Jeremias*, 134 Nev. at 52, 412 P.3d at 49 (holding that this court's review of forfeited errors is discretionary and not appropriate where the error asserted is trivial or of no

consequence).

1.

In interpreting a statutory provision, this court starts with the statute's text. *See* *Bigpond v. State*, 128 Nev. 108, 114, 270 P.3d 1244, 1248 (2012). Enacted in 1913 and amended in 1915, the text of NRS 173.035(2) has changed little over the years. It provides this:

> If ... upon the preliminary examination the accused has been discharged ... the district attorney may, upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof, upon being furnished with the names of the witnesses for the prosecution, by leave of the court first had, file an information, and process must forthwith be issued thereon.

NRS 173.035(2) (originally enacted as 1913 Nev. Stat., ch. 209, § 9, at 295 and amended by 1915 Nev. Stat., ch. 17, § 1, at 16).

Procedurally, this case tracks NRS 173.035(2) except as to the statute's affidavit requirement. The justice court "discharged" Bolden when, after the "preliminary [hearing] examination," it dismissed the charges against him. The district attorney, "by leave of court first had," proceeded to "file an information" against Bolden in district court. The district attorney obtained such leave by motion. But instead of the "affidavit" NRS 173.035(2) references, the State supported its motion by attaching a copy of the preliminary hearing transcript.

An affidavit resembles a hearing transcript in that both memorialize a declarant's statement under oath after being sworn to tell the truth. But an affidavit is a "voluntary declaration of facts written down and sworn to by a declarant, usu. before an officer authorized to administer oaths." *Affidavit*, *Black's Law Dictionary* (11th ed. 2019); *see Affidavit*, 1 *Bouvier's Law Dictionary* 158 (Rawle 3d rev. ***1204** 1914) (defining "affidavit" as "[a] statement or declaration reduced to writing, and sworn or affirmed to before some officer who has authority to administer an oath or affirmation"). A hearing transcript, by contrast, reports a witness's oral testimony, whether voluntary or compelled by subpoena. And unlike an affidavit, which the declarant normally reviews and then signs, *see Bouvier's*, *supra* ("The deponent must sign the affidavit at the end."), a witness does not sign off on the hearing transcript; rather, the court reporter certifies that the transcript accurately reports what the witness orally said. *See* NRS 3.360 ("The transcript of the official reporter ... of any court, duly appointed and sworn, when transcribed and certified as being a correct transcript of the testimony and proceedings in the case, is prima facie evidence of such testimony and proceedings.").

Bolden takes a literalist's approach. He argues that, by its plain terms, NRS 173.035(2) requires an affidavit. Because an affidavit and a hearing transcript are two different things, Bolden contends, the district court should have rejected the State's motion as rogue. Granted, NRS 173.035(2) refers only to an affidavit and does not expressly provide for affidavit equivalents. Yet, a separate statute, NRS 53.045, allows a court to consider, in lieu of an affidavit, certain unsworn written declarations. To qualify as an alternative to an affidavit, such a declaration must recite that its statements are true and correct and be signed by the declarant under penalty of perjury. *See* NRS 53.045; *see also MountainView Hosp. v. Eight Judicial Dist. Court*, 128 Nev. 180, 185-86, 273 P.3d 861, 865 (2012) (allowing extrinsic evidence to cure a defective jurat). A declaration that complies with NRS 53.045 can satisfy a separate statute's affidavit requirement even though the declaration is not sworn as an affidavit, by definition, would be. *See Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 202, 234 P.3d 920, 921 (2010) (reading NRS 41A.071 and NRS 53.45 harmoniously and holding that, while NRS 41A.071 "imposes an affidavit requirement," a litigant can meet that requirement "either by sworn affidavit or unsworn declaration made under penalty of perjury" that complies with NRS 53.045); *State, Dep't of Motor Vehicles v. Bremer*, 113 Nev. 805, 811-13, 942 P.2d 145, 149-50 (1997) (concluding in an administrative matter that an unsworn declaration that complied with NRS 53.045 satisfied a statute requiring affidavits from persons who had conducted breath analyzer tests).

The California Supreme Court confronted an analogous statutory construction issue in *Sweetwater Union High School District v. Gilbane Building Co.*, 6 Cal.5th 931,

243 Cal.Rptr.3d 880, 434 P.3d 1152 (2019). At issue in *Sweetwater* was California's anti-SLAPP statute, specifically, its provision that, in ruling on a special motion to dismiss, a court may consider the pleadings and "supporting and opposing *affidavits* stating the facts upon which the liability or defense is based." Cal. Civ. Proc. Code § 425.16(b)(2) (West 2016) (emphasis added). The question was whether a grand jury transcript could meet the anti-SLAPP statute's affidavit requirement, and the court held that it could. *Sweetwater*, 243 Cal.Rptr.3d 880, 434 P.3d at 1158-59.

Like Nevada, California has a statute permitting courts to accept certain unsworn declarations as affidavit equivalents. Cal. Civ. Proc, Code § 2015.5 (West 1983); *see* NRS 53.045. The purpose of these statutes requiring a sworn statement or declaration under penalty of perjury before a court may consider a written statement as evidence on a motion is "to enhance reliability." *Sweetwater*, 243 Cal.Rptr.3d 880, 434 P.3d at 1158. "Sworn testimony made before a grand jury ... is made under penalty of perjury ... [so] a transcript of this testimony is the equivalent of a testifying witness's declaration under penalty of perjury, assuming the authenticity of the transcript can be established." *Id.* at 1159 (citation omitted). Because "[t]he statutory scheme already permits consideration of [declarations as] affidavit equivalents" and a grand jury transcript is "at least as reliable as an affidavit or declaration," the *Sweetwater* court held that the district court properly considered the grand jury transcript in ruling on the special motion to dismiss. *Id.* Given the early stage of the proceedings, an affidavit or declaration "would have added little to the evidence" that the grand jury transcript provided, and it ***1205** seemed to the court "doubtful that the Legislature contemplated dismissal of a potentially meritorious suit for want of [affidavits or] declarations largely duplicating available evidence." *Id.*

Sweetwater's approach aligns with Nevada's caselaw addressing strict v. substantial compliance with statutes. To determine whether a statutory provision requires "strict compliance or substantial compliance, this court looks at the language used and policy and equity considerations" and "examine [s] whether the purpose of the statute ... can be adequately served in a manner other than by technical compliance." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1278 (2011). Given that an unsworn declaration can satisfy a statute's stated affidavit requirement, we see no reason to hold, as Bolden presses us to do, that NRS 173.035(2) requires strict compliance with its affidavit requirement. Instead, we hold that a certified preliminary hearing transcript can—and in this case did—substantially comply with the statute's affidavit requirement.

Bolden does not contest that the preliminary hearing transcript was certified or that it accurately reports the witnesses' testimony. The witnesses who testified did so under oath. See NRS 50.035(1) (requiring every witness, before testifying, "to declare that he or she will testify truthfully, by oath or affirmation"). Similar to the grand jury transcript in *Sweetwater*, 243 Cal.Rptr.3d 880, 434 P.3d at 1159, the preliminary hearing transcript is at least as accurate as a declaration or affidavit would be.

Substantively, NRS 173.035(2) requires the State to support its motion with evidence consisting of a written statement from a competent witness with personal knowledge of the crime and who committed it. *See* NRS 173.035(2) (specifying that the affidavit may be from "any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case, setting forth the offense and the name of the person or persons charged with the commission thereof"); *cf. Cipriano v. State*, 111 Nev. 534, 540, 894 P.2d 347, 351 (1995) (holding that an affidavit from the prosecutor did not satisfy the statute, since the prosecutor "only had knowledge of the alleged crimes because of his fortuitous presence at the preliminary hearing," rather than personal knowledge of the alleged crimes' commission), *overruled on other grounds by Warren*, 114 Nev. at 743, 964 P.2d at 50-51. NRS 173.035(2) does not license the State to present new evidence on motion to the district court that it did not present to the justice court. *Warren*, 114 Nev. at 741, 964 P.2d at 49. Rather, it "contemplates a safeguard against egregious error by a [justice of the peace] in determining probable cause, not a device to be used by a prosecutor to satisfy deficiencies in evidence at a preliminary examination, through affidavit." *Cranford v. Smart*, 92 Nev. 89, 91, 545 P.2d 1162, 1163 (1976). The preliminary hearing transcript serves these policies as well as, if not better than, one or more affidavits would. The district court thus did not err, much less plainly err, in considering the State's motion for leave to proceed by information as substantially compliant with NRS 173.035(2).

2.

Bolden next argues that the district court erred in granting

the State's motion for leave to file an information by affidavit because the justice court properly dismissed the charges against him. The State contends that the justice court improperly based its dismissal on the brothers' purported lack of credibility. It argues that such credibility determinations belong to the trier of fact.

At the preliminary hearing, the justice court's role "is to determine whether there is probable cause to find that the offense has been committed and the defendant has committed it." *State v. Justice Court of Las Vegas Twp.*, 112 Nev. 803, 806, 919 P.2d 401, 402 (1996); *see also* NRS 171.206 (addressing the role of the justice of the peace in determining probable cause after a preliminary hearing). Thus, "[t]he preliminary hearing is not a trial and the issue of the defendant's guilt or innocence is not a matter before the court." *Las Vegas Twp.*, 112 Nev. at 806, 919 P.2d at 402; *see also* ***1206** *DuFrane v. Sheriff*, 88 Nev. 52, 54, 495 P.2d 611, 613 (1972) (recognizing the lower standard of proof needed to establish probable cause at a preliminary hearing versus the beyond-a-reasonable-doubt standard that must be met at trial). Slight, or even marginal, evidence can support a probable cause finding. *Sheriff v. Potter*, 99 Nev. 389, 391, 663 P.2d 350, 352 (1983).

If the justice court dismisses criminal charges for lack of probable cause, the district court may permit the State to file an information if the district court finds that the justice court committed egregious error. *Warren*, 114 Nev. at 741-42, 964 P.2d at 49. Egregious error occurs when the justice of the peace "commits plain error that affects the outcome of the proceedings." *Moultrie v. State*, 131 Nev. 924, 930, 364 P.3d 606, 611 (Ct. App. 2015).

Citing *Wrenn v. Sheriff*, 87 Nev. 85, 482 P.2d 289 (1971), Bolden argues that the justice court is permitted to weigh witness credibility at a preliminary hearing. But this argument overreads *Wrenn*. What *Wrenn* holds is that "if an inference of criminal agency can be drawn from the evidence it is proper for the [justice of the peace] to draw it, thereby leaving to the jury at the trial the ultimate determination of which of the witnesses are more credible." *Id.* at 87, 482 P.2d at 290. Thus, *Wrenn* implicitly recognizes the slight-or-marginal-evidence standard and does not license the justice court to dismiss charges based on conflicting evidence where the evidence permits the finder of fact to draw "an inference of criminal agency." *Id.; see also Miner v. Lamb*, 86 Nev. 54, 58, 464 P.2d 451, 453 (1970) (concluding that an inference of criminal agency, despite an "equally plausible" noncriminal inference, was sufficient to establish probable cause); *Bryant v. Sheriff*, 86 Nev. 622, 624, 472 P.2d 345, 346 (1970) (holding that, in the face of conflicting evidence, the justice of the peace should draw an inference of criminal agency if the evidence supports it).

In this case, despite the credibility issues that troubled the justice court, the State satisfied its burden of demonstrating probable cause at the preliminary hearing. A picture of Bolden given to police when they arrived on scene was entered into evidence, and an officer testified that Brenton confirmed that the person in the picture was the shooter. A police detective and Bryston also testified to the description of the shooter Bryston gave on the scene, with the detective confirming that the description matched Bolden. This evidence "was sufficient to show that a crime had been committed and that there were reasonable grounds to believe that [Bolden] had committed it." *Watkins v. Sheriff Clark Cty.*, 88 Nev. 387, 391, 498 P.2d 374, 377 (1972) (citing *State v. Von Brincken*, 86 Nev. 769, 476 P.2d 733 (1970)). The justice court committed egregious error in sua sponte determining that this evidence did not adequately demonstrate probable cause to believe Bolden committed the crime charged, thereby preventing a jury from making the ultimate credibility determination at trial. *See Wrenn*, 87 Nev. at 87, 482 P.2d at 290. The district court correctly granted the State's motion for leave to proceed by information filed in district court.

B.

Bolden's final argument is that insufficient evidence supports his convictions because Brenton's failure to identify him as the shooter at the preliminary hearing made Brenton's trial identification of Bolden incredible. We "view[ ] the evidence in the light most favorable to the prosecution" to determine whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). Brenton explained at trial that he lied at the preliminary hearing because he did not want to aid in the investigation but later decided to "deal with the situation" after receiving numerous subpoenas. And other evidence identified Bolden as the perpetrator, including Bryston's girlfriend's 911 call and Brenton's photo identification, both made shortly after the shooting. "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Id.* Based on the evidence presented, a rational juror ***1207** could have found beyond a

reasonable doubt that Bolden was the perpetrator.

III.

The State's motion for leave to proceed by information in district court substantially complied with NRS 173.035(2) and demonstrated that the justice court committed egregious error in dismissing the charges against Bolden. Further, substantial evidence supports the jury's verdict. We therefore affirm.

We concur:

Cadish, J.

Herndon, J.

All Citations

499 P.3d 1200, 137 Nev. Adv. Op. 28

495 P.3d 478
Supreme Court of Nevada.

Jay Leslie JIM, a/k/a Jay Lee Jim, a/k/a Little Jay, A/K/A Little J., Appellant,
v.
The STATE of Nevada, Respondent.

No. 81545
|
FILED SEPTEMBER 23, 2021

Synopsis
Background: Defendant pled guilty and was convicted in the District Court, Elko County, Nancy Porter, J., of trafficking a schedule I controlled substance and possession of a firearm by a prohibited person. Defendant appealed.

The Supreme Court, Pickering, J., held that officer, who had planned to impound vehicle defendant was driving without valid registration, was lawfully present in vehicle where he observed firearm and bags containing crystalline-like substance, and therefore contraband was properly seized under the plain-view exception to warrant requirement.

Affirmed.

Procedural Posture(s): Appellate Review; Plea Challenge or Motion.

***479** Appeal from a judgment of conviction, pursuant to a guilty plea, of trafficking a schedule I controlled substance under NRS 453.3385(l)(b) and possession of a firearm by a prohibited person under NRS 202.360(1). Fourth Judicial District Court, Elko County; Nancy L. Porter, Judge.

Attorneys and Law Firms

Jeff Kump, PLLC, and Jeffrey J. Kump, Elko, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Tyler J. Ingram, District Attorney, and Jeffrey C. Slade, Deputy District Attorney, Elko County, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, PICKERING, J.:

Following a lawful stop and arrest, an Elko Police Department (EPD) officer found contraband in appellant Jay Jim's car. The officer observed the contraband during a warrantless inventory search that produced no formal inventory. After the State brought criminal charges against Jim, he filed a motion to suppress the evidence recovered from the vehicle, alleging that the items were the products and fruits of an illegal search. The district court denied the motion on the ground that the officer validly discovered the evidence under the plain-view exception to the warrant requirement of the United States and Nevada Constitutions. Jim appeals from his subsequent judgment of conviction, arguing that the plain-view exception does not apply because the officer did not complete the inventory. But because the officer's presence in the vehicle was legally justified at the time he observed the contraband, we hold that the plain-view exception to the warrant requirement applies and therefore affirm.

I.

Officers Joshua Chandler and Jeremy Shelley of the EPD responded to a report of suspicious activity at the Red Lion Hotel parking lot in Elko. When the officers arrived, they encountered Jim attempting to start a silver Chevrolet Impala that he did not own. After calling the car's registered owners and confirming that Jim planned to purchase the Impala, the officers told Jim that they would take "enforcement action" if he drove the car, because its registration was expired. But Jim did not heed this warning—one day later, Chandler saw and stopped Jim driving the same Impala in Elko's West Sage area, still with expired registration. Based on Jim's past failures to appear in court, Chandler arrested Jim for failure to produce valid registration, insurance, and a current driver's license, and for failure to wear a seatbelt.

Shelley responded to the scene as back-up, and after Chandler handcuffed Jim and placed him in the back of the patrol car, Shelley began an impound inventory of the Impala. Under EPD policy, if a car's driver is arrested and is not its registered owner, then the car will be impounded and "an impound inventory will be done and given to the tow truck driver." A different EPD policy applies if the car has "evidentiary value": "When impounding a vehicle of evidentiary value, the vehicle will be secured with evidence tape and the officer will follow the vehicle ... to the police garage where it will be secured for processing." Shelley testified that he initially entered the Impala under the policy for impounded vehicles without evidentiary value, to either turn the car off or retrieve the keys, when he saw the butt of a dock handgun and two small bags of a crystalline-like substance wedged between the driver's seat and center console. Shelley immediately recognized ***480** these items as contraband. Shelley and Chandler photographed the firearm and bags in place and on the front seat of the Impala before Shelley removed the items and secured them in his patrol car.

Shelley testified that upon finding the contraband items, he determined that the Impala may have evidentiary value. So, in accordance with the EPD policy for vehicles with evidentiary value, he seized the Impala, followed the car to the police garage, and delivered the car to Officer Jason Checketts, who placed evidence tape on its entry points. At the station, Shelley determined that the dock handgun had been reported stolen, and the crystalline-like substance tested presumptively positive for methamphetamine. With this evidence as grounds for probable cause, Officer Matthew Miller applied for and received a warrant to search the Impala. On executing the warrant, Miller recovered a blue Superior Balance digital scale, a black Weighmax digital scale, and "a paper receipt containing methamphetamine" from the Impala. Miller listed these items on the warrant log, but at no point did Miller, Shelley, or any other EPD officer complete an inventory of personal items in the Impala.

The State charged Jim with trafficking in a schedule I controlled substance and possession of a firearm by a prohibited person and sought punishment under the habitual criminal statute. Jim moved to suppress all evidence recovered from the Impala, alleging that the items were the products and fruits of an illegal search. But the district court concluded that Shelley recovered the firearm and methamphetamine under the plain-view exception to the Fourth Amendment's warrant requirement and denied Jim's motion. Jim pleaded guilty to one count of trafficking a controlled substance under NRS 453.3385(l)(b)[1] and one count of possession of a firearm by a prohibited person under NRS 202.360(1). As a term of his plea agreement, Jim reserved the right to appeal the suppression decision and now challenges the district court's denial of his motion to suppress and the resulting judgment of conviction.

[1] The parties stipulate to correct a clerical error in the judgment of conviction indicating that Jim was convicted of trafficking in a schedule I controlled substance under NRS 453.3385(l)(c) by conforming the judgment to the court's sentencing minutes, which indicate that Jim was convicted of trafficking in a schedule I controlled substance under NRS 453.3385(l)(b).

II.

The United States and Nevada Constitutions both guarantee "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV; Nev. Const. art. 1, § 18; *see also* *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013). A warrantless search is per se unreasonable unless an exception to the warrant requirement applies. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013). This court reviews de novo whether a valid exception to the warrant requirement applies. *See* *Beckman*, 129 Nev. at 485-86, 305 P.3d at 916 (holding that this court reviews a district court's denial of a motion to suppress de novo as to legal conclusions and that the reasonableness of a search is a legal inquiry); *Scott v. State*, 110 Nev. 622, 628, 877 P.2d 503, 507 (1994) (noting that a non-owner driver has a reasonable expectation of privacy in a vehicle that he or she lawfully possesses).

The "plain-view" exception to the warrant requirement applies when (1) an officer is lawfully present in a place where evidence can be viewed, (2) the item is in plain view, and (3) the item's incriminating nature is immediately apparent. *Horton v. California*, 496 U.S. 128, 136, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990); *State v. Conners*, 116 Nev. 184, 187 n.3, 994 P.2d 44, 46 n.3 (2000). Jim does not contest that the items in question here were in plain view once Shelley entered the Impala, that Shelley immediately recognized the incriminating nature of the items, or that towing of the Impala was reasonable. Accordingly, the narrow issue here is whether Shelley was lawfully present in the Impala when he entered the car to conduct a standard inventory search but never completed the inventory.

To be "lawfully present" under the plain-view exception, a warrant or warrant exception must justify the officer's presence ***481** in the first instance. *See* *Horton*, 496 U.S. at 136, 110 S.Ct. 2301 (holding that the officer must not have "violate[d] the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed"). And an inventory search carried out in good-faith compliance with "standardized official department procedures" is a well-established exception to the Fourth Amendment's warrant requirement. *Weintraub v. State*, 110 Nev. 287, 288, 871 P.2d 339, 340 (1994) (citing *South Dakota v. Opperman*, 428 U.S. 364, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976)); *see also* *Colorado v. Bertine*, 479 U.S. 367, 374, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). An officer's compliance with standard procedures ensures that an inventory search is truly "designed to produce an inventory" and is not just "a ruse for a general rummaging ... to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990).

Applying this standard, this court has held that without a sufficiently complete inventory of the subject vehicle or item searched, the officer failed to comply with the applicable department inventory procedures, rendering the inventory warrant exception inapplicable. *State v. Greenwald*, 109 Nev. 808, 810-11, 858 P.2d 36, 38 (1993) ("Without an inventory, we can have no inventory search."); *see also* *State v. Nye*, 136 Nev. 421, 423-24, 468 P.3d 369, 371-72 (2020); *Weintraub*, 110 Nev. at 289, 871 P.2d at 340. To wit, in *State v. Nye*, this court held that the inventory search was invalid because the officer only listed "bag" on the inventory log instead of listing the items in the bag, as was required under the policy. *Id.* at 424, 468 P.3d at 372-73. The booking officer further failed to comply with department policy by not conducting the search in view of a camera, signing the inventory receipt, or testifying as to how the search was conducted. *Id.* at 424, 468 P.3d at 373.

While an officer's failure to complete an inventory per department policy may foreclose the inventory warrant exception, such a failure does not per se establish that an officer's motive for *beginning* an inventory was a subterfuge. *See* *Wells*, 495 U.S. at 4, 110 S.Ct. 1632 ("[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."); *United States v. Garay*, 938 F.3d 1108, 1111-12 (9th Cir. 2019) (noting that an inventory search is valid if the search motive is administrative and holding that officers' failure to create an inventory sheet did not render the search motive as pretextual). And, unlike *Nye* where the searching officer strayed far afield from the applicable inventory policy, Shelley complied with the EPD policy for impounded vehicles when he entered the Impala to inventory its contents, which he had a legal right and obligation to do. *See Collins v. State*, 113 Nev. 1177, 1181, 946 P.2d 1055, 1059 (1997) (holding that an officer has a "right and obligation" to enter a vehicle to inventory its items for safekeeping). While lawfully present in the vehicle to conduct a standard inventory—to that point pursuant to and consistent with EPD policy—Shelley saw the firearm and bags of a crystalline-like substance in plain view between the driver's side seat and center console, and he immediately recognized those items as contraband based on his law-enforcement training. Shelley then changed course and followed the applicable EPD policy for vehicles with evidentiary value by halting his search, following the Impala to the police garage, directing Checketts to secure the vehicle with evidence tape, and seeking a search warrant. Shelley very well could have continued and completed the inventory search at that time, thus inevitably discovering all of the items that EPD eventually recovered under the warrant. Instead, Shelley halted the search and sought and obtained a search warrant, consistent with the Fourth Amendment.

Jim further argues that Shelley failed to comply with EPD policies by not having the Impala secured with evidence tape until after the vehicle was towed to the police garage. But this is beside the point—Shelley's alleged deviation from the policy was slight and does not show that his search motive was pretextual because Shelley did not continue his search at the scene. Indeed, EPD did not recover further incriminating evidence before Checketts secured the vehicle with evidence tape and Miller obtained and eventually executed a search warrant.

***482** III.

Shelley's close adherence to EPD policies, along with his decision to terminate a legal inventory search to secure a warrant, show that his motive was administrative and not an investigatory ruse. Shelley was lawfully present in the Impala when he saw the firearm and bags of methamphetamine in plain view. *See* *Horton*, 496 U.S. at 135, 110 S.Ct. 2301 (holding that the plain-view exception applies when "a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object")

(citing *Harris v. United States*, 390 U.S. 234, 235-36, 88 S.Ct. 992, 19 L.Ed.2d 1067 (1968) (holding that an officer was lawfully present for purposes of the plain-view exception when he entered a car to roll up the windows pursuant to a police department policy concerning impounding vehicles and found incriminating evidence in plain view)). And the plain-view warrant exception therefore applies to validate Shelley's seizure of the firearm and bags of methamphetamine, along with the items recovered under the warrant. *See Collins*, 113 Nev. at 1182, 946 P.2d at 1059 (holding that warrant was valid when premised on items seized under valid warrant exception). We accordingly affirm.

We concur:

Cadish, J.

Herndon, J.

All Citations

495 P.3d 478, 137 Nev. Adv. Op. 57

495 P.3d 506
Supreme Court of Nevada.

The State of Nevada, DEPARTMENT OF BUSINESS AND INDUSTRY, FINANCIAL INSTITUTIONS DIVISION, Appellant,
v.
TITLEMAX OF NEVADA, INC., a Delaware Corporation, Respondent.

No. 79224
|
FILED SEPTEMBER 23, 2021

Synopsis

Background: Title lender brought declaratory judgment action against Financial Institutions Division (FID), seeking relief from FID's findings that certain purported refinances were loan extensions within meaning of statute prohibiting extensions for 210-day title loans. The District Court, Clark County, Jerry A. Wiese, J., granted summary judgment to lender. FID appealed.

Holdings: The Supreme Court, Pickering, J., held that:

purported "refinance" opportunity offered by lender was in fact an "extension" and thus was a prohibited practice for 210-day title loans, and

"fair market value" of a vehicle, in calculating permissible upper limit on vehicle title loan, only refers to principal amount of the loan and does not include interest.

Affirmed in part and reversed in part.

Procedural Posture(s): On Appeal; Motion for Declaratory Judgment.

***507** Appeal from a district court summary judgment in a declaratory relief action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Attorneys and Law Firms

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Lewis Roca Rothgerber Christie LLP and Daniel F. Polsenberg, Joel D. Henriod, and Malani D. Kotchka-Alanes, Las Vegas, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, PICKERING, J.:

NRS 604A.5065 to NRS 604A.5089 regulate title loans, a financial product for which a lender "[c]harges an annual percentage rate of more than 35 percent" and "[r]equires the customer to secure the loan" via title to their vehicle (excluding purchase-money security interests). NRS 604A.105. While NRS 604A.5074(1) generally limits the permissible duration of the original term of a title loan to 30 days, NRS 604A.5074(3) extends the permissible duration to "up to" 210 days, provided that the title loan meets the requirements delineated in that subsection; as relevant here, such loans (210-day title loans) cannot be subject to "any extension." NRS 604A.5074(3)(c) (the extension prohibition). NRS 604A.5076(1) (the FMV limitation) separately limits the permissible amount of any title loan to the "fair market value" of the securing vehicle.

With regard to these two limitations, in this appeal the Nevada Department of Business and Industry, Financial Institutions Division (FID) argues that (1) a refinance qualifies as a species of extension within the meaning of the extension prohibition and is therefore a prohibited practice for 210-day title loans; and (2) a lender must calculate interest and other costs and fees along with the principal loan amount into the FMV limitation for all title loans. FID asks that we reverse the district court's order granting summary judgment in favor of TitleMax and declaratory relief to the contrary. On the first point, we agree with FID—the unambiguous language of NRS 604A.065 (defining "extension") includes a refinance such that the extension prohibition reaches the practice at issue here. As to the second, we agree with TitleMax and the district court; the text of the FMV limitation demonstrates that only the principal loan amount is included as part of that calculation. Accordingly, we

affirm in part and reverse in part as follows.

I.

Respondent TitleMax of Nevada, Inc., is a licensed lender offering title loans to its customers; appellant FID regulates that practice to ensure compliance with NRS Chapter 604A, including those sections laid out above. At issue in this appeal are TitleMax's 210-day title loans, on which interest accrues daily. Despite the extension prohibition in NRS 604A.5074(3)(c), TitleMax regularly offers borrowers on 210-day title loans the opportunity to "refinance," whereby the parties effectively agree to extend the period in which the title loan's principal amount is amortized for another 210 days in exchange for the borrower paying off the interest then owed. With regard to the FMV limitation, TitleMax limits the principal amount loaned to the fair market value of the vehicle in question, but it does not include the daily accruing interest or other associated fees and costs in the calculation of that upper limit.

***508** In 2018, FID conducted an examination of TitleMax's practices and issued several Records of Examination (ROEs). As relevant to this appeal, the 2018 ROEs stated that (1) TitleMax's "refinances" were actually "extensions" that violated the extension prohibition, and (2) TitleMax had underwritten several loans that exceeded the fair market value of the securing vehicle because, as FID subsequently explained, FID believes TitleMax should account for "[t]he total amount the borrower must pay back include[ing] the principal, interest, and fees" in the calculation. Based on these findings, FID issued TitleMax a "Needs Improvement" rating, meaning that TitleMax was subject to additional regulatory oversight and required to make changes to its practices to bring them into compliance with the statutory requirements or else face liability and potential loss of its lender's license.

Rather than modifying its practices to conform with FID's demands, TitleMax sued in the Nevada district court, seeking declaratory relief from the findings of the 2018 ROEs, as well as temporary and permanent injunctive relief enjoining FID from imposing or seeking to impose discipline based on those alleged violations. As relevant here, TitleMax asked that the district court declare that (1) refinancing a title loan does not amount to a prohibited extension and (2) the FMV limitation refers only to the principal amount of the loan. FID moved for summary judgment, and TitleMax opposed and moved for summary judgment in its own right. The district court denied FID's motion for summary judgment and granted TitleMax's, as follows:

> This Court hereby finds, concludes, and declares, that TitleMax's practice of "refinancing" does not violate either NRS 604A.5074 or NRS 604A.065.
>
> This Court further finds, concludes, and declares, that the language of NRS 604A.5076 which refers to the "fair market value" of a vehicle, refers only to the principal amount of the loan, and does not include interest, fees, or other expenses or other recoverable amounts.

FID's appeal followed.

II.

The district court's order granting summary judgment is subject to de novo review. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). So too, the interpretation the district court gave to the various statutes at issue in reaching that result. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). In this case, the language of those statutes is sufficiently plain to answer the questions FID's appeal poses. *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012) (stating that "[w]hen a statute is clear on its face, [this court] will not look beyond the statute's plain language").

A.

FID's first challenge is to the district court's determination that TitleMax's practice of offering its customers repeated opportunities to "refinance" violates the extension prohibition for 210-day title loans, as informed by the definition of "extension" found in NRS 604A.065. In full, NRS 604A.5074(3) provides,

> The original term of a title loan may be up to 210 days if:
>
> (a) The loan provides for payments in installments;
>
> (b) The payments are calculated to ratably and fully amortize the entire amount of principal and interest payable on the loan;

(c) *The loan is not subject to any extension*;

(d) The loan does not require a balloon payment of any kind; and

(e) The loan is not a deferred deposit loan.

(emphasis added). NRS 604A.065, somewhat circularly, defines an extension as "any *extension* or *rollover* of a loan beyond the date on which the loan is required to be paid in full under the original terms of the loan agreement, *regardless of the name given to the extension or rollover*." (emphases added).

The ordinary meaning of an extension is "[a] period of additional time to take an action, make a decision, accept an offer, or complete a task." *Extension*, *Black's Law* ***509** *Dictionary* (11th ed. 2019); *see Lofthouse v. State*, 136 Nev. 378, 380, 467 P.3d 609, 611 (2020) (noting that the court gives statutory words their plain and ordinary meanings unless the context requires a technical meaning or a different meaning is apparent from the context). TitleMax argues that, in a refinance, the first loan is paid off and second loan is made, such that the original loan term is not "extended." But when the same lender and the same borrower are involved, the principal is only given to the borrower once, at the inception of the original loan, and must be repaid when the refinanced loan's term expires. Thus, functionally, such a "refinancing" product offers customers who accept its terms a "period of additional time"—210 days from the day of "refinancing"—to pay TitleMax back the principal of the originally issued, later refinanced loan. Accordingly, "regardless of the name" TitleMax gives to this particular practice, in substance, based on the common understanding of the term, it appears to fall within NRS 604A.065 and, by reference, the extension prohibition.

But even setting this aside, under NRS 604A.065 a prohibited extension may also be a "rollover," which is "[t]he extension or renewal of a short term loan; *the refinancing* of a maturing loan or note." *Rollover*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). Accordingly, the parties' dispute over whether TitleMax's refinancing product was, in fact, a refinance is beside the point in any case. In this context, given the ordinary meaning of the statutory terms used, an extension is a rollover, and a rollover is a refinance; refinances are therefore a species of extension that fall within the extension prohibition. *See Bruce v. First Fed. Sav. & Loan Ass'n of Conroe, Inc.*, 837 F.2d 712, 719 (5th Cir. 1988) (holding, in the context of the former Thrift Institution Restructuring Act, that a lender's "offer to refinance the loan ... may constitute an extension of credit"); *Cf.* Nathalie Martin & Ozymandias Adams, *Grand Theft Auto Loans: Repossession and Demographic Realities in Title Lending*, 77 Mo. L. Rev. 41, 74 (2012) (discussing practice of title loan extensions, rollovers, and refinancing as synonymous and collecting data from service providers).

Despite the seeming clarity of the language laid out above, TitleMax attempts to call this analysis into question. First, TitleMax points to graphics on a pamphlet offered to the Legislature by the assemblyperson who presented the bill that enacted NRS Chapter 604A and argues that the caption on those graphics demonstrates that a "rollover," as referenced in NRS 604A.065, is a very specific kind of financial product that meaningfully differs from a refinance. But even assuming that the pamphlet graphics imply what TitleMax says they do, any implicit suggestion drawn from the caption on a graphic on a pamphlet presented, at one point, to the Legislature cannot overcome the enacted text of the statute itself. *Wheble*, 128 Nev. at 122, 272 P.3d at 136. The Legislature could not have written NRS 604A.065 more expansively—an "[e]xtension" is "any extension or rollover" of a loan beyond its original due date, "regardless of the name [the lender gives] the extension or rollover."

TitleMax also suggests that treating a refinance as a type of extension renders certain language found elsewhere in NRS Chapter 604A superfluous. *See Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 202, 234 P.3d 920, 922 (2010) (noting that statutes should be construed together to avoid rendering any language superfluous). NRS 604A.5037, which regulates high-interest loans, is structured similarly to NRS 604A.5074. NRS 604A.5037(1) generally prohibits the original term of a high-interest loan from exceeding 35 days, though subsection (2) allows the original term to be for a longer period (90 days) if certain criteria are met, including—as with the limitations on title loans—that the high-interest loan does not allow for "any extension." According to TitleMax, if a refinance is a type of prohibited extension, NRS 604A.5037(3), which separately prohibits the lender from "agree[ing] to establish or extend the period for the repayment, renewal, *refinancing* or consolidation of an outstanding high-interest loan for a period that exceeds 90 days after the date of the origination of the loan," would have no meaning. But this is not the case; NRS 604A.5037(3) limits the period of extensions for high-interest loans under NRS 604A.5037(1), not those that meet the heightened ***510** requirements of subsection (2), for which no extension is allowed in the first place. Put differently, a high-interest loan might fall under subsection (1), with, say, a 35-day original term and provisions that allow for an extension of that term;

however, subsection (3) would *still* prohibit the lender from stretching that extension beyond 90 days from the date of the original loan. If anything, NRS 604A.5037(3)'s allowance of additional time via refinancing, so long as the total period does not exceed 90 days from the original date of the loan, confirms that in the Legislature's view a refinance is in fact a form of extension. Our reading of extension to include refinances as a subcategory does not violate the *Buckwalter* principle.

TitleMax relatedly argues that the Legislature's use of the word "refinancing" in NRS 604A.5037(3)—which express reference is also found in NRS 604A.501 (regulating deferred deposit loans)—means that it did not intend to include a refinance as a type of "extension" under NRS 604A.5074(3). But, as discussed, the plain meaning of an extension in this context broadly encompasses a refinance, among other types of loan renewals or agreements to extend the loan-term period; the reverse is not true. Accordingly, where the Legislature refers to "any extension" in NRS Chapter 604A, it is really saying "a refinance, among any other product with similar effect"; where, in contrast, the Legislature refers to "refinancing" specifically, it is limitedly pointing to that financial practice in particular. Thus, TitleMax's citation in its favor of the principle that this court "presume[s] that the variation in language indicates a variation in meaning," *Williams v. State, Dep't of Corr.*, 133 Nev. 594, 598, 402 P.3d 1260, 1264 (2017), does not land—our understanding of extension as a top-line category of financial products, and refinances as a subvarietal thereof, still gives distinct meaning to each term.

Neither do the remainder of TitleMax's arguments on this point sway the outcome. Citing *Becerra v. Superior Court*, 29 Cal.App.5th 486, 240 Cal. Rptr. 3d 250, 265 (2018), TitleMax argues that because "refinances" are not forbidden they are implicitly allowed; but, as established, refinances *are actually forbidden* as a species of extension. *See* NRS 604A.5074(3)(c). And, while TitleMax seems to claim that this interpretation would infringe upon its due process rights, the text itself plainly counsels this result; any claim of a failure of notice stemming therefrom thus necessarily fails. *Cf. Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 514, 217 P.3d 546, 554 (2009) (holding that statute did not give notice of what conduct was prohibited because plain meaning of undefined terms could not be ascertained). Finally, while the parties dispute the proper application of the maxim *expressio unius est exclusio alterius* in this context, *see Horizons at Seven Hills Homeowners Ass'n v. Ikon Holdings, LLC*, 132 Nev. 362, 369, 373 P.3d 66, 71 (2016), this is beside the point—NRS 604A.065 defines "extension" functionally, "regardless of the name given to the extension," making the *expressio unius* canon inapposite. *See Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 370, 252 P.3d 206, 209 (2011).

We therefore reverse the district court's order granting declaratory relief to the extent that it held that "TitleMax's practice of 'refinancing' does not violate either NRS 604A.5074 or NRS 604A.065."[1]

[1] With regard to the merits of TitleMax's motion to strike portions of FID's reply brief, it is unnecessary to address them—this decision is founded in the text of the relevant statutes, rather than any argument FID raises in reply. TitleMax's motion to strike is therefore denied.

B.

FID bases its second challenge on the latter part of the district court's declaratory judgment—that the FMV limitation refers only to the principal amount of the loan. In relevant part, NRS 604A.5076(1) provides, "A licensee who makes title loans shall not... [m]ake a title loan that exceeds the fair market value of the vehicle securing the title loan." Pursuant to NRS 604A.105,

> 1. "Title loan" means a loan made to a customer pursuant to a loan agreement which, under its original terms:
>
> (a) Charges an annual percentage rate of more than 35 percent; and
>
> ***511** (b) Requires the customer to secure the loan by either:
>
> (1) Giving possession of the title to a vehicle legally owned by the customer to the licensee or any agent, affiliate or subsidiary of the licensee; or
>
> (2) Perfecting a security interest in the vehicle by having the name of the licensee or any agent, affiliate or subsidiary of the licensee noted on the title as a lienholder.
>
> 2. The term does not include a loan which creates a purchase-money security interest in a vehicle or the refinancing of any such loan.

NRS Chapter 604A's definition of "loan" is, again, unhelpfully circular, "referring the reader [back] to" the definitions of the products regulated by the chapter. *State, Dep't of Bus. & Indus., Fin. Insts. Div. v. Check City P'ship, LLC*, 130 Nev. 909, 913, 337 P.3d 755, 758 (2014); see *also* NRS 604A.080. But the ordinary meaning of the term, as relevant here, is "a sum of money lent at interest," not the sum of money lent *and* the interest. *Loan*, *Black's Law Dictionary* (11th ed. 2019); *see also* *Check City*, 130 Nev. at 913, 337 P.3d at 758 (recognizing that the "usual and natural reading" of the term is the principal amount borrowed before applying different statutory definition). Indeed, like Nevada, many other states similarly regulate the practice of title loans, and definitions in these foreign statutes further support this common understanding of the term. *See* Mark S. Edelman, Robert A. Aitken, Raechelle C. Yballe, *The Road Ahead: Emerging Trends in Personal Property Finance*, 63 Bus. Law. 597, 598 (2008) (collecting statutes treating the principal amount of a loan as distinct from interest); *see also* Unif. Consumer Credit Code § 1.301(25)(a)(i), 7 U.L.A. 126 (2002) (defining "loan" as "the creation of [a] debt"); Fla. Stat. Ann. § 537.003 (West 2013) (defining a title loan as "a loan of money to a consumer" secured by a vehicle title and separately defining "[i]nterest" as the cost of obtaining a title loan); Ill. Admin. Code tit. 38, § 110.300 (separating the terms "loan" and "interest... charged [thereon]" in the definition of title loan); *Berger v. State, Dep't of Revenue*, 910 P.2d 581, 586 (Alaska 1996) (defining a loan, for the purposes of the Alaska Small Loans Act, as "the payment of money by a lender to a borrower in exchange for an agreement to repay with or without interest").

As FID recognizes, this court departed from the ordinary meaning of "loan" in *Check City*—which examined the limitations on another financial product regulated by NRS Chapter 604A, deferred deposit loans—by holding that interest and other fees had to be included in the calculation of the permissible upper limit of such a loan. 130 Nev. at 912, 337 P.3d at 757 (interpreting NRS 604A.425, recodified with amendment as NRS 604A.5017, which provided, "A licensee shall not... [m]ake *a deferred deposit loan* that exceeds 25 percent of the expected gross monthly income of the customer when the loan is made"). But this court did so because NRS 604A.050 defined a deferred deposit loan as "a transaction," such that it was clear that "the principal amount borrowed is merely one aspect of the larger transaction" at play in the deferred deposit loan context. *Check City*, 130 Nev. at 912, 337 P.3d at 757. In contrast, with regard to title loans (and high-interest loans), the Legislature straightforwardly phrased the products' definitions in terms of types of "loan[s]" rather than "transaction[s]," such that there is no reason to deviate from what this court previously recognized is the ordinary meaning of the relevant term. *See* NRS 604A.065; NRS 604A.0703 (defining a high-interest loan as "a loan made to a customer pursuant to a loan agreement which, under its original terms, charges an annual percentage rate of more than 40 percent").

Moreover, contrary to FID's claims that reaching a result inapposite from *Check City* would be "nonsensical" here, it actually makes pragmatic and policy sense for the Legislature to have regulated deferred deposit loans differently than either title loans or high-interest loans. As this court recognized in *Check City*, deferred deposit loans are unusual because the whole cost of the "transaction"—including interest—is included upfront in the check the borrower gives the lender; that is, at the outset, "a deferred deposit loan transaction encompasses more ***512** than simply the amount borrowed but also includes some consideration to the lender beyond the customer's promise to repay the amount borrowed." 130 Nev. at 913, 337 P.3d at 757. In terms of the workability of the rule, given that the total cost to the borrower is readily discernable at the time the lender accepts the post-dated check, the reference to the "transaction" and the inclusion of interest and other fees therein makes sense. Not so in the title loan context, where interest accrues daily and can typically only be determined *post hoc*, when the loan is finally paid off.

Policy reasons further support the distinction. In contrast to a deferred deposit loan, a title loan is nonrecourse, meaning that the lender's recovery will ultimately be limited to the value of the vehicle that secures its loan. *Compare* NRS 604A.503 (providing that deferred deposit lender may recover total amount of principal owed plus unpaid interest), *with* NRS 604A.5078 (providing that "the sole remedy of the licensee who made the title loan is to seek repossession and sale of the vehicle which the customer used to secure the title loan"); *see also* Jim Hawkins, *Regulating on the Fringe: Reexamining the Link Between Fringe Banking and Financial Distress*, 86 Ind. L.J. 1361, 1392 (2011) (noting that in the context of title loans, as opposed to other "fringe" banking products, "consumers have a safety hatch they can use if they cannot pay off the loan—they can walk away with the money and lose their vehicle"). Thus, a title loan lender does not have the same incentive to inflate the total amount of a loan and interest as does a deferred deposit lender, and a borrower is less likely to fall into a cycle of unmanageable debt as a result of the former. *See*

Hawkins, 86 Ind. L.J. at 1393 (concluding that title loan lenders "have structured the transaction to prevent the total financial breakdown of the people who use them"). The Legislature therefore could have feasibly determined that the interest charged on deferred deposit loans needed to be more tightly regulated. *See State, Dep't of Bus. & Indus., Fin. Insts. Div. v. Dollar Loan Ctr., LLC*, 134 Nev. 112, 112, 412 P.3d 30, 32 (2018) (noting that in enacting NRS Chapter 604A the Legislature was "[r]esponding to a so-called 'debt treadmill' ").[2]

[2] This is not to minimize the potential detrimental effect of losing one's vehicle after making repeated payments on an over-secured loan, *see, e.g.*, Jessie Lundberg, *Big Interest Rates Under the Big Sky: The Case for Payday and Title Lending Reform in Montana*, 68 Mont. L. Rev. 181, 191 (2007) (arguing that "[t]itle loans can be every bit as disastrous as payday loans"), but to illuminate a potential rationale for regulating other types of consumer financial products even more aggressively.

Further, while FID relies heavily on the policy underlying NRS Chapter 604A in support of its interpretation of the FMV limitation, *see id.*, 134 Nev. at 115, 412 P.3d at 34 (suggesting that NRS Chapter 604A has a protective purpose), scholars who study these types of financial products have argued that laws capping the amount of a title loan based on the value of the securing vehicle should actually "aim to incentivize lenders to loan the *highest percentage* of the vehicle's value possible because then borrowers who lose a vehicle will lose the least amount of their equity." Jim Hawkins, *Credit on Wheels: The Law and Business of Auto-Title Lending*, 69 Wash. & Lee L. Rev. 535, 601 (2012) (emphasis added). This means that FID's favored interpretation of the FMV limitation may actually undercut the very policy it seeks to promote. Accordingly, to the extent that policy considerations were even pertinent to our interpretation of the FMV limitation, those considerations do not clearly counsel in favor of our sidestepping the plain meaning laid out above and rolling the interest charged on a loan into the FMV limitation. *Lofthouse*, 136 Nev. at 380, 467 P.3d at 611.

III.

In sum, we conclude that (1) the extension prohibition on 210-day title loans includes refinances as a species of extension based on the plain language of NRS 604A.065 and (2) the FMV limitation only refers to the principal amount of the loan. We therefore reverse in part and affirm in part the district court's order granting summary judgment and declaratory relief in TitleMax's favor.

We concur:

Cadish, J.

Herndon, J.

All Citations

495 P.3d 506, 137 Nev. Adv. Op. 55

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495 P.3d 127
Supreme Court of Nevada.

Kevin SUNSERI, Appellant,
v.
The STATE of Nevada, Respondent.

No. 81551
|
FILED SEPTEMBER 23, 2021

Synopsis

Background: Defendant charged with robbery and ownership or possession of firearm by a prohibited person moved to withdraw his guilty plea. The District Court, Clark County, Michael Villani, J., denied defendant's motion to withdraw. Defendant moved to dismiss charges. The District Court denied defendant's motion and subsequently entered a judgment of conviction. Defendant appealed.

Holdings: The Supreme Court, Herndon, J., held that:

delay in execution of arrest warrant was presumptively prejudicial;

delay in execution of arrest warrant was caused by state's gross negligence;

defendant did not assert his right to a speedy trial in due course;

delay in executing warrant prejudiced defendant;

defense counsel's failure to advise defendant that his right to a speedy trial might have been violated prejudiced defendant; and

state failed to rebut presumption that defense counsel's conduct constituted deficient performance.

Reversed in part, vacated in part, and remanded with instructions.

Procedural Posture(s): Appellate Review; Plea Challenge or Motion; Pre-Trial Hearing Motion.

***129** Appeal from a judgment of conviction, pursuant to a guilty plea, of robbery and ownership or possession of firearm by prohibited person. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Attorneys and Law Firms

Nevada Defense Group and Damian Robert Sheets and Kelsey L. Bernstein, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Alexander G. Chen, Chief Deputy District Attorney, John T. Niman, Deputy District Attorney, and Christopher J. Lalli, Assistant District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, HERNDON, J.:

***130** Appellant Kevin Sunseri was incarcerated in Nevada when a warrant for his arrest was issued, but the warrant was not executed for 25 months, until he was set to be released from prison. Sunseri entered into a guilty plea agreement based on the new charges and then suffered a mental breakdown. When he regained competency, he obtained new counsel and sought to withdraw his guilty plea, alleging that his right to a speedy trial had been violated and his former counsel had not advised him of the violation prior to his acceptance of the guilty plea offer. The district court denied the motion to withdraw the guilty plea, denied Sunseri's subsequent motion to dismiss the charges, and entered a judgment of conviction based on the guilty plea. We conclude the district court erred in denying the motion to withdraw the guilty plea because withdrawal was just and fair, as Sunseri had a strong argument that his right to a speedy trial had been violated and a colorable claim that his counsel was ineffective. Therefore, we vacate the judgment of conviction, reverse the denial of the motion to withdraw the guilty plea, and remand with instructions to reconsider the motion to dismiss the charges in light of this opinion.

FACTS AND PROCEDURAL HISTORY

On December 10, 2015, Sunseri robbed a man at gunpoint. On May 25, 2016, Sunseri began serving a two-to-five-year sentence in the Nevada Department of Corrections for an unrelated crime. A warrant for Sunseri's arrest concerning the robbery was issued roughly two months later, on July 28, 2016, while Sunseri was incarcerated, but the warrant was not immediately executed.

Meanwhile, while in prison, Sunseri received his high school diploma, earned a college degree, published a book, and earned a certification in personal training. Sunseri worked with a caseworker before his scheduled release on August 27, 2018, to ensure there was no reason to hold him. He learned that he had a charge pending against him in Florida for driving under a revoked license and entered into an agreement to have that charge vacated in exchange for a payment of $10,000 in restitution. Sunseri was unaware of any other warrants against him that would jeopardize his release or that there was ever an investigation into the underlying crimes. Instead of being released as anticipated on August 27, however, the 2016 arrest warrant was executed, and Sunseri was transferred to the jail.

Sunseri agreed to plead guilty to robbery and ownership or possession of a firearm by a prohibited person. Before sentencing, Sunseri became suicidal, required mental health treatment, was deemed incompetent, and was transferred to a mental health facility to receive treatment. When Sunseri regained competency, he obtained new counsel and filed a motion to withdraw his guilty plea agreement on the grounds that his constitutional right to a speedy trial was violated and his previous counsel never advised him that the charges could potentially have been dismissed as a result of the violation.

At the evidentiary hearing on the motion, Las Vegas Metropolitan Police Department's records technician testified that her search through the records did not show any attempt to locate Sunseri before his anticipated release from prison or to execute the arrest warrant. Sunseri testified that his previous counsel never discussed any violation to his right to a speedy trial or filing a motion to dismiss the charges. He further stated that at the time he entered the guilty plea, he was unaware that his right to a speedy trial may have already been violated. Finally, he testified that his memory of the facts surrounding the underlying crime was not as clear as it would have been if the warrant had been executed in 2016. Sunseri's former counsel did not testify.

***131** The district court denied the motion to withdraw the guilty plea. Sunseri then filed a motion to dismiss the case because of his violated speedy-trial right, which the district court denied, concluding that he waived this argument by entering into the plea agreement. Sunseri was convicted and sentenced to 66 to 180 months under the guilty plea.

DISCUSSION

"[A] district court may grant a defendant's motion to withdraw his guilty plea before sentencing for any reason where permitting withdrawal would be fair and just ...." *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015); NRS 176.165 (permitting withdrawal of a guilty plea before sentencing). Courts should not focus exclusively on whether the plea was knowingly, voluntarily, and intelligently pleaded, *Stevenson*, 131 Nev. at 603, 354 P.3d at 1281, nor should courts consider the guilt or innocence of the defendant, *Hargrove v. State*, 100 Nev. 498, 503, 686 P.2d 222, 226 (1984). In determining whether withdrawal of a guilty plea would be fair and just, courts should "consider the totality of the circumstances." *Stevenson*, 131 Nev. at 603, 354 P.3d at 1281.

In reviewing a denial of a motion to withdraw a guilty plea, this court gives deference to the district court's factual findings as long as they are supported by the record. *Id.* at 604. 354 P.3d at 1281. Because Sunseri's claim that the district court should have permitted him to withdraw his guilty plea is based on his argument that his speedy-trial right was violated, we must start our analysis there before also considering the issue of whether his counsel was ineffective.

The Barker-Doggett *speedy trial test*

The United States Supreme Court set out a four-part balancing test for determining if a defendant's Sixth Amendment right to a speedy trial has been violated: "[1] whether delay before trial was uncommonly long, [2] whether the government or the criminal defendant is more to blame for that delay, [3] whether, in due course, the defendant asserted his right to a speedy trial, and [4] whether he suffered prejudice as the delay's result." *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992) (citing *Barker v. Wingo*, 407 U.S. 514, 530-33, 92 S.Ct. 2182, 33 L.Ed.2d

101 (1972)). This court adopted the four-factor test, noting that no factor was determinative and that each must be considered together, along with all the relevant circumstances of the case. *State v. Inzunza*, 135 Nev. 513, 516, 454 P.3d 727, 731 (2019).

In regard to the first factor, in order to trigger the *Barker*-*Doggett* speedy-trial analysis, the delay must be presumptively prejudicial, which occurs around the one-year mark. *Id.* Here, the underlying warrant was executed 25 months after it was issued. Thus, the first factor has been met. as the delay was uncommonly long.

"The second factor, the reason for the delay, focuses on whether the government is responsible for the delay and is the focal inquiry in a speedy trial challenge." *Id.* at 517, 454 P.3d at 731 (internal quotations omitted). If the delay results from the government's negligence, that is weighted less heavily than if it is the result of a deliberate delay to hamper the defense, but it is still relevant because "the ultimate responsibility for such circumstances must rest with the government rather than with the defendant." *Id.* at 517, 454 P.3d at 732 (internal quotations omitted). Additionally, this court's "toleration of negligence varies inversely with the length of the delay that the negligence causes." *Id.* (quoting *United States v. Oliva*, 909 F.3d 1292, 1302 (11th Cir. 2018)). In *Inzunza*, the 26-month delay was caused by the government's "gross negligence," as the police knew of the defendant's whereabouts in New Jersey but did nothing to contact him or arrest him. *Id.* at 518, 454 P.3d at 732. This case is more egregious than *Inzunza* because Sunseri was in the government's custody. A simple search would have found him. Thus, the delay here was caused by the State's gross negligence.

The third factor looks at whether the defendant asserted his right to a speedy trial in due course. In considering this factor, courts are warned to only consider the time in which the defendant knew of the charges. ***132** *Id.* at 518, 454 P.3d at 732. If the defendant had no knowledge of the charges until the tardy arrest, the court cannot hold that against the defendant. *Id.* While Sunseri did not have knowledge of the charges until two years after the warrant was issued, when he learned of the charges he entered a plea agreement. Thereafter Sunseri did not raise the issue of a speedy trial for eight months.[1] While we recognize this factor would generally weigh against Sunseri in determining whether his speedy-trial right was violated, as discussed further below, because Sunseri has a colorable claim for ineffective assistance of counsel and may not have been aware that his right had been violated, this factor does not weigh strongly against him.

[1] We recognize Sunseri was committed and deemed incompetent for a portion of those eight months, so the entirety of the delay may not be appropriately held against him.

The last factor considers the prejudice of the delay to the defendant and specifically considers "oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the defense will be impaired."[2] *Id.* (internal quotations omitted). Sunseri demonstrated actual prejudice when he testified that he suffered a mental breakdown upon learning that he would not be released from prison because of the State's dilatory execution of the underlying warrant. He became suicidal and required mental health treatment. Thus, Sunseri met his burden of showing the delay prejudiced him by causing him anxiety and concern. Further, Sunseri testified that his recollection of the underlying crime was not as clear as it would have been earlier. While this alone likely does not show an impairment of his defense, it does provide further support for his claim of prejudice.

[2] While Sunseri argues that he need not show actual prejudice because the delay was more than one year so prejudice is assumed, he is incorrect because prejudice is only presumed for this factor if the delay is five years or more. *Inzunza*, 135 Nev. at 519, 454 P.3d at 733.

Considering all four factors, Sunseri made a strong argument that his right to a speedy trial had been violated and the charges against him should be dismissed. The fact that he entered into the guilty plea is the only factual circumstance potentially weighing against him, but he asserts that he did so as a result of ineffective assistance of counsel. Thus, we must next consider whether his counsel was ineffective in failing to advise him regarding the possible violation of his speedy trial right.

Ineffective assistance of counsel

As an initial matter, the State argues that Sunseri can only make an argument that his counsel was ineffective in a petition for a writ of habeas corpus and cannot make such an allegation in a motion to withdraw a guilty plea. While we recognize that we have never specifically stated that ineffective assistance of counsel can be grounds for withdrawal of a guilty plea, we reaffirm that the consideration for when a guilty plea can be withdrawn

before sentencing is when withdrawal is fair and just. *Stevenson*, 131 Nev. at 604, 354 P.3d at 1281. Thus, if ineffective assistance of counsel resulted in a fair and just reason to withdraw a guilty plea before sentencing, doing so would be appropriate. *See id.* (considering whether counsel's alleged lies and coercion provided grounds for withdrawing a guilty plea prior to sentencing).

To demonstrate ineffective assistance of counsel sufficient to invalidate a judgment of conviction based on a guilty plea, a defendant must show counsel's performance was deficient in that it fell below an objective standard of reasonableness and prejudice resulted in that, but for counsel's errors, there is a reasonable probability the defendant would not have pleaded guilty and would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); *Kirksey v. State*, 112 Nev. 980, 987-88, 923 P.2d 1102, 1107 (1996).

As discussed above, Sunseri has demonstrated prejudice because, if not for the guilty plea, he had a probable chance that the charges against him would be dismissed under *Barker*-*Doggett*. Regarding whether Sunseri's former counsel's performance was below an objective standard of reasonableness, ***133** the record is underdeveloped because the district court did not fully consider Sunseri's claim that his counsel was ineffective and did not hear evidence from Sunseri's former counsel regarding his conversations with Sunseri or the advice he provided to Sunseri. Nevertheless, based on the record before us, Sunseri testified that his counsel never discussed with him whether his speedy-trial right had been violated before he agreed to the guilty plea agreement. While a criminal defendant may be aware that a waiver of his statutory speedy-trial right waives the right to have a trial in 60 days, the average, uneducated criminal defendant cannot be expected to understand or know that a delay in executing an arrest warrant can constitute a constitutional violation of his right to a speedy trial. A defendant may only be aware of such a violation if informed by his or her counsel. Sunseri's former counsel, however, did not testify at the hearing. Thus, the State failed to rebut Sunseri's claim that his former counsel's performance was unreasonable.[3]

[3] While the State argues Sunseri's former counsel did not have to inform Sunseri that his speedy trial right may have been violated because this court had yet to issue its opinion in *State v. Inzunza*, 135 Nev. 513, 454 P.3d 727 (2019), as the United States Supreme Court had already laid out the test for determining whether a defendant's right to a speedy trial had been violated and numerous other jurisdictions had applied that test, the State's argument lacks merit.

Accordingly, while we are unable to fully address Sunseri's ineffective-assistance-of-counsel claim because of the insufficient record on this issue, we conclude that Sunseri made at least a colorable claim that his counsel was ineffective. This colorable claim, coupled with Sunseri's strong argument that his right to a speedy trial was violated, demonstrates a fair and just reason for the withdrawal of Sunseri's guilty plea. Accordingly, we conclude the district court erred in denying Sunseri's motion to withdraw the guilty plea.

CONCLUSION

The *Barker*-*Doggett* factors weigh in favor of Sunseri's argument that his right to a speedy trial was violated. Sunseri's strong argument in that regard, coupled with his colorable claim that his counsel was ineffective by not advising him that his right to a speedy trial had potentially been violated before he entered the guilty plea agreement, present a just and fair reason to grant Sunseri's motion to withdraw his guilty plea. Accordingly, we vacate the judgment of conviction, reverse the district court's denial of Sunseri's motion to withdraw his guilty plea, and remand this matter. Additionally, because the district court denied Sunseri's motion to dismiss the charges on the ground that he had waived his right to a speedy trial in his guilty plea, and because the guilty plea has now been withdrawn, we direct the district court to reconsider that motion on remand.

We concur:

Cadish, J.

Pickering, J.

All Citations

495 P.3d 127, 137 Nev. Adv. Op. 58

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495 P.3d 1091
Supreme Court of Nevada.

David James BURNS, Appellant,
v.
The STATE of Nevada, Respondent.

No. 80834
|
FILED SEPTEMBER 23, 2021

Synopsis

Background: Defendant was convicted in the District Court, Clark County, Charles Thompson, Senior Judge, of conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of firearm, robbery with use of deadly weapon, murder with use of a deadly weapon, attempted murder with use of deadly weapon, and battery with use of deadly weapon, and he appealed.

Holdings: The Supreme Court, Stiglich, J., held that:

sentencing was not part of "guilt phase of trial," as that phrase was used in parties' mid-trial agreement in which defendant waived appellate rights stemming from guilt phase of trial;

appellate court would construe the appeal waiver in parties' mid-trial agreement against the government and conclude that defendant did not waive claim relating to jury selection;

phrase "guilt phase of trial" encompassed defendant's claims stemming from every part of the proceedings after the jury was impaneled up until the verdict was returned, as that phrase was used in parties' agreement;

defendant did not waive for purposes of appeal any errors that occurred during closing arguments;

defendant waived his right to appellate review of claims related to denial of his suppression motion pursuant to parties' mid-trial agreement;

any error in jury deliberations fell within appeal waiver provision of parties' agreement;

defendant did not make prima facie case of racial discrimination with respect to State's peremptory challenge of Black juror;

State gave race-neutral rationale for peremptory strike of Black juror;

it was not prosecutorial misconduct for prosecutor to refer to nontestifying witness in its rebuttal closing argument; and

as matter of first impression, defendant's stipulation to the sentence of life-without-parole for first degree murder precluded his argument on appeal that the sentence was unreasonable and unconstitutional.

Affirmed.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection; Trial or Guilt Phase Motion or Objection; Jury Selection Challenge or Motion; Pre-Trial Hearing Motion.

***1095** Appeal from a judgment of conviction, pursuant to a jury verdict, of conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of a firearm, two counts of robbery with the use of a deadly weapon, murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and battery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; J. Charles Thompson, Senior Judge.

Attorneys and Law Firms

Resch Law, PLLC, dba Conviction Solutions, and Jamie J. Resch, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Pamela C. Weckerly and Alexander G. Chen, Chief Deputy District Attorneys, Clark County, for Respondent.

BEFORE THE SUPREME COURT, HARDESTY, C.J., STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

***1096** In this appeal, we consider the scope of a mid-trial waiver of appellate rights. During a capital trial, appellant David Burns stipulated to a sentence of life without the possibility of parole if the jury found him guilty and to waive his right to appeal issues "stemming from the guilt phase of the trial." In exchange, the State agreed to withdraw its notice of intent to seek the death penalty. The jury found Burns guilty, and the court, sitting without a jury, sentenced him to life without the possibility of parole. He now appeals, raising errors related to a pretrial motion to suppress, jury selection, closing arguments, jury deliberations, and sentencing.

We hold that Burns did not waive any errors that occurred during closing arguments because oral representations made to the court and reflected in the record indicate that the parties did not intend to extend the waiver to such errors. Further, we hold that Burns did not waive any errors that occurred during sentencing because sentencing was clearly not part of "the guilt phase of the trial." It is less clear on these facts whether voir dire is encompassed within "the guilt phase of trial," and so we construe the waiver against the government and conclude that Burns did not waive the claim relating to jury selection. But we hold that Burns waived the other alleged errors, even those that may have arisen after the agreement was executed. While unrelated to the appellate waiver portion of his agreement, we also conclude that Burns' stipulation to the sentence the court imposed precludes his argument on appeal that the sentence is unreasonable and unconstitutional. Because we conclude that there was no reversible error in jury selection or closing arguments, we affirm the judgment of conviction.

BACKGROUND

Appellant David Burns was charged with conspiracy to commit robbery, conspiracy to commit murder, burglary while in possession of a firearm, two counts of robbery with the use of a deadly weapon, murder with the use of a deadly weapon, attempted murder with the use of a deadly weapon, and battery with the use of a deadly weapon. The charges stemmed from a home robbery in which a woman was shot and killed and her 12-year-old daughter was shot but survived. Although several individuals were involved, Burns was prosecuted as the shooter. The State filed a notice of intent to seek the death penalty, and the case proceeded to a bifurcated jury trial with a guilt phase and a penalty phase.

On the twelfth day of trial, Burns and the State presented a Stipulation and Order (Agreement) for the district court's approval. This Agreement contained two related provisions. In the first, Burns agreed to waive a penalty hearing before the jury and stipulated to a sentence of life without the possibility of parole if the jury found him guilty of first-degree murder. In the second, the State agreed to withdraw the notice of intent to seek the death penalty in exchange for Burns' waiver of "all appellate rights stemming from the guilt phase of the trial." When the parties presented the Agreement to the district court, the State was still presenting its case-in-chief. Burns' codefendant did not waive his appellate rights, and Burns' attorneys told the court that the codefendant's presence would provide a safeguard against future misconduct despite Burns' appeal waiver.

***1097** During discussion of the Agreement, Burns' attorney explained that "for purposes of further review down the road, we are not waiving any potential misconduct during the closing arguments. We understand that to be a fertile area of appeal." The State did not contest that statement and implied that the defense attorney's recounting of the Agreement was correct. The district court approved the Agreement.

The jury found Burns guilty on all charges. Burns filed a sentencing memorandum detailing a report of mitigating factors, including Burns' age at the time of the crime, a diagnosis of fetal alcohol syndrome, and other cognitive issues. The district court sentenced Burns to life without the possibility of parole for the first-degree murder conviction.

Burns' counsel declined to file a direct appeal because of the waiver, asserting that Burns would have a better likelihood of success in a postconviction habeas proceeding. However, on appeal from a district court order denying Burns' subsequent postconviction habeas petition, this court held that Burns' trial counsel was ineffective for not filing a direct appeal when Burns desired to do so. *See Toston v. State*, 127 Nev. 971, 979, 267 P.3d 795, 801 (2011) ("[T]rial counsel has a duty to file a direct appeal when the client's desire to challenge the conviction or sentence can be reasonably inferred from the totality of the circumstances ...."). Accordingly, Burns was permitted to file this untimely direct appeal under NRAP 4(c). *Burns v. State*, Docket No. 77424 (Order Affirming in Part, Reversing in Part and Remanding, Jan. 23, 2020).

DISCUSSION

In this appeal, we consider the scope of Burns' mid-trial

waiver of appellate rights and then the merits of the nonwaived claims. The State contends that Burns waived all the claims brought in this appeal, and Burns disagrees. Burns' claims on the merits include error in admitting evidence, a wrongly denied *Batson*[1] objection, prosecutorial misconduct, error in allowing the jury to review video of trial testimony, and an unreasonable and unconstitutional sentence.

[1] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Burns' waiver covered all allegations of error except those related to voir dire, closing arguments, and sentencing

The State claims that Burns waived the right to appellate review of *every* error he raises in this appeal because they all fall within the scope of "the guilt phase of the trial" referenced in the Agreement. In contrast, Burns argues that "the guilt phase of the trial" only refers to the State's case-in-chief.[2] Burns does not challenge the validity of the appeal waiver in this case, only its scope.

[2] In addition, Burns argues that this court's decision in his postconviction appeal determined the scope of this appeal by finding that counsel was ineffective for not filing a direct appeal. Burns incorrectly reads our prior decision as if we considered the waiver's scope. We did not. Our prior decision simply concluded that Burns' counsel had a duty to file the requested direct appeal regardless of the waiver. *Cf. Garza v. Idaho*, —— U.S. ——, 139 S. Ct. 738, 747, 203 L.Ed.2d 77 (2019) (holding that, despite an appeal waiver, an attorney was ineffective for refusing to file an appeal upon the defendant's request). We said nothing about what issues, if any, Burns could raise in a direct appeal given the waiver.

This court has held that contract principles apply when analyzing a written guilty plea agreement. *See, e.g., State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1079 (1994). The same principles apply here. Although the Agreement at issue did not include a guilty plea, it is a contract to the same extent as a written plea agreement. Similar to a written guilty plea agreement, the Agreement here involved a bargained-for exchange between a defendant and the State, with both parties relinquishing a known right. Applying contract principles, we must construe the Agreement from its plain language and enforce it as written. *See Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599, 603 (2005) ("[W]hen a contract is clear on its face, it 'will be construed from the written language and enforced as written.' " (quoting ***1098** *Ellison v. Cal. State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990))). But any ambiguities must be construed against the State. *See United States v. Under Seal*, 902 F.3d 412, 418 (4th Cir. 2018); *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003).

The Agreement stated as follows:

> [T]he parties hereby stipulate and agree to waive the separate penalty hearing in the event of a finding of guilt on Murder In the First Degree and pursuant to said Stipulation and Waiver agree to have the sentence of LIFE WITHOUT THE POSSIBILITY OF PAROLE imposed by the Honorable Charles Thompson, presiding trial judge.
>
> FURTHER, in exchange for the State withdrawing the Notice of Intent to Seek the Death Penalty, Defendant agrees to waive all appellate rights stemming from the guilt phase of the trial.

Although the Agreement does not explain what constitutes "the guilt phase of the trial," this phrase is typically used to distinguish between the parts of a bifurcated criminal trial when guilt is determined versus when a sentence is determined. "The first phase of a bifurcated capital case may be referred to as the 'guilt phase' as a convenient abbreviation, rather than using awkward terms such as the 'guilt or innocence phase' or 'determination of guilt or innocence' phase." *State v. Mason*, 82 Ohio St.3d 144, 694 N.E.2d 932, 948 (1998); *see also* NRS 175.552(1) (providing that guilt phase and penalty phase in capital cases are separate proceedings for murder of the first degree); *Harte v. State*, 132 Nev. 410, 411, 373 P.3d 98, 99-100 (2016) (distinguishing the "guilt phase of trial" and the "penalty hearing" when discussing admissibility of certain forms of evidence). It is fairly clear when the guilt phase of a trial ends—when a verdict is returned as to the defendant's guilt. Thus, Burns' claim on appeal that his sentence was unconstitutional is not waived by this provision, since sentencing occurred after the guilt phase of the trial finished.

It is much less clear when the guilt phase of a trial *begins.* Does it begin with the swearing in of the venire from which the jury is selected or the swearing in of the

impaneled jurors? *Black's Law Dictionary* defines "guilt phase" as "[t]he part of a criminal trial during which the fact-finder determines whether the defendant committed a crime." *Guilt Phase*, *Black's Law Dictionary* (11th ed. 2019). That definition contemplates the fact-finder already being in place when the guilt phase begins. In jury trials, the fact-finder is the impaneled jury—which categorically does not exist until voir dire is completed. This suggests that the guilt phase begins after voir dire. Other authority is split about whether voir dire is part of the trial or an event that occurs pretrial.[3]

[3] *Compare* *State v. Melendez*, 244 So. 2d 137, 139 (Fla. 1971) ("It is settled law that trial begins when the selection of a jury to try the case commences."), *with* *State v. White*, 132 Ohio St.3d 344, 972 N.E.2d 534, 541 (2012) ("[V]oir dire is not a substantive part of trial; rather, it is a mechanism to seat an impartial jury so that the due process rights of a defendant are protected."). Under the federal Speedy Trial Act, "voir dire marks the technical commencement of the trial, [but] the strictures of the Speedy Trial Act are not fully satisfied by mere technical commencement." *United States v. Stayton*, 791 F.2d 17, 19 (2d Cir. 1986). But, for double jeopardy purposes, "jeopardy attaches [in a jury trial] when a jury is empaneled and sworn." *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975).

"Generally speaking, a plea agreement or other contract is ambiguous if it is reasonably susceptible of two meanings." *Under Seal*, 902 F.3d at 419. Therefore, we are not tasked today with deciding once and for all when the guilt phase of a trial begins. That the answer is unclear leads us to conclude that the Agreement in this case is ambiguous in that respect. Protection of defendants' rights when interpreting these kinds of bargains requires us to construe this ambiguity in the defendant's favor. For purposes of the issue before us today (the interpretation of the Agreement), we conclude that Burns' *Batson* claim is outside the scope of his waiver.

So, we necessarily reject Burns' argument that "the guilt phase of the trial" referred only to the State's case-in-chief and decline to adopt the State's argument that voir dire is categorically within "the guilt ***1099** phase of the trial." In the circumstances presented here, "the guilt phase of the trial" in the Agreement's waiver provision encompassed Burns' claims stemming from every part of the proceedings after the jury was impaneled up until the verdict was returned.

Under that definition, the appeal waiver in the Agreement includes closing arguments. But, during a discussion on the record regarding the Agreement, Burns' counsel muddied the waters by stating that Burns was not waiving appellate review of any misconduct that might occur during closing arguments:

> I believe that states the agreement, other than there is a proviso that we, for purposes of further review down the road, we are not waiving any potential misconduct during the closing statements. We understand that to be a fertile area of appeal.

The State did not dispute defense counsel's representation that Burns intended to reserve the right to appellate review of any errors during closing arguments. Under the circumstances presented, we will give effect to Burns' oral reservation of the right to appellate review of any misconduct during closing arguments of the guilt phase of the trial.[4]

[4] We note that NRS 174.035(3), which provides that a reservation of the right to appellate review of an adverse pretrial decision must be in writing, does not apply here because the Agreement does not involve a plea of guilty, guilty but mentally ill, or nolo contendere.

With this understanding of the appeal waiver's scope, we now consider whether it includes the claims Burns brings related to a motion to suppress evidence and jury deliberations. We conclude that it does.

Although the district court denied the motion to suppress evidence before the trial started, Burns is actually challenging the admission of that evidence during the guilt phase of the trial. Any error in denying the motion to suppress could not have prejudiced Burns until the subject evidence was admitted during the guilt phase of the trial. Therefore, any right to challenge the admission of this evidence "stemmed from" the guilt phase, and Burns waived his right to appellate review of the district court's decision.

Finally, we conclude that the appeal waiver also includes the alleged error during deliberations, given that the

deliberations preceded the verdict as to Burns' guilt. But this alleged error is unique among the remaining issues Burns raises because it occurred *after* the Agreement was entered. As the jury was deliberating days after Burns signed the Agreement, this issue highlights the prospective aspect of Burns' appeal waiver—it included appellate review of errors that might happen after the Agreement was entered.

The prospective waiver of the right to appellate review raises some concerns because when a defendant agrees to such a waiver, he or she cannot know what errors may occur in subsequent proceedings. *See generally* *United States v. Teeter*, 257 F.3d 14, 21 (1st Cir. 2001) ("The basic argument against presentence waivers of appellate rights is that such waivers are anticipatory: at the time the defendant signs the plea agreement, she does not have a clue as to the nature and magnitude of the sentencing errors that may be visited upon her."). Nonetheless, the weight of authority, with some narrow exceptions, bends toward enforcing knowing and voluntary waivers of the right to appeal, even if it means barring appellate review of errors arising after the waiver is entered.[5] Some appellate courts, however, ***1100** will refuse to honor a prospective appeal waiver that is knowingly and voluntarily entered "if denying a right of appeal would work a miscarriage of justice." *Id.* at 25; *see also* *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004); *Andis*, 333 F.3d at 889-92. Because that approach fairly balances the interests in enforcing valid agreements and remedying injustices that arise after entry of a prospective appeal waiver, we adopt it. Applying that rule here, we find no danger of a miscarriage of justice if the appeal waiver is applied to the alleged error during jury deliberations. The alleged error occurred when the district court provided the jury a video recording of trial testimony at the jury's request and with defense counsel's consent. We find no miscarriage of justice on these facts, and as such, we will honor the prospective appeal waiver as to this claim.

[5] *See* *United States v. Bibler*, 495 F.3d 621, 624 (9th Cir. 2007) (enforcing prospective appeal waivers unless "1) a defendant's guilty plea failed to comply with Fed. R. Crim. P. 11; 2) the sentencing judge informs a defendant that she retains the right to appeal; 3) the sentence does not comport with the terms of the plea agreement; or 4) the sentence violates the law"); *United States v. Blick*, 408 F.3d 162, 172 (4th Cir. 2005) (enforcing prospective appeal waivers unless the defendants challenge "errors that the defendants could not have reasonably contemplated when the plea agreements were executed"); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (enforcing prospective appeal waivers unless it would result in a miscarriage of justice); *Andis*, 333 F.3d at 891-92 (adopting a miscarriage of justice exception); *People v. Panizzon*, 13 Cal.4th 68, 51 Cal.Rptr.2d 851, 913 P.2d 1061, 1071 (1996) (enforcing prospective appeal waivers unless the appeal brings up sentencing issues "left unresolved by the particular plea agreement" when the sentencing occurred after the entry of a broad appeal waiver (emphasis omitted)).

Therefore, we conclude that the appeal waiver encompasses all of Burns' claims on appeal except those related to voir dire, closing arguments, and sentencing.

The district court did not err in denying a Batson *challenge during jury selection*

Burns alleges that the district court improperly denied his challenge to the State's peremptory removal of a prospective juror. An allegation that a peremptory challenge was used with racially discriminatory intent is governed by the three-step analysis adopted by the United States Supreme Court in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

> Under [that] jurisprudence, once the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.

Purkett v. Elem, 514 U.S. 765, 767, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995).

We review the district court's ruling on a *Batson* challenge for an abuse of discretion. *Nunnery v. State*, 127 Nev. 749, 783, 263 P.3d 235, 258 (2011). Further, with respect to step three, "[t]he trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Walker v. State*, 113 Nev. 853, 867-68, 944 P.2d 762, 771-72 (1997) (quoting *Hernandez v. New York*, 500 U.S. 352, 364, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991)).

Burns objected to the State's use of a peremptory challenge to remove Juror 91. The juror did not identify his race, but he stated that he had emigrated from India. The district court took judicial notice that Juror 91 was a member of a cognizable group. The State alleges that Burns did nothing "more than point out that a member of a cognizable group was struck," which is insufficient to meet his burden at step one of the *Batson* analysis. *Williams v. State*, 134 Nev. 687, 690, 429 P.3d 301, 306 (2018). The district court indicated its agreement with the State, saying, "I don't think they've met their burden .... " But then, "in an abundance of caution," the court asked the State to "tell [the court] what race neutral reasons there are for excusing this particular juror?" We have noted that, when "the district court asked the State to provide its explanation for the peremptory challenge solely out of an abundance of caution after the court had determined that [the defendant] failed to make a prima facie case, the first step of the *Batson* analysis was not rendered moot." *Watson v. State*, 130 Nev. 764, 780, 335 P.3d 157, 169 (2014). As a result, we may examine whether Burns made a prima facie case of racial discrimination. We agree with the district court that he did not. Counsel offered no explanation besides anecdotes from other cases counsel had argued and references to other matters before this court. Burns' only point related to this specific juror was that the court had taken judicial notice that the juror was "Black." Burns did not meet the step one standard of a prima facie showing of discrimination.

***1101** Even if Burns *had* made such a showing, the State did give a race-neutral rationale based primarily on the juror's answers in a questionnaire regarding the death penalty. According to the district court, in the questionnaire, the juror had said, "Although I could not vote to impose the death penalty, I could vote to impose a sentence of life imprisonment without any possibility of parole in the proper circumstances." While the juror walked back this questionnaire answer on direct questioning, the district court found that the juror's answers to the death penalty questions were sufficient justifications so that there had not been a showing of purposeful racial discrimination under step three of the *Batson* analysis.

We conclude the district court did not abuse its discretion in overruling the *Batson* challenge to Juror 91. It does not appear that Burns met his burden under step one, and even if he had, the race-neutral explanation and the decision by the district court were sufficient, so we find no error in steps two or three.

The State did not engage in reversible prosecutorial misconduct during closing arguments

Burns claims that the State engaged in multiple instances of prosecutorial misconduct during its closing argument. In reviewing such claims, this court determines whether the prosecutor's conduct was improper and, if so, whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). If the error is preserved and of a constitutional dimension—that is, if it involves impermissible comment on a constitutional right or has "so infected the trial with unfairness as to make the resulting conviction a denial of due process"—this court "will reverse unless the State demonstrates, beyond a reasonable doubt, that the error did not contribute to the verdict." *Id.* at 1189, 196 P.3d at 476-77 (internal quotation marks omitted). If the misconduct is not of a constitutional dimension, this court "will reverse only if the error substantially affects the jury's verdict." *Id.* at 1189, 196 P.3d at 476.

Referring to defense counsel

The State opened its rebuttal argument with the following comment: "What happens in courthouses across America and what should be happening in this courtroom by a jury of 12 people is that it's a search for a truth. And before about 20 minutes ago, that would seem to be what we were all doing here for the last four weeks." By "20 minutes ago," the State was plainly referring to the defense's closing argument, thus implying that the defense was not engaged in "a search for a truth." Burns objected, saying "[t]hat's disparaging counsel," but the court overruled the objection. Burns alleges on appeal that this was reversible prosecutorial misconduct of a

constitutional dimension.

This court has found that "[d]isparaging remarks directed toward defense counsel 'have absolutely no place in a courtroom, and clearly constitute misconduct.' " *Butler v. State*, 120 Nev. 879, 898, 102 P.3d 71, 84 (2004) (quoting *McGuire v. State*, 100 Nev. 153, 158, 677 P.2d 1060, 1064 (1984)). We have found such misconduct in quips made solely "to belittle defense counsel," *McGuire*, 100 Nev. at 158, 677 P.2d at 1064; when a prosecutor commented that defense counsel resorted to "smoke screens and flat-out deception," *Rose v. State*, 123 Nev. 194, 210, 163 P.3d 408, 419 (2007); and when a prosecutor made lengthy comments that defense counsel was trying to distract the jurors and to "market" them a "product," *Butler*, 120 Nev. at 897-98, 102 P.3d at 84. In contrast, the comment at issue here was not directed at opposing counsel with the purpose to belittle them; instead, it was focused particularly on the truth of the defense's version of events. Therefore, we conclude that the prosecutor's comments did not amount to misconduct.

Referring to a nontestifying witness

During his trial testimony, a detective referred to a statement made to him by a woman, Ulonda Cooper, who did not testify at trial. Defense counsel mentioned Cooper during his closing argument: "According to Detective Bunting,... that's what Ulanda [sic] Cooper told me; I never got her taped statement; that's what she told me and I just put it in there. Okay. ... And you know what ***1102** the most ironic thing about this, Ulonda Cooper was right." In rebuttal, the State said, "There's no connection whatsoever to him [another suspect] other than Ulonda Cooper. Oh, wait, we didn't hear from Ulonda Cooper. She's not a witness in this case. Did you assess Ulonda Cooper's credibility?" The defense objected and was overruled.

This court has held "it is generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense." *Whitney v. State*, 112 Nev. 499, 500, 502, 915 P.2d 881, 882, 883 (1996) (reversing a conviction after prosecutor "repeatedly call[ed] attention to the defense's lack of witnesses"). But when the comment goes to the defense's theory of what happened, it is permissible. For example, in *Rimer v. State*, we concluded that misconduct did not occur when the prosecutor pointed out that the defense failed to substantiate its theory that the defendants were sick and unable to commit the alleged crime. 131 Nev. 307, 331, 351 P.3d 697, 714 (2015). The comment at issue here is similar to that in *Rimer*. Burns' defense was, in part, that a coconspirator was the shooter. Burns' reference to Ulonda Cooper during his closing argument went to that theory. In these circumstances, the prosecution's response was a permissible comment on the evidence at hand and whether it substantiated the defense theory, not impermissible shifting of the burden of proof. Therefore, we conclude that there was no prosecutorial misconduct as to the Ulonda Cooper comments.

PowerPoint display

The State used a PowerPoint presentation during its rebuttal closing argument. One slide contained an illustration purporting to set out facts that disprove any notion of coincidence, which both the State and Burns describe on appeal as "a circle of guilt." Defense counsel objected and was overruled.

This court has held that it was reversible error for the prosecutor, during opening statements, to display a defendant's booking photo overlaid with the word "GUILTY," while simultaneously urging the jurors orally to find the defendant guilty. *Watters v. State*, 129 Nev. 886, 891, 313 P.3d 243, 247-48 (2013), This court found that while the oral statement was permissible, the visual slide was not because it "directly declared Watters guilty." *Id.* at 891, 313 P.3d at 248. In doing so, we noted that making the improper argument visually (declaring a defendant guilty in an opening statement photo) was even more prejudicial than it would have been had it been made orally. *Id.* at 892, 313 P.3d at 248.

Here, the district court overruled the objection on the ground that the PowerPoint slide was used in closing argument, whereas the slide in *Watters* was used in an opening statement. We agree. *Watters* is limited to opening statements, where a prosecutor may not directly declare the defendant guilty. *See Artiga-Morales v. State*, 130 Nev. 795, 799, 335 P.3d 179, 182 (2014) (holding that the use of the defendant's photograph with the word "guilty" across the front was not error, in part because it was shown during closing arguments). And even if the district court erred, the slide alleging "a circle of guilt" did not make the proceedings so unfair as to be

error of a constitutional dimension or substantially affect the verdict.

Burns' agreement to a specific sentence precludes his arguments that the sentence was unreasonable and unconstitutional

Although Burns' challenge to the life-without-parole sentence is not barred by the appeal waiver, it nonetheless is barred by his stipulation to that sentence as part of the Agreement. This court has not yet spoken to this threshold question: Can a defendant challenge a sentence that was agreed upon in a bargain with the State? Neither Burns nor the State addresses this question, although the State does point out that Burns "*agreed* to his sentence of life without the possibility of parole, but now complains it is unreasonable and unconstitutional."

Generally, "[w]hen a defendant pleads guilty and agrees to a specific sentence, he waives his right to challenge the propriety of his sentence." *Creech v. State*, 887 N.E.2d 73, 75 (Ind. 2008). As discussed above, we see no reason to treat the Agreement entered here any differently than a ***1103** plea agreement. We therefore conclude that because Burns received the benefit of his bargain—the stipulated-to sentence of life without the possibility of parole—he cannot challenge that sentence on appeal.

Even if we were to consider Burns' arguments about the sentence, they lack merit. "A sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotation marks omitted). Burns' sentence was certainly within the statutory limits, *see* NRS 200.030(4)(b)(l), and was not unreasonably disproportionate to his offense of murder with the use of a deadly weapon.

CONCLUSION

Burns' mid-trial appeal waiver applied to the entirety of "the guilt phase of the trial," including all parts of the trial up to the jury's verdict as to his guilt. The language of the Agreement is ambiguous as to whether the guilt phase commenced before or after jury selection, so we construe the ambiguity in Burns' favor and consider his claim of error related to jury selection. The parties also carved out a limited exception to the appeal waiver, with Burns orally reserving his right to appellate review of misconduct during closing arguments and the State implicitly agreeing to that reservation. Therefore, the mid-trial appeal waiver covered all of Burns' claims raised in this appeal, except those regarding voir dire, closing arguments, and an unconstitutional and unreasonable sentence. We conclude that the prosecutorial-misconduct and *Batson* claims are substantively without merit. Further, since Burns agreed to a specific sentence as part of the Agreement and the district court imposed that sentence, he may not challenge the imposition of the agreed-upon sentence. On these bases, we affirm the judgment of conviction.

We concur:

Hardesty, C.J.

Silver, J.

All Citations

495 P.3d 1091, 137 Nev. Adv. Op. 50

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495 P.3d 88
Supreme Court of Nevada.

Samuel HOWARD, Appellant,
v.
The STATE of Nevada, Respondent.
Samuel Howard, Appellant,
v.
The State of Nevada, Respondent.

No. 81278, No. 81279
|
FILED SEPTEMBER 16, 2021

Synopsis

Background: After affirmance, 102 Nev. 572, 729 P.2d 1341, of prisoner's murder conviction and death sentence, prisoner filed successive petition for habeas corpus relief, alleging that the single statutory aggravating circumstance supporting the death sentence was his prior out-of-state conviction for a felony involving use or threat of violence to another person, and that the prior conviction had recently been vacated and the charge had been dismissed. The District Court, Douglas County, Michael P. Villani, J., denied the petition as procedurally barred and as barred by statutory laches. Prisoner appealed.

Holdings: The Supreme Court, Herndon, J., held that:

death sentence was no longer supported, for Eighth Amendment purposes, by sole statutory aggravating circumstance;

prisoner showed actual innocence with respect to death penalty, as grounds for overcoming procedural bars to habeas relief pursuant to untimely successive petition; and

prisoner rebutted statutory presumption that State was prejudiced.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***89** Consolidated appeals from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Attorneys and Law Firms

Hendron Law Group LLC and Lance J. Hendron, Las Vegas; Federal Defender Services of Idaho and Jonah J. Horwitz and Deborah A. Czuba, Boise, Idaho, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Jonathan VanBoskerck, Chief Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, EN BANC.

OPINION

By the Court, HERNDON, J.:

***90** Appellant Samuel Howard was sentenced to death after being found guilty of first-degree murder. His death sentence currently depends on a single aggravating circumstance—a New York conviction for a felony involving the use or threat of violence to another person. However, a New York court recently vacated the conviction and dismissed the charge. Based on the fact that the conviction supporting the sole aggravating circumstance has been vacated, Howard argues that he is now actually innocent of the death penalty such that he overcomes the procedural bars that apply to his postconviction habeas petition and that his sentence violates the Eighth Amendment. We agree with both contentions. The aggravating circumstance at issue requires a conviction for, not just the commission of, a prior violent felony, and Howard no longer has such a conviction. We further conclude Howard promptly sought relief from the Nevada death sentence after the New York court's decision. Accordingly, we reverse the district court's order denying the postconviction habeas petition and remand for the district court to grant the petition and conduct a new penalty hearing.

BACKGROUND

In 1983, a jury convicted Howard of two counts of robbery with the use of a deadly weapon and one count of first-degree murder with the use of a deadly weapon. *Howard v. State*, 106 Nev. 713, 716, 800 P.2d 175, 177 (1990), *abrogated on other grounds by Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000). Although a jury sentenced him to death based on two aggravating circumstances, *id.* at 720, 800 P.2d at 179, this court later invalidated one of them. *Howard v. State*, Docket No. 57469, 2014 WL 3784121 (Order of Affirmance, July 30, 2014), The remaining aggravating circumstance relied on Howard's 1979 conviction in New York for a felony offense that involved the use or threat of violence to another person—robbery. But in 2018, a New York court vacated the 1979 conviction and dismissed the indictment. Not long after, Howard filed a postconviction petition for a writ of habeas corpus claiming his death sentence constitutes cruel and unusual punishment because the prior-violent-felony-conviction aggravating circumstance is invalid in light of the order vacating the New York conviction. The district court denied the petition as procedurally barred and barred by statutory laches, and Howard appealed.

DISCUSSION

Because Howard filed his petition over one year after the remittitur issued on his direct appeal, the petition was untimely under NRS 34.726(1). The petition was also untimely because it was filed more than 25 years after the January 1, 1993, effective date of NRS 34.726. Sec 1991 Nev. Stat., ch. 44, § 33, at 92. Further, the petition was successive because Howard had previously litigated five postconviction habeas petitions. *See* NRS 34.810(l)(bX2); NRS 34.810(2). Howard could overcome these procedural bars by demonstrating that failure to consider any constitutional claims in his petition would result in a fundamental miscarriage of justice because he is actually innocent (the "actual innocence gateway").[1] *See* ***91** *Lisle v. State*, 131 Nev. 356, 361, 351 P.3d 725, 729-30 (2015) ("Where a petition is procedurally barred and the petitioner cannot demonstrate good cause, the district court may nevertheless reach the merits of any constitutional claims if the petitioner demonstrates that failure to consider those constitutional claims would result in a fundamental miscarriage of justice. A fundamental miscarriage of justice requires a colorable showing that the petitioner is actually innocent of the crime or is ineligible for the death penalty." (citation and internal quotation omitted)).

1 Howard also could overcome these procedural bars by showing good cause and actual prejudice. NRS 34.726(1); NRS 34.810(l)(b), (3). Here, we focus on the actual innocence gateway because Howard's arguments in that respect have merit, and therefore we need not determine whether he also demonstrated good cause and actual prejudice.

For his gateway claim, Howard argues that he is actually innocent of the death penalty. Where a petitioner claims he is actually innocent of the death penalty, the "focus [is] on the objective factors that make a defendant eligible for the death penalty, that is, the objective factors that narrow the class of defendants for whom death may be imposed." *Id.* at 367-68, 351 P.3d at 734. Those objective factors are the elements of the capital offense and the statutory aggravating circumstances. *Id.* at 367, 351 P.3d at 733. Here, Howard's gateway claim is focused on the sole remaining aggravating circumstance—that it is no longer valid because the New York conviction supporting it has been vacated.[2] *See* *State v. Bennett*, 119 Nev. 589, 597-98, 81 P.3d 1, 6-7 (2003) (applying an actual innocence gateway based, in part, on the legal validity of an aggravating circumstance).

2 The State suggests that this court has already rejected a challenge to this aggravating circumstance and therefore the law-of-the-case doctrine bars the current challenge. We disagree because the facts are substantially different than before, most notably Howard's New York conviction has since been vacated. *See Hsu v. County of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 729 (2007) (recognizing exceptions to the doctrine of the law of the case that have been adopted by federal courts); *Hall v. State*, 91 Nev. 314, 315, 535 P.2d 797, 798 (1975) (explaining that the doctrine of the law of the case prohibits subsequent claims "in which the facts are substantially the same" (internal quotation omitted)).

At the relevant time, NRS 200.033(2) provided that first-degree murder is aggravated if "[t]he murder was committed by a person who was previously *convicted* of another murder or of a felony involving the use or threat of violence to the person of another." 1981 Nev. Stat., ch. 771, § 19, at 2011 (emphasis added). In proving that aggravating circumstance at the penalty hearing, the State relied on Howard's New York conviction. But a New

York court has since vacated the conviction and dismissed the matter. Consequently, there is no conviction to satisfy NRS 200.033(2). The State, however, suggests the aggravating circumstance survives the New York court's order based on the substantive evidence the State presented at the penalty hearing about the facts underlying the now-vacated New York conviction. It argues that evidence shows Howard committed a violent felony in New York. That evidence does not, however, satisfy the statute's plain language, which requires a "conviction" and not merely the commission of a crime. 1981 Nev. Stat., ch. 771, § 19, at 2011. Thus, cases from other states with a statute that focuses on the defendant's "commission" of a violent felony are not persuasive. *See, e.g., Gardner v. State*, 297 Ark. 541, 764 S.W.2d 416, 418 (1989). Given that the statute clearly requires a conviction, we cannot salvage the aggravating circumstance based on the other evidence the State presented at the penalty hearing. *Cf. Johnson v. Mississippi*, 486 U.S. 578, 585-86, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988) (concluding that a death sentence had to be reexamined where one of the aggravating circumstances was based on a prior conviction for a violent felony and the conviction had since been reversed, declining to consider whether the aggravating circumstance could be sustained based solely on evidence of the conduct underlying the reversed conviction where the prosecutor did not introduce any such evidence, and noting that "[s]ince that conviction has been reversed, unless and until petitioner should be retried, he must be presumed innocent of that charge"). Because the only aggravating ***92** circumstance supporting Howard's death sentence is no longer valid, he is ineligible for the penalty. *See* NRS 200.030(4)(a) (requiring "one or more aggravating circumstances" for a sentence of death). Thus, Howard demonstrated that he is actually innocent of the death penalty, establishing a fundamental miscarriage of justice to overcome the procedural bars to his untimely and successive petition. Accordingly, we conclude that the district court erred by dismissing the petition as procedurally barred under NRS 34.726 and NRS 34.810.

The State alternatively argues that the district court properly dismissed the petition because Howard did not exercise reasonable diligence. The State's argument is based primarily on NRS 34,800, which allows a district court to dismiss a petition if delay in filing it prejudices the State in responding to the petition or in its ability to retry the petitioner.[3] NRS 34.800(1). Where, as here, the petition was filed more than five years after a decision on direct appeal, the statute imposes a rebuttable presumption of prejudice to the State in its ability both to respond to the petition and to retry the petitioner. NRS 34.800(2). Relevant here, to overcome the presumption of prejudice as to the State's ability to respond to the petition, Howard had to show "that the petition is based upon grounds of which [he] could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the State occurred."[4] NRS 34.800(l)(a). The State argues, and the district court agreed, that Howard did not exercise reasonable diligence because he waited too long to seek relief from the New York conviction.

[3] The State further points to NRS 34.726 and NRS 34.960 as support for a diligence requirement. The State's reliance on NRS 34.726 is misplaced, given that Howard asserts actual innocence as a gateway to obtain review of a claim otherwise barred by NRS 34.726. And the State's reliance on NRS 34.960 is also misplaced, given that the statute did not exist when Howard filed the at-issue petition in 2018 and does not apply to that petition. *See* 2019 Nev. Stat., ch. 495, §§ 1-9, at 2976-81 (adopting provisions codified as NRS 34.900-.990).

[4] To overcome the presumption of prejudice as to the State's ability to retry him, Howard had to show "that a fundamental miscarriage of justice has occurred in the proceedings resulting in the judgment of conviction or sentence." NRS 34.800(l)(b). The focus on a fundamental miscarriage of justice similarly animates our actual-innocence-gateway caselaw, which equates a fundamental miscarriage of justice that is sufficient to overcome the procedural bars to an untimely or successive petition with a showing of actual innocence. *See, e.g., Lisle*, 131 Nev. at 361, 351 P.3d at 729-30. It thus appears that a successful actual-innocence-gateway claim would necessarily satisfy the showing required under NRS 34.800(l)(b). *See Mitchell v. State*, 122 Nev. 1269, 1273-74, 149 P.3d 33, 36 (2006) (suggesting that a fundamental miscarriage of justice required to overcome the procedural bars to an untimely or successive petition and to rebut the presumption of prejudice to the State in conducting a retrial can be satisfied with a showing of actual innocence); *see also Berry v. State*, 131 Nev. 957, 974, 363 P.3d 1148, 1159 (2015) (indicating that if petitioner could not show a fundamental miscarriage of justice for purposes of an actual-innocence-gateway claim,

his petition would also be barred by laches). The State does not argue otherwise.

The State's argument is flawed. NRS 34.800(1)(a) asks about reasonable diligence as to the ground(s) on which the petition seeks relief. Here, the substantive ground for relief asserted in the petition (an Eighth Amendment violation) depends on the New York court's order vacating the New York conviction. The same is true of the actual-innocence-gateway claim, assuming that it also is subject to the reasonable diligence showing. Howard promptly filed his Nevada petition after the New York court vacated the conviction. And we are not convinced that Howard needed to show reasonable diligence in obtaining relief from the New York conviction to satisfy his burden under NRS 34.800(l)(a). In particular, Howard obtained relief in New York because of unreasonable delay by the New York prosecutor's office. Thus, to suggest that Howard could have obtained the same relief in New York at some unidentified and speculative earlier time, when the prosecutor's delay would not have been as significant, creates a catch-22 situation. *See Catch-22, Webster's Ninth New Collegiate Dictionary* (1983) (defining "catch-22" as "a problematic situation for which the only solution is denied by a circumstance inherent in the problem or by a rule"). In these circumstances, we conclude that the district court abused its discretion to the ***93** extent it dismissed the petition under NRS 34.800.

The remaining question then is whether the substantive Eighth Amendment claim has merit. It does. Howard claimed that his death sentence violates the Eighth Amendment because the only aggravating circumstance is invalid and he therefore is ineligible for the death penalty. That claim depends on the same underlying premise as the actual-innocence-gateway claim, which we have determined has merit. As a result of the New York court's order, there are no aggravating circumstances remaining in this case to narrow the class of persons eligible for the death penalty. The death sentence therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment. *See* *McConnell v. State*, 120 Nev. 1043, 1063, 102 P.3d 606, 620-21 (2004) (recognizing that the constitutional prohibition against cruel and unusual punishment requires a sentencing scheme that "genuinely narrow[s] the class of person eligible for the death penalty" (internal quotation omitted)). Because our decision as to the actual-innocence-gateway claim necessarily disposes of the substantive Eighth Amendment claim, we need not remand for the district court to consider the substantive claim. Howard is entitled to a new penalty hearing. *See* *State v. Harte*, 124 Nev. 969, 975, 194 P.3d 1263, 1267 (2008) (concluding that a new penalty hearing was the appropriate remedy when the sole aggravating circumstance found by the jury had been invalidated). We therefore reverse the district court's order and remand for proceedings consistent with this opinion.

We concur:

Hardesty, C.J.

Parraguirre, J.

Stiglich, J.

Cadish, J.

Silver, J.

Pickering, J.

All Citations

495 P.3d 88, 137 Nev. Adv. Op. 48

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495 P.3d 82
Supreme Court of Nevada.

Tyerre Lanell WHITE-HUGHLEY, a/k/a Tyerre Lanell White, Appellant,
v.
The STATE of Nevada, Respondent.

No. 80549
|
FILED SEPTEMBER 16, 2021

Synopsis

Background: Defendant pled guilty in the District Court, Clark County, David M. Jones, J., to home invasion, and he appealed. The Court of Appeals, 476 P.3d 930, 2020 WL 7238306, affirmed. Defendant's petition for review was granted.

The Supreme Court, Silver, J., held that defendant was entitled to presentence confinement credit to both concurrent sentences up to date first sentence was imposed.

Vacated and remanded.

Herndon, J., dissented and filed opinion.

Procedural Posture(s): Appellate Review; Sentencing or Penalty Phase Motion or Objection.

***83** Appeal from a judgment of conviction, pursuant to a guilty plea, of home invasion. Eighth Judicial District Court, Clark County; David M. Jones, Judge.

Attorneys and Law Firms

Nobles & Yanez Law Firm and Dewayne Nobles, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Alexander G. Chen, Chief Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, EN BANC.

OPINION

By the Court, SILVER, J.:

Appellant Tyerre White-Hughley was arrested and booked on two separate warrants simultaneously. He subsequently pleaded guilty in both cases. White-Hughley was sentenced in the first case on December 9, 2019, and in the second case on January 7, 2020, by different judges, with each sentence imposed to run concurrently. The first sentencing judge applied credit for White-Hughley's time served to the sentence in the first case, but the second sentencing judge, voicing concerns about double-dipping credit for time served, declined to likewise apply credit for time served to the sentence in the second case.

In this opinion, we reiterate, consistent with NRS 176.055(1), *Poasa v. State*, 135 Nev. 426, 453 P.3d 387 (2019), *Johnson v. State*, 120 Nev. 296, 89 P.3d 669 (2004), and *Kuykendall v. State*, 112 Nev. 1285, 926 P.2d 781 (1996), that a district court "must give a defendant credit for any time the defendant has actually spent in presentence confinement absent an express statutory provision making the defendant ineligible for that credit." *Poasa*, 135 Nev. at 426, 453 P.3d at 388. We clarify that where a defendant simultaneously serves time in presentence confinement for multiple cases and the resulting sentences are imposed concurrently, credit for time served must be applied to each corresponding sentence. Because we conclude that White-Hughley is entitled to have 70 days' credit for time served applied to his sentence in his second case, we vacate the judgment of conviction and remand for the district court to enter a judgment of conviction with the correct amount of presentence credit.

FACTS AND PROCEDURAL HISTORY

White-Hughley had outstanding warrants for his arrest in two felony cases: a child abuse, neglect, or endangerment and battery case (the child abuse case); and a home invasion case. He was arrested and booked on both warrants on October 1. 2019. White-Hughley entered into a 'packaged deal" plea agreement whereby he pleaded guilty in the child abuse case on October 28, 2019, and

pleaded guilty in the home invasion case on November 7, 2019. The parties agreed that both sentences were to run concurrently.

On December 9, 2019. Judge Tierra Jones sentenced White-Hughley to 12-36 months with 70 days' credit for time served in the child abuse case. On December 11, 2019, ***84** Judge Tierra Jones entered a judgment of conviction in the child abuse case.

On January 7, 2020. Judge David Jones sentenced White-Hughley to 12-30 months in the home invasion case. Judge David Jones ordered the sentence in the home invasion case to run concurrently with the sentence in the child abuse case. White-Hughley requested credit for time served from the date of his arrest, arguing that because the cases were concurrent, he was entitled to credit for time served on the home invasion case as well as the child abuse case. The district attorney opposed, asserting that credit for time served had already been applied in the child abuse case and that numerous unpublished dispositions by this court prohibit applying that credit toward more than one sentence. Judge David Jones agreed "we don't double dip" and declined to apply credit for time served in the home invasion case, noting "that's how I always rule." On January 16, 2020, Judge David Jones entered a judgment of conviction in the home invasion case.

White-Hughley appealed, arguing that Judge David Jones should have at least applied credit for time served from the time of his arrest until the time he was sentenced on the first case—the child abuse case. The court of appeals affirmed. We granted White-Hughley's subsequent petition for review under NRAP 40B, and we now issue this opinion addressing his arguments.

DISCUSSION

The sole issue before us is whether NRS 176.055 required the district court to give White-Hughley credit for time served in the home invasion case. We review questions of statutory construction de novo. *Jackson v. State*, 128 Nev. 598, 603, 291 P.3d 1274, 1277 (2012). While legislative intent controls our interpretation, we will not look beyond a statute's plain language if the statute is clear on its face. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

As we held in *Poasa v. State*, a district court "must give a defendant credit for any rime the defendant has actually spent in presentence confinement absent an express statutory provision making the defendant ineligible for that credit."[1] 135 Nev. at 426, 453 P.3d at 388. At issue here is the portion of NRS 176.055(1) that provides for the award of presentence credit:

> [W]henever a sentence of imprisonment in the county jail or state prison is imposed, the court may order that credit be allowed against the duration of the sentence *... for the amount of time which the defendant has actually spent in confinement before conviction, unless the defendant's confinement was pursuant to a judgment of conviction for another offense.*

(Emphasis added.)

[1] In *Poasa*, our unanimous court expressly rejected the argument, which the dissent now raises, that NRS 176.055(1) is permissive. 135 Nev. at 427-29, 453 P.3d at 389. We explained that NRS 176.055(1) uses "may," which is permissive, but we held that NRS 176.055(1) mandates courts to award credit for time served in presentence confinement based on the statute's purpose and decades of well-settled Nevada law, the Legislature's approval of that construction, and constitutional and fairness considerations. *Id.*

Nothing in this provision, expressly makes a defendant ineligible to have credit for presentence confinement applied to multiple concurrent sentences where the defendant was in presentence confinement for those cases simultaneously. Rather, NRS 176.055(1) only precludes this credit if the presentence confinement was served "pursuant to a judgment of conviction for another offense." We consider this language in tandem with NRS 176.335(3). which establishes that a term of imprisonment imposed by a judgment, of conviction begins on the date of the sentence. It follows that when a defendant is simultaneously serving time before sentencing in multiple cases, and the sentences are imposed on different dates, the time served is not "pursuant to a judgment of conviction for another offense" until a sentence is actually imposed—because serving a term of imprisonment pursuant to a judgment of conviction begins at sentencing.

This interpretation finds ample support in our jurisprudence, In construing the phrase "time which the defendant has actually spent in confinement before conviction," this court has recognized the statute's purpose ***85** "is to ensure that all time served is credited towards a defendant's ultimate sentence." *Poasa*, 135 Nev. at 427-28, 453 P.3d at 389 (quoting NRS 176.055(1) and *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783). We have therefore previously held that NRS 176.055 requires district courts to award credit for time served in presentence confinement despite the discretionary language used in the statute. *Id.* at 428, 453 P.3d at 389. This construction "comports with notions of fundamental fairness, prevents arbitrary application of the statute, and avoids constitutional concerns with discrimination based on indigent status." *Id.* at 429, 453 P.3d at 389-90.

To be sure, before today, we have not had occasion to consider this statute's application where the defendant was confined simultaneously pursuant to charges in more than one case before sentencing. However, in *Johnson v. State*, we determined that the defendant was entitled under NRS 176.055(1) to have credit for presentence confinement be applied to concurrent sentences imposed for two counts in a single case. 120 Nev. at 299, 89 P.3d at 671. Relying on *Kuykendall*, we concluded that credit for time served "may not be denied to a defendant by applying it to only one of multiple concurrent sentences," as this "would render such an award a nullity or little more than a 'paper' credit." *Id.*

We recognize that *Johnson*, *Poasa*, and *Kuykendall* differ factually from this case. White-Hughley was arrested and confined on two warrants, entered guilty pleas in separate cases, was sentenced to concurrent sentences in each case, and now seeks application of his presentence confinement credit to both concurrent sentences. In contrast, *Johnson* dealt with the application of presentence confinement credit to multiple counts within a single case, and *Poasa* and *Kuykendall* dealt with presentence confinement credit in a single case. Nevertheless, the takeaway from *Poasa*, *Kuykendall*, and *Johnson* is uniform and applicable here: NRS 176.055(1) must be construed in favor of application of presentence credit for time served unless there is an express statutory provision precluding application of such credit.

Here, the district court ordered White-Hughley's sentence on the home invasion case to run concurrent to his earlier sentence on the child abuse case but gave him no credit on the home invasion sentence for the presentence time that he actually served. The court reasoned that White-Hughley had already been given credit for time served on his child abuse case—a sentence White-Hughley began serving nearly a month before he was sentenced on the home invasion case. But because White-Hughley was sentenced to identical minimum sentences, and nearly identical maximum sentences, crediting his time served solely to the earlier-imposed sentence deprives him of the full effect of credit for time he has served prior to his sentencing. Under these facts, the district court's denial of White-Hughley's credit neither comports with NRS 176.055(1)'s plain language nor furthers the statute's purpose of ensuring that credit for time served is reflected in the defendant's ultimate sentence. *Cf.* *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783 (explaining the statute's purpose).

Furthermore, White-Hughley's presentence confinement was not "pursuant to a judgment of conviction for another offense" until he was actually sentenced in the first case. White-Hughley was simultaneously booked on two warrants and spent 70 days in presentence confinement awaiting conviction on the home invasion case before being sentenced first on the child abuse case. Although the remaining 29 days between the time he was sentenced on the child abuse case and the time he was sentenced on the home invasion case were days served "pursuant to a judgment of conviction for another offense," the initial 70 days were not.[2] Therefore, because White-Hughley was in presentence confinement for multiple cases at the same time and the resulting sentences were imposed concurrently, he is entitled to receive ***86** the 70 days' credit on both of his concurrent sentences.

[2] White-Hughley initially argued that he was entitled to 99 days of credit for time served but now concedes that under NRS 176.055 he is not entitled to credit for time served after December 9, 2019, when he was sentenced in the child abuse case. *See* NRS 176.335(3) (recognizing that a term of imprisonment begins on the date of sentencing).

We have long recognized the obligation of the district court to accurately determine the amount of presentence credits to be applied in a particular case.[3] *Griffin*, 122 Nev. at 745, 137 P.3d at 1170. In doing so, the court should first consider the time spent in actual confinement prior to sentencing, and then consider whether any of that

time was spent in confinement pursuant to a judgment of conviction in another case and subtract those days in order to calculate the amount of presentence credit to which the defendant is entitled.[4] Where a defendant is confined simultaneously on multiple cases before sentencing, and the district court runs the sentence in the second case concurrently to that in the first case, a defendant is entitled to credit for time served on each case up to the date of sentencing in the first case.

[3] Of course, the parties are similarly obligated to be prepared to discuss the issue of credits at sentencing. *Griffin v. State*, 122 Nev. 737, 745, 137 P.3d 1165, 1170 (2006).

[4] There may be additional exclusions to applying credit, e.g., NRS 176.055(2), that are not applicable here but should be considered in accurately determining the amount of credits.

This is not to say that NRS 176.055 provides a defendant with a tool to hamstring the district court's discretion in determining the length of a term of incarceration so long as the sentence imposed is within the applicable statutory sentencing range. Within these statutory parameters, the district court can give a defendant more time in prison if, in its wide discretion, the court finds that additional prison time is warranted. This can be accomplished by adding more time to the defendant's minimum or maximum sentence. Moreover, the decision regarding whether to impose consecutive or concurrent sentences is committed to the district court's sound discretion. In either situation the district court can accomplish the same result—namely, a longer term of incarceration—without depriving a defendant of the appropriate credit due.

CONCLUSION

NRS 176.055(1) requires courts to apply credit for time served in presentence confinement to the defendant's sentence, "unless the defendant's confinement was pursuant to a judgment of conviction for another offense." We conclude that where a defendant simultaneously serves time in presentence confinement for multiple cases and the resulting sentences are imposed concurrently, credit for time served must be applied to each case. This ensures that the defendant actually receives credit for time served in presentence confinement. Therefore, we vacate the judgment of conviction and remand with instructions for the district court to enter a judgment of conviction applying 70 days' credit for time served to White-Hughley's sentence for felony home invasion.

We concur:

Hardesty, C.J.

Parraguirre, J.

Stiglich, J.

Cadish, J.

Pickering, J.

HERNDON, J., dissenting:

I disagree with the majority's interpretation of NRS 176.055(1) as applied to the facts of this case, and as I would affirm the district court's judgment of conviction instead, I dissent.

The majority is venturing into the duties and responsibilities of the Legislature and rewriting the statute under the guise of compliance with caselaw. However, this court can apply the statute as written and still respect *stare decisis*. While the majority quotes NRS 176.055(1), it emphasizes the wrong portion of the statute. NRS 176.055(1) provides that "whenever a sentence of imprisonment in the county jail or state prison is imposed, the court *may* order that credit be allowed against the duration of the sentence." (Emphasis added.) " 'May,' as it is used in legislative enactments, is often construed as a permissive grant of authority." *Butler v. State*, 120 Nev. 879, 893, 102 P.3d 71, 81 (2004). And, as the majority states, when the statute's plain language is clear on its face, we ***87** will not look beyond that. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). In fact, when construing a statute, this court must not read the statute "in a way that would render words or phrases superfluous or make a provision nugatory," and "every word, phrase, and provision of a statute is presumed to have meaning." *Butler*, 120 Nev. at 892-93, 102 P.3d at 81. Thus, this court must construe NRS 176.055(1) such that it does not render the Legislature's use of the

term "may" meaningless.

The majority cites to precedent as requiring the district court to provide White-Hughley with the same credit for time served in *two separate* judgments of conviction arising from *two separate* cases; however, the majority fails to acknowledge a critical factor that each of the cited cases has in common and which distinguishes those cases from this matter. All three of the cases cited by the majority concern the application of credit for time served in a situation where the defendant is in pretrial custody on a single case, not in multiple, separate cases. Further, those cases—*Poasa v. State*, 135 Nev. 426, 426-27, 453 P.3d 387, 388 (2019), *Johnson v. State*, 120 Nev. 296, 297-98, 89 P.3d 669, 670 (2004), and *Kuykendall v. State*, 112 Nev. 1285, 1286, 926 P.2d 781, 782 (1996)—are concerned with ensuring a defendant is not deprived of credit for time served, especially when the defendant served time preconviction as a result of indigency. *Poasa*, 135 Nev. at 428, 453 P.3d at 389; *Kuykendall*, 112 Nev. at 1287, 926 P.2d at 783. However, this concern is misplaced here, as White-Hughley, in a separate child abuse case, already received credit for all of the pretrial detention time he served.

In *Kuykendall*, the defendant was in pretrial custody on a single case and pleaded guilty to one felony charge. 112 Nev. at 1286, 926 P.2d at 782. The district court declined to award him any credit for his pretrial detention, and this court appropriately held that it was error for the district court to refuse to grant him credit for time served in pretrial confinement. *Id.* at 1286-87, 926 P.2d at 782-83. In *Johnson*, the defendant was similarly in pretrial custody on a single case and pleaded guilty to three felony charges. 120 Nev. at 297, 89 P.3d at 669. The district court awarded him credit for time served in pretrial detention but only applied it to one of the three charges. *Id.* at 297, 89 P.3d at 669-70. This court held that the district court erred by failing to apply his pretrial credit to all of the charges in the case in which he was sentenced. *Id.* at 299, 89 P.3d at 671. Lastly, in *Poasa*, the defendant had been in pretrial custody on a single case and was being sentenced on one felony charge. 135 Nev. at 426-27, 453 P.3d at 388. The district court declined to award her credit for her pretrial confinement when it sentenced her to probation. *Id.* at 427, 453 P.3d at 388. Thereafter, this court once again held that the district court erred in not awarding her the credit earned in pretrial detention on her case. *Id.* at 429, 453 P.3d at 390. Despite the permissive nature of NRS 176.055(1), the holdings in *Kuykendall*, *Johnson*, and *Poasa* appropriately recognized that refusing to award a defendant credit for time served while he or she is in pretrial custody on a single case would fail to give meaning to pretrial confinement and repudiate the punitive nature of such confinement. *See Anglin v. State*, 90 Nev. 287, 290, 525 P.2d 34, 36 (1974).

The same analysis does not apply when a defendant is in pretrial custody on multiple cases. What is required there is only that the defendant receives, in at least one case, full credit for the time spent in pretrial detention. As the Supreme Court of Wyoming recognized in *Hagerman v. State*, "[i]n cases where concurrent sentences have been imposed in a single case, the defendant is entitled to have credit for time served applied equally against both sentences, but this principle does not apply where a defendant is serving concurrent sentences imposed in separate cases." 264 P.3d 18, 21 (Wyo. 2011). In *Hagerman*, the defendant was charged with a second separate crime in a separate case while he was in jail awaiting sentencing in the first case. *Id.* at 20. The Supreme Court of Wyoming concluded that the defendant was not entitled to credit for time served in the second case because he received that credit in the first case and his presentence detention was related to the first case, not the second case. *Id.* at 22. In fact, other jurisdictions have cautioned against awarding ***88** double credit for time served when a defendant is in jail on two separate cases, even when those states' statutes *require* credit for time served, compared to Nevada's discretionary statutory language. *See, e.g.*, *State v. Banes*, 268 Neb. 805, 688 N.W.2d 594, 598-600 (2004) (explaining that a defendant can receive credit for time served only in one case); *Gust v. State*, 714 N.W.2d 826, 827-28 (N.D. 2006) (holding that granting credit for time served in more than one case would constitute double credit).

Turning back to White-Hughley, he received credit for all of his pretrial confinement when he was sentenced in his separate child abuse case. Thus, there was a recognition of. and application of credit for, the pretrial confinement that he served. The district court in the underlying home invasion case was not required to provide him with identical credit under *Poasa*, *Johnson*, or *Kuykendall*. To give meaning to the word "may" in NRS 176.055(1) and construe the statute in accordance with the Legislature's purpose as recognized in those cases, this court must conclude that the district court is not mandated to award credit for time served when the defendant already received credit for that time in another case, but rather, the district court has discretion to do so. Such discretion is vital because the district court should

not be forced to credit a defendant twice for time served without being able to engage in a case-by-case analysis where the court evaluates the totality of facts and circumstances surrounding an individual's sentencing. A district court has always been accorded wide discretion in imposing a sentence that fits the crime as well as the individual defendant, *see* *Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998), and the Legislature included the word "may" in NRS 176.055(1) to ensure that discretion is not impinged.

Thus, deferring to the district court's discretionary decision regarding credit for time served in a second, independent case complies with *stare decisis* and gives meaning to every word in NRS 176.055(1). In contrast, the majority decision today thwarts the district court's sentencing discretion under NRS 176.055(1), improperly rewriting the statute and overriding the Legislature's authority. Accordingly, because I would affirm the district court's judgment of conviction, I dissent.

All Citations

495 P.3d 82, 137 Nev. Adv. Op. 47

492 P.3d 556
Supreme Court of Nevada.

Melvin Leroy GONZALES, Appellant,
v.
The STATE of Nevada, Respondent.

No. 78152
|
FILED JULY 29, 2021

Synopsis
Background: Defendant petitioned for writ of habeas corpus after his conviction for aggravated stalking was affirmed, 2014 WL 6090812. The District Court, Humboldt County, Michael R. Montero, J., denied petition. Defendant appealed. The Court of Appeals, 476 P.3d 84, affirmed. Defendant appealed.

Holdings: The Supreme Court, en banc, Stiglich, J., held that:

a guilty plea does not waive a habeas claim of ineffective assistance of counsel at sentencing;

State breached its promise in plea agreement to recommend concurrent sentences;

trial counsel was ineffective in not objecting to State's breach of plea agreement;

appropriate remedy for counsel's ineffectiveness was new sentencing hearing; and

counsel's advice to plead guilty to aggravated stalking was not deficient performance.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***558** Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Attorneys and Law Firms

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Michael Macdonald, District Attorney, and Anthony R. Gordon, Deputy District Attorney, Humboldt County, for Respondent.

Aaron D. Ford, Attorney General, and Charles L. Finlayson, Senior Deputy Attorney General, Carson City, for Amicus Curiae Nevada Attorney General's Office.

Rene L. Valladares, Federal Public Defender, and Ellesse D. Henderson and Jonathan M. Kirshbaum, Assistant Federal Public Defenders, Las Vegas; Brown Mishler, PLLC, and William H. Brown, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

BEFORE THE SUPREME COURT, EN BANC.

OPINION

By the Court, STIGLICH, J.:

NRS 34.810(1)(a) requires a district court to dismiss a postconviction habeas corpus petition if "[t]he petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel." This case requires us to decide whether a defendant who pleads guilty may challenge his sentence on the ground that he received ineffective assistance of counsel at the post-plea sentencing hearing. We hold that NRS 34.810(1)(a) does not bar a claim that a petitioner received ineffective assistance ***559** of counsel at sentencing. Because we further conclude that appellant in fact received ineffective assistance of counsel at sentencing, we reverse and remand for a new sentencing hearing. Finally, we conclude that the district court did not err in denying appellant's remaining claims.

FACTS AND PROCEDURAL HISTORY

In 2013, appellant Melvin Gonzales was charged with burglary, receiving stolen property, possession of

methamphetamine, and four counts of aggravated stalking. The stalking counts arose from disturbing and threatening text messages he sent to his ex-wife and her parents. Gonzales agreed to plead guilty to three counts of aggravated stalking. In exchange, the State agreed to dismiss the remaining charges. Further, while the State reserved the right to argue at sentencing, it expressly agreed to recommend that the sentences for each count run concurrently.

At the sentencing hearing, the prosecutor exercised his right to argue by emphasizing the serious nature of the crimes. But instead of recommending that those sentences run concurrently as required by the plea agreement, he stated only that he concurred with the recommendation contained in the presentence investigation report (PSI) prepared by the Division of Parole and Probation. The PSI recommended that two of the three sentences should run consecutively. Gonzales's counsel did not object. The district court ultimately sentenced Gonzales to three consecutive prison terms of 62 to 156 months. Gonzales appealed but did not argue the State breached the plea agreement, and this court affirmed his conviction. *Gonzalez v. State*, Docket No. 65768, 2014 WL 6090812 (Order of Affirmance, Nov. 12, 2014).

Gonzales filed a timely postconviction petition for a writ of habeas corpus, which he supplemented twice. Among the grounds for the petition, and central to this appeal, was a claim that trial counsel was ineffective because he did not object to the State's breach of the plea agreement. During the hearing on the petition, Gonzales's postconviction counsel questioned trial counsel, who acknowledged that he did not object, explaining that he was unsure whether the State had in fact breached the plea agreement. He stated that when the State concurred with the PSI, he did not know which specific recommendation the State was concurring with. The district court denied the petition in its entirety. While it denied some claims on the merits, it concluded that any "[i]ssues regarding [the] sentence are outside the scope of NRS 34.810(1)(a)" and thus declined to address those issues at all. Gonzales appealed.

DISCUSSION

NRS 34.810 does not bar claims that counsel was ineffective at sentencing

Gonzales challenges the district court's determination that NRS 34.810(1)(a) precludes his claim of ineffective assistance of counsel at sentencing. NRS 34.810(1)(a) limits the types of claims that may be raised in a postconviction petition for a writ of habeas corpus challenging a conviction based upon a guilty plea:

> 1. The court shall dismiss a petition if the court determines that:
>
> (a) The petitioner's conviction was upon a plea of guilty or guilty but mentally ill and the petition is not based upon an allegation that the plea was involuntarily or unknowingly entered or that the plea was entered without effective assistance of counsel.

The district court's application of NRS 34.810 is a question of statutory interpretation that we review de novo. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

In construing a statute, we seek "to give effect to the Legislature's intent." *Williams v. State, Dep't of Corr.*, 133 Nev. 594, 596, 402 P.3d 1260, 1262 (2017) (internal quotation marks omitted). "If the statute's language is clear and unambiguous, we enforce the statute as written." *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). But if a "statute is ambiguous, meaning that it is subject to more than one reasonable interpretation, ... we 'look beyond the language [of the statute] to consider its meaning in light of its spirit, subject matter, and public policy.' " *Id.* (alteration in original) (quoting ***560***Butler v. State*, 120 Nev. 879, 893, 102 P.3d 71, 81 (2004)). In doing so, we construe statutes "in light of their purpose and as a whole," and thus look to the "entire act" to reconcile any apparent inconsistencies. *White v. Warden*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980).

The State contends that an allegation "that the plea was entered without effective assistance of counsel," NRS 34.810(1)(a), must necessarily contend that counsel's advice *to enter the plea* was deficient. In the State's view, adopted by the district court, an allegation of deficient performance *at sentencing* does not relate to the entry of the plea and is thus not cognizable in state habeas proceedings following a guilty plea. This is undoubtedly one facially reasonable reading of the statute, but it is not the only reasonable reading. Another reasonable interpretation is that NRS 34.810(1)(a) limits the types of claims arising *before* entry of the guilty plea to only those claims that relate to the validity of the guilty plea and the effective assistance of counsel in entering a plea. But NRS 34.810(1)(a) does not limit

ineffective-assistance-of-counsel claims arising *after* entry of the guilty plea, as there is no express language doing so and those claims are naturally not known at the time the guilty plea is entered. As there are two reasonable interpretations, NRS 34.810(1)(a) is ambiguous, and we look to the "spirit, subject matter, and public policy" behind NRS Chapter 34 and NRS 34.810(1)(a) in particular. *Butler*, 120 Nev. at 893, 102 P.3d at 81. In this context, we conclude that the second reading—which permits Gonzales's claim here—is clearly the better one.

First, considering the chapter as a whole, our Legislature created a remedy to challenge the validity of a judgment of conviction or sentence for a person "under sentence of death or imprisonment who claims that the conviction was obtained, or that the sentence was imposed, in violation of the Constitution of the United States or the Constitution or laws of this State." NRS 34.724(1). This remedy was made exclusive, supplanting the common-law writ and other procedures formerly available to challenge a conviction or sentence. NRS 34.724(2)(b). Because a defendant has a constitutional right to the effective assistance of counsel at sentencing, *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978) (citing *Gardner v. Florida*, 430 U.S. 349, 358, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977)), the context of NRS Chapter 34 strongly suggests that the Legislature intended to provide a remedy when "the sentence was imposed," NRS 34.724(1), without the effective assistance of counsel.

To be sure, it is clear that the Legislature meant to provide *one* remedy, not more, and thus barred petitioners from raising most claims that were or should have been raised earlier. *See* NRS 34.810(2); *see also Harris v. State*, 130 Nev. 435, 446-48, 329 P.3d 619, 626-28 (2014) (recognizing the Legislature's goal of creating a single postconviction remedy to challenge the validity of a judgment of conviction for a person in custody). This court has further recognized that claims that could have been raised on direct appeal, but were not, are waived in subsequent proceedings. *See Franklin v. State*, 110 Nev. 750, 752, 877 P.2d 1058, 1059 (1994), *overruled on other grounds by Thomas v. State*, 115 Nev. 148, 979 P.2d 222 (1999). And of course, the Legislature can impose procedural limitations on statutory postconviction petitions. *See Pellegrini v. State*, 117 Nev. 860, 878, 34 P.3d 519, 531 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1084, 1097 n.12 (2018).

But it is equally clear that the Legislature did *not* mean to provide *zero* remedies, and the State candidly admits that its interpretation will provide no state-law remedy whatsoever for violations of a defendant's rights that take place after the entry of a guilty plea. We are not persuaded that the potential availability of a federal remedy for such claims means that our Legislature did not provide its own remedy for ineffective-assistance-of-counsel claims arising after entry of the guilty plea. The lack of any state remedy weighs heavily against the State's interpretation. The vast majority of convictions in our system are obtained through guilty pleas. To hold that defendants who plead guilty have no remedy for such constitutional violations at sentencing would seriously undermine the purpose of NRS Chapter 34 as applied to ***561** most petitioners. We are convinced that the Legislature did not intend this. Such an interpretation, which gives a defendant *no* remedy instead of one unified remedy, fails to implement the public policy and purpose behind "the entire act." *White*, 96 Nev. at 636, 614 P.2d at 537.

Rather than reading NRS 34.810(1)(a) as providing no remedy for a challenge to the ineffective assistance of counsel at sentencing, we conclude that the purpose of this provision was to preclude wasteful litigation of certain *pre-plea* violations. This policy is common to Nevada and federal habeas procedure and was well stated by the United States Supreme Court in *Tollett v. Henderson*, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). There, a petitioner sought federal habeas relief on the grounds that the grand jury that indicted him was unconstitutionally selected. *Id.* at 259-60, 93 S.Ct. 1602. The Court held that the petitioner's "guilty plea ... foreclose[d] independent inquiry into the claim of discrimination in the selection of the grand jury." *Id.* at 266, 93 S.Ct. 1602. It explained that:

> [A] guilty plea represents a break in the chain of events which has *preceded* it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred *prior to the entry of the guilty plea.* He may only attack the voluntary and intelligent character of the guilty plea by

> showing that the advice he received from counsel was not within the [acceptable] standards....

Id. at 267, 93 S.Ct. 1602 (emphases added).

Following *Tollett*, we also recognized limitations in habeas proceedings on claims arising before the guilty plea. *See Warden v. Lyons*, 100 Nev. 430, 432, 683 P.2d 504, 505 (1984) (recognizing in habeas proceeding that by entering a guilty plea, a petitioner "waived all constitutional claims based on events occurring prior to the entry of the pleas, except those involving the voluntariness of the pleas themselves"); *Webb v. State*, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975) (approving *Tollett's* holding that a defendant may not raise independent claims that arise before entry of the guilty plea). The Legislature added NRS 34.810(1)(a) to the statutory postconviction remedy in 1985, and this timing suggests it was intended to codify these existing limits. *See* 1985 Nev. Stat., ch. 435, § 10(1), at 1232. Since this enactment, we have again affirmed that "[w]here the defendant has pleaded guilty, the only claims that may be raised thereafter [in a habeas proceeding] are those involving the voluntariness of the plea itself and the effectiveness of counsel." *Kirksey v. State*, 112 Nev. 980, 999, 923 P.2d 1102, 1114 (1996).

In contrast to these repeated statements that claims arising before the plea are generally waived, we have never once suggested that ineffective-assistance-of-counsel claims arising after the plea might be waived. Indeed, we have repeatedly entertained petitions alleging ineffective assistance of counsel arising after a guilty plea. *See, e.g.*, *Toston v. State*, 127 Nev. 971, 978-80, 267 P.3d 795, 800-01 (2011) (holding that an evidentiary hearing was required to determine whether counsel failed to file an appeal after being asked to do so); *Thomas*, 115 Nev. at 151, 979 P.2d at 224 (same); *Weaver v. Warden*, 107 Nev. 856, 858-59, 822 P.2d 112, 114 (1991) (holding that relief was proper where counsel failed to present evidence of defendant's PTSD in mitigation at sentencing); *see also Griffin v. State*, 122 Nev. 737, 745, 137 P.3d 1165, 1170 (2006) (recognizing that "[d]efense counsel who fail to ensure that a defendant receives the proper amount of presentence credit are subject to claims of ineffective assistance"). We have even entertained ineffective-assistance-of-counsel claims arising after the plea while rejecting other independent claims presented in the same petition as barred under NRS 34.810(1)(a), thus implicitly recognizing the limitations of the statute.[1] ***562** *Toston*, 127 Nev. at 974 & n.1, 980, 267 P.3d at 798 & n.1, 801 (remanding for hearing on appeal-deprivation claim arising after guilty plea, but rejecting prosecutorial misconduct and abuse of discretion allegations as barred under NRS 34.810(1)(a)). The Legislature has never suggested that the courts should discontinue consideration of these ineffective-assistance-of-counsel claims, despite having the opportunity to do so when it amended NRS 34.810 in other respects. *See, e.g.*, 2019 Nev. Stat., ch. 500, § 3, at 3010.

[1] We note that both parties implicitly accept the background principle that under NRS 34.810(1)(a), each ground for the petition must be considered separately, although the statute directs the court to "dismiss a petition." We agree. That principle of ground-by-ground analysis, uncontested by the parties (but questioned by amicus Nevada Attorneys for Criminal Justice), is consistent with our unbroken practice. *See, e.g.*, *Harris*, 130 Nev. at 439, 329 P.3d at 622 (NRS 34.8*I*0(1)(a) "limit[s] the *issues* that may be raised" (emphasis added)); *Toston*, 127 Nev. at 974 n.1, 980, 267 P.3d at 798 n.1, 801 (determining that specific claims were properly dismissed under NRS 34.810(1)(a)). Because a petition may contain many separate grounds for relief, it makes no sense for the whole petition to rise and fall based on just one of those grounds. It is clear that the context of NRS 34.810(1)(a) requires consideration of the individual grounds raised within a petition.

In sum, we explicitly hold today what has been implicit in our caselaw for decades. The core claims prohibited by NRS 34.810(1)(a) are "independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea" that do not allege that the guilty plea was entered involuntarily or unknowingly or without the effective assistance of counsel. *Tollett*, 411 U.S. at 267, 93 S.Ct. 1602. Those claims are "waived" by the guilty plea. *Lyons*, 100 Nev. at 432, 683 P.2d at 505. But where a petitioner argues that he or she received ineffective assistance of counsel at sentencing, he or she could not have raised that claim before entering his or her plea. It would violate the spirit of our habeas statute and the public policy of this state to prohibit him or her from *ever* raising that claim in state court. Therefore, the district court erred by declining to

consider Gonzales's claim that counsel provided ineffective assistance at sentencing.

Ineffective assistance of counsel at sentencing

To prove ineffective assistance of counsel, a petitioner must show "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defense." *Kirksey*, 112 Nev. at 987, 923 P.2d at 1107 (internal quotation marks omitted) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). The first prong of this test asks whether counsel's representation fell "below an objective standard of reasonableness" as evaluated from counsel's perspective at the time. *Id.* at 987-88, 923 P.2d at 1107. The second prong asks whether there is "a reasonable probability that, but for counsel's errors, the result of the [proceeding] would have been different." *Id.* at 988, 923 P.2d at 1107. We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous, but we review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Both components of the inquiry must be shown. *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052.

In considering whether trial counsel's performance was deficient, we must first determine whether the State breached the plea agreement. "When the State enters into a plea agreement, it is held to the most meticulous standards of both promise and performance with respect to both the terms and the spirit of the plea bargain." *Sparks v. State*, 121 Nev. 107, 110, 110 P.3d 486, 487 (2005) (internal quotation marks omitted). Here, the State agreed to recommend that the prison terms for each count run concurrently. In close cases, courts have grappled with the details of what, exactly, counts as a recommendation. *See, e.g.*, *Sullivan v. State*, 115 Nev. 383, 387-90, 990 P.2d 1258, 1260-62 (1999) (prosecution did not breach plea bargain by supporting its recommendation with facts about defendant's criminal record and the instant offenses); *Kluttz v. Warden*, 99 Nev. 681, 684, 669 P.2d 244, 245 (1983) (although prosecution expressly recommended agreed-upon sentence, the prosecutor's "insinuation that the plea bargain should not be honored" was a breach); *see also State v. Bearse*, 748 N.W.2d 211, 216 (Iowa 2008) (prosecutor should "indicate to the court that the recommended sentence is supported by ***563** the State" (cleaned up)). We have no need to do so here because this is not a close case. Uncontroverted evidence in the record shows that the prosecutor concurred with the recommendation in the PSI and that the PSI recommended two consecutive sentences with the third to run concurrently. That was in direct conflict with the agreement that the prosecutor would recommend all sentences run concurrently. *See State v. Howard*, 246 Wis.2d 475, 630 N.W.2d 244, 251 (Wis. Ct. App. 2001) ("[W]here a plea agreement undisputedly indicates that a recommendation is to be for concurrent sentences, an undisputed recommendation of consecutive sentences that is not corrected at the sentencing hearing constitutes a material and substantial breach of the plea agreement as a matter of law."). We therefore conclude that the State materially breached its promise to recommend concurrent sentences.

We next consider whether counsel's failure to object to a breach of the plea agreement was deficient performance—that is, whether counsel's performance fell below an objective standard of reasonableness. We conclude that counsel's performance was deficient. "If the State commits a material breach of a negotiated plea agreement, it would be a rare circumstance when a lawyer with ordinary training and skill in the area of criminal law would not inform the court of the breach." *State v. Gonzalez-Faguaga*, 266 Neb. 72, 662 N.W.2d 581, 588 (2003). Where the State induces a defendant's guilty plea with a promise to recommend a favorable sentence, the defendant has a right to expect that the State will perform that promise. If the State fails to do so, defense counsel must ordinarily protect the defendant's interests by objecting.

While it is certainly difficult to imagine a strategic reason why defense counsel would deliberately fail to object to a breach of the plea bargain, *see id.* at 588-89, we decline at this time to categorically rule out such a possibility, *cf. State v. Sidzyik*, 281 Neb. 305, 795 N.W.2d 281, 289 (2011). But in this case, the record shows no such strategic maneuvering took place. At the evidentiary hearing on Gonzales's petition, postconviction counsel asked trial counsel whether he was aware prior to sentencing that the PSI's recommendation was inconsistent with the plea bargain; trial counsel confirmed that he was. Postconviction counsel asked trial counsel whether, in his view, the State's concurrence with the PSI's inconsistent recommendation was a breach of the plea bargain; trial counsel replied, "I guess you'd have to determine what the State, when they say recommendation, which recommendation they're talking about." Postconviction counsel pointed to the plea agreement

itself, quoted the agreement's language that "the State agrees to recommend that the penalty on each count run concurrent to each other," and asked trial counsel whether the State had made any such recommendation during its argument. Trial counsel replied, "[o]rally, perhaps not, but it seems in writing it's there in the plea agreement." It appears that trial counsel believed that the State's promise to make a recommendation was *itself* the recommendation, and thus the State performed the promise as soon as the promise was made. That was, of course, mistaken. *Cf. Bearse*, 748 N.W.2d at 216 (prosecution "recommends" a sentence by "indicat[ing] to the court that the recommended sentence is supported by the State" (cleaned up)). Counsel's apparent misunderstanding of the State's duty did not render his actions strategic or reasonable. *See State v. Sidzyik*, 292 Neb. 263, 871 N.W.2d 803, 808 (2015) (holding that counsel performed deficiently by failing to object to the State's breach of a plea agreement, even though counsel believed that no breach had occurred).

Finally, we have no difficulty concluding that counsel's failure to object prejudiced Gonzales. If the district court had properly been made aware that Gonzales's guilty plea was pursuant to an agreement in which the State promised to recommend concurrent sentences, there is a reasonable probability that the district court would not have imposed three consecutive sentences. While the district court retained discretion in imposing the sentences, the State's recommendations often carry significant weight. *See, e.g.*, *State v. Adams*, 8 N.E.3d 984, 991 (Ohio Ct. App. 2014). Further, trial counsel's failure to object meant that the district court could very well have believed that the PSI was an accurate representation of the sentences ***564** agreed to by the parties—which it was not. Under these circumstances, we do not have confidence in the reliability of the outcome at sentencing. *See Strickland*, 466 U.S. at 694, 104 S.Ct. 2052 ("A reasonable probability is a probability sufficient to undermine confidence in the outcome.").[2] Because Gonzales's counsel performed deficiently by failing to object to the State's breach of the plea agreement, and because that deficient performance prejudiced Gonzales, we hold that Gonzales received ineffective assistance of counsel at sentencing.

[2] In view of our decision, we need not reach Gonzales's claim that his appellate counsel was ineffective for failing to raise the issue on appeal. To the extent that Gonzales raised a breach claim independently from his claim of ineffective assistance of counsel, we conclude that this claim was waived because it was not raised on direct appeal. *See Franklin*, 110 Nev. at 752, 877 P.2d at 1059.

Generally, a successful ineffective-assistance-of-counsel claim at sentencing results in "a new sentencing hearing in front of the same district court judge who originally sentenced appellant." *Weaver*, 107 Nev. at 859, 822 P.2d at 114. However, here, the ineffective-assistance claim is entwined with the underlying breach of the plea agreement. When we review such a breach claim directly, we require the new sentencing hearing to take place before a different judge. *Echeverria v. State*, 119 Nev. 41, 44, 62 P.3d 743, 745 (2003). This rule ensures that the new hearing is not "tainted" by the State's breach at the prior hearing. *See State v. Boldon*, 954 N.W.2d 62, 70 (Iowa 2021). We conclude that this rule applies with equal force when counsel is ineffective by failing to object to the State's breach.

Gonzales argues that he should be permitted to withdraw his plea and proceed to trial, rather than submit to a new sentencing hearing. We disagree. When the State breaches a plea agreement,

> [c]ourts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge's sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing. Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances.

Van Buskirk v. State, 102 Nev. 241, 244, 720 P.2d 1215, 1216-17 (1986) (quoting *People v. Mancheno*, 32 Cal.3d 855, 187 Cal.Rptr. 441, 654 P.2d 211, 215 (1982)). Here, no "additional information or changed circumstances," *id.* at 244, 720 P.2d at 1216 (quoting *Mancheno*, 187 Cal.Rptr. 441, 654 P.2d at 215), have

come to light, and we conclude that a new sentencing hearing will best implement the parties' reasonable expectations at the time they entered the plea agreement. At the new sentencing hearing, the State must specifically perform the plea bargain by recommending that the three sentences run concurrently. The sentencing judge will retain all "normal sentencing discretion," *id.* at 243, 720 P.2d at 1216 (quoting *Mancheno*, 187 Cal.Rptr. 441, 654 P.2d at 214), except that under the circumstances of this case, the new sentence must not exceed the original sentence, *see Citti v. State*, 107 Nev. 89, 94, 807 P.2d 724, 727 (1991).

Remaining claims

In addition to Gonzales's claim that counsel failed to enforce the plea agreement, Gonzales raised two other claims in this appeal. However, we conclude that these claims are without merit.

First, Gonzales claims that by advising him to enter a guilty plea, counsel's performance fell below an objective standard of reasonableness because any reasonable counsel would have realized that the acts alleged did not constitute aggravated stalking. We disagree. In order to prove aggravated stalking, the State had to show that Gonzales engaged in stalking and threatened his victims with the intent to place them "in reasonable fear of death or substantial bodily harm." NRS 200.575(3).[3] Gonzales asserts that "[t]here was absolutely not one shred of evidence" that he violated this statute. This claim is belied by the record. For example, the victims testified at the sentencing hearing to the grisly and threatening nature of ***565** the text messages.[4] We conclude that counsel's advice to plead guilty to aggravated stalking was not deficient.

[3] At the time of Gonzales's conviction, the relevant statute was numbered NRS 200.575(2). 2009 Nev. Stat., ch. 497, § 1, at 3007. For simplicity, we cite the statute as it exists today; the substance has not changed.

[4] Gonzales correctly notes that text messages can support a conviction for a category C felony under NRS 200.575(4). From there, he leaps to the illogical and unsupported conclusion that text messages can never support a conviction for a category B felony under NRS 200.575(3). We conclude this argument is frivolous.

Next, Gonzales alleges that trial counsel was ineffective for failing to move to suppress evidence related to the nonstalking charges, and for failing to move to sever those charges. This claim is at least arguably barred by NRS 34.810(1)(a), since it alleges an error which occurred *before* the plea and which does not obviously relate to the entry of the plea. But even assuming without deciding that the claim is properly raised, it is meritless. Gonzales ultimately entered into a plea agreement in which the nonstalking charges were dismissed. We conclude that Gonzales was not prejudiced by the absence of a motion to sever charges, or to suppress evidence related to charges, of which he was neither tried nor convicted.[5] We thus affirm the district court's denial of Gonzales's petition on all grounds other than ineffective assistance related to breach of the plea agreement.

[5] Gonzales speculates that if the stalking and nonstalking charges had been severed, and if a motion to suppress had resulted in the dismissal of the nonstalking charges, then counsel might have had more resources to argue that text messages can never support a conviction for aggravated stalking. Even if we ignore the attenuation of this proposed causal chain, such an argument would have necessarily failed, *see supra* n.4, and there is thus no reasonable probability that the outcome would have been different.

CONCLUSION

We conclude that NRS 34.810(1)(a) does not bar Gonzales's claim that he received ineffective assistance of counsel at his sentencing hearing. We further conclude that this claim is meritorious because counsel's failure to object to the State's breach of the negotiated plea agreement was unreasonable and prejudicial. We have considered Gonzales's other claims and conclude they lack merit. Accordingly, we affirm in part, reverse in part, and remand with instructions to grant the petition in part and to hold a new sentencing hearing before a different judge. At the new hearing, the State must recommend that Gonzales serve concurrent sentences, consistent with the plea agreement.

We concur:

Hardesty, C.J.

Parraguirre, J.

Cadish, J.

Silver, J.

Pickering, J.

Herndon, J.

All Citations

492 P.3d 556, 137 Nev. Adv. Op. 40

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492 P.3d 1
Supreme Court of Nevada.

Tyrone David JAMES, Sr., Appellant,
v.
The STATE of Nevada, Respondent.
Tyrone David James, Sr., Appellant,
v.
The State of Nevada, Respondent.

No. 80902, No. 80907
|
FILED JULY 29, 2021

Synopsis

Background: Inmate convicted of sexual assault of a minor, open or gross lewdness, and battery with intent to commit a crime filed post-conviction petition requesting a genetic marker analysis of DNA obtained from rape kit and a postconviction petition for a writ of habeas corpus. The District Court, Clark County, Ronald J. Israel, J., denied the petitions, and inmate appealed.

Holdings: The Supreme Court, Herndon, J., held that:

Rape Shield Law did not necessarily preclude evidence that DNA contained in victim's rape kit matched another man's DNA, and

inmate demonstrated a reasonable possibility that he would not have been convicted if exculpatory results had been obtained through a genetic marker analysis of DNA contained in victim's rape kit.

Reversed, vacated, and remanded.

Procedural Posture(s): Appellate Review; Post-Conviction Review.

***2** Consolidated appeals from a district court order denying a postconviction petition requesting a genetic marker analysis (Docket No. 80902) and a postconviction petition for a writ of habeas corpus (Docket No. 80907). Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Attorneys and Law Firms

Rene L. Valladares, Federal Public Defender, and C.B. Kirschner, Assistant Federal Public Defender, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Taleen Pandukht, Chief Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, HERNDON, J.:

A jury convicted appellant Tyrone David James, Sr. (James) of sexual assault of a minor, open or gross lewdness, and battery with intent to commit a crime. He was sentenced ***3** to 25 years to life. A rape kit collected from the alleged victim, and not tested prior to trial, was subjected to postconviction testing and revealed a DNA match to a man other than James. After being notified about the discovery of the DNA evidence, James filed a postconviction petition requesting a genetic marker analysis and a postconviction petition for a writ of habeas corpus. The district court denied both petitions. James appeals both decisions. He argues that the district court erred by denying his request for genetic marker analysis when there was a presumptive CODIS match to a man other than himself. He further argues that the district court erred by dismissing his petition for habeas corpus because the CODIS match constituted new evidence of actual innocence that overcame procedural bars.

We conclude that the district court erred in denying James's postconviction petition requesting a genetic marker analysis and thus reverse the decision in Docket No. 80902. We further conclude that because the district court erred in denying the petition requesting genetic marker analysis, the district court's decision in Docket No. 80907 regarding the habeas petition must be vacated. We remand both matters for further proceedings.

FACTS

On May 14, 2010, T.H., then 15 years old, reported to

police that she had been sexually assaulted by James, an adult man who was dating T.H.'s mother at the time. T.H. underwent a sexual assault exam and told the examiner that her last consensual sexual encounter was one year prior. James denied engaging in any sexual activity with T.H. At trial, he admitted to briefly stopping by T.H.'s house on the morning of May 14 and giving T.H. a ride to school, but he denied assaulting T.H. James argued that T.H. "openly disliked" him prior to her allegation of assault and that there was no physical evidence against him, including "medical findings or DNA," to corroborate T.H.'s allegations. James was ultimately convicted of multiple crimes related to T.H.'s sexual assault and sentenced in 2011 to 25 years to life.[1]

[1] Barnes was convicted by jury of two counts of sexual assault of a minor under the age of 16, two counts of open or gross lewdness, and battery with intent to commit a crime. The open or gross lewdness charges were dismissed at sentencing due to being pleaded in the alternative to the sexual assault of a minor under the age of 16 charges.

James's direct appeal and postconviction proceedings in state court were unsuccessful. In early 2019, James learned that new DNA evidence had been discovered in his case that was potentially exculpatory. Specifically, James learned that postconviction testing had been conducted on a rape kit collected from T.H. and the analysis of the perineum swab from T.H.'s rape kit revealed a DNA profile that when entered into the CODIS DNA database was a presumptive match to another man. James filed a petition requesting a genetic marker analysis in order to get confirmation of the presumptive results. He also filed a second postconviction petition for a writ of habeas corpus.

At a hearing where the district court considered James's petition requesting a genetic marker analysis, the court stated the following:

> [T]here is no indication that this was anything other than an individual known to the victim. This was not the type of case where the allegations may prove that it was some—some unknown individual. And from everything I have read on the rape shield, et cetera, provided to me, and from the Supreme Court on this case, that the fact that the victim may have had other sexual conduct would not be admissible.
>
> And, therefore, although I realize that the standard is very slight, it's the possibility, if there is no new evidence, meaning that this can't come in to show someone else, the—well, the statute, along with what I just quoted, preclude the testing. And therefore I'm denying the petition on that basis.

The district court failed to enter a written order directly addressing its denial of the petition requesting a genetic marker analysis. Instead, the district court issued an order denying the second postconviction petition for a writ of habeas corpus and implicitly ***4** denying the petition requesting a genetic marker analysis. James appeals.

DISCUSSION

James contends that because there is a reasonable possibility that he would not have been convicted if exculpatory results had been obtained from the DNA evidence identified in his petition, the district court erred in denying his genetic marker petition. He further argues the district court erred in concluding the evidence obtained from genetic marker analysis would have been inadmissible under the rape shield statute. We agree.

"[A] district court's factual findings will be given deference by this court on appeal, so long as they are supported by substantial evidence and are not clearly wrong." *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005). Questions of law are reviewed de novo. *Bailey v. State*, 120 Nev. 406, 407, 91 P.3d 596, 597 (2004).

NRS 176.0918(1) provides that "[a] person convicted of a felony ... may file a postconviction petition requesting a genetic marker analysis of evidence within the possession or custody of the State which may contain genetic marker information relating to the investigation or prosecution that resulted in the judgment of conviction." NRS 176.09183(1) provides that the district court shall order genetic marker analysis if the court finds the following:

> (a) The evidence to be analyzed exists;
>
> (b) ... the evidence was not previously subjected to a genetic marker analysis, including, without limitation, because such an analysis was not available at the time of trial; and
>
> (c) One or more of the following situations applies:
>
> (1) A reasonable possibility exists that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained

> through a genetic marker analysis of the evidence identified in the petition;
>
> (2) The petitioner alleges and supports with facts that he or she asked his or her attorney to request to have a genetic marker analysis conducted, but the attorney refused or neglected to do so;[2] or
>
> (3) The court previously ordered a genetic marker analysis to be conducted, but an analysis was never conducted,

" 'Exculpatory evidence' is defined as '[e]vidence tending to establish a criminal defendant's innocence.' " *State v. Huebler*, 128 Nev. 192, 200 n.5, 275 P.3d 91, 96 n.5 (2012) (alteration in original) (quoting *Exculpatory Evidence*, *Black's Law Dictionary* 637 (9th ed. 2009)).

[2] James claimed below that he did request that his counsel test the swabs, but does not assert on appeal that this request is the basis for his petition requesting a genetic marker analysis. He argues exclusively on appeal that NRS 176.09183(1)(c)(1) is the basis for his genetic marker analysis request, so we only address this argument.

The district court apparently concluded that there was no reasonable possibility James would not have been prosecuted or convicted because any evidence from a genetic marker analysis that indicated another male's DNA was present in the rape kit would be inadmissible under Nevada's rape shield statute. NRS 50.090 provides that in a prosecution for sexual assault, "the accused may not present *evidence of any previous sexual conduct*" of the victim in order to challenge the victim's credibility as a witness "unless the prosecutor has presented evidence or the victim has testified concerning such conduct, or the absence of such conduct." (Emphasis added.) In cases where NRS 50.090 is arguably applicable, the defendant must be given an opportunity upon motion to demonstrate that due process requires the admission of evidence concerning the victim's past sexual conduct because such evidence's probative value substantially outweighs its prejudicial effect. *Summitt v. State*, 101 Nev. 159, 163, 697 P.2d 1374, 1377 (1985).

First, we note that it is difficult to evaluate the district court's decision on the petition requesting a genetic marker analysis because it failed to state the basis for its ***5** reasoning in the order that was entered.[3] That said, we nonetheless conclude that the district court mistakenly assumed that the CODIS match to another man's DNA was evidence of "previous sexual conduct" such that the evidence would be inadmissible at a trial. There is no evidence to support the conclusion that the match is evidence of sexual conduct preceding the assault. The district court assumed that since T.H. testified that she knew James was her assailant, any other DNA evidence collected through the rape kit would be indicative of T.H. having engaged in a prior consensual sexual encounter with another person and was therefore inadmissible. However, the other man's DNA was found in a rape kit collected the day of the alleged assault, and T.H. reported that she had not engaged in any sexual conduct within a year prior to the assault. This, therefore, leaves open the possibility that the evidence indicated the identity of the person that engaged in sexual acts with T.H. on the day in question and was not evidence of sexual conduct prior to the assault. Thus, the district court's assumption was not supported by evidence in the record, and it erred in concluding that the CODIS match would have been precluded by NRS 50.090.

[3] Indeed, although the order was intended to address both the petition requesting a genetic marker analysis and the petition for habeas corpus relief, it only directly addressed the petition for habeas corpus. The only information expressly regarding the district court's decision on the petition requesting a genetic marker analysis is found in the transcript of a hearing discussing the matter and subsequent minute order.

Importantly, even if the CODIS match evidence could have been considered as falling within the scope of NRS 50.090's definition of "previous sexual conduct," such that it might arguably be inadmissible at trial, James would have been entitled to an opportunity, upon his request, to raise the issue of whether his constitutional rights would be violated by not admitting the evidence and require the court to consider whether the probative value of the evidence substantially outweighs its prejudicial effect. *Summitt*, 101 Nev. at 163, 697 P.2d at 1377. Thus, the district court's conclusion was a premature determination that the evidence would have been excluded at trial. This, coupled with the district court's refusal to even permit the requested genetic marker analysis, denied James the opportunity to litigate the admissibility of potentially critical evidence.

We must next consider if the district court nonetheless correctly denied the petition. A petitioner need only show "[a] reasonable possibility ... that the petitioner would not have been prosecuted or convicted if exculpatory results had been obtained through a genetic marker analysis of

the evidence identified in the petition." NRS 176.09183(1)(c)(1). The "reasonable possibility" standard is "more favorable to the accused than the" "reasonable probability" standard. *Wade v. State*, 115 Nev. 290, 296 n.4, 986 P.2d 438, 441 n.4 (1999) (internal quotation marks omitted). While not binding precedent, this court has interpreted the meaning of "reasonable possibility" in prior unpublished orders, and typically, when the results of the analysis would be irrelevant to the State's theory of the crime or the defendant's defense, a "reasonable possibility" does not exist. *See, e.g.*, *Langford v. State*, Docket No. 77262, 2019 WL 1646005 (Order of Affirmance, Apr. 12, 2019) (holding that when the appellant sought testing solely for the purpose of identifying the victim's DNA on bedding, when the victim testified that the appellant had laid a towel on top of the bedding before committing the assault, and the victim's and the appellant's DNA was found on the towel, a "reasonable possibility" that the appellant would not have been prosecuted or convicted did not exist). James maintained throughout his case that he is innocent of this crime and that he did not engage in any sexual activity, consensual or nonconsensual, with T.H. Accordingly, the existence of another man's DNA on T.H.'s body, as discovered in a rape kit collected the day of the alleged assault, paired with T.H.'s report that she had engaged in no sexual activity for a year prior to the assault, would have strongly supported James's defense. This case is also not analogous to that in the unpublished order mentioned above, *Langford*, where the testing requested would not have refuted the State's narrative of events. ***6** We conclude that the district court erred in denying James's petition requesting a genetic marker analysis because there was a reasonable possibility that James would not have been prosecuted or convicted had the genetic marker analysis been conducted prior to trial. Accordingly, we reverse the decision in Docket No. 80902 and remand for further proceedings on the petition requesting a genetic marker analysis.

Due to the district court's error in denying James's petition requesting a genetic marker analysis, this court cannot adequately consider whether the denial of James's habeas petition was appropriate; after further analysis is performed, there will be new evidence for the district court to consider in evaluating his habeas petition. Thus, the district court's decision in Docket No. 80907 regarding James's postconviction petition for a writ of habeas corpus is vacated, and the matter is remanded for further proceedings to follow the reception of the genetic marker analysis results.

CONCLUSION

The district court erred in concluding that the CODIS match would have been inadmissible and denying James's petition requesting a genetic marker analysis on this basis. We thus reverse the decision in Docket No. 80902. We further conclude that because the district court erred in denying the petition requesting a genetic marker analysis, the district court's decision in Docket No. 80907 regarding the habeas petition must be vacated. These matters are remanded for further proceedings on both petitions.

We concur:

Cadish, J.

Pickering, J.

All Citations

492 P.3d 1, 137 Nev. Adv. Op. 38

490 P.3d 1262
Supreme Court of Nevada.

Gustavo Adonay GUNERA-PASTRANA,
Appellant,
v.
The STATE of Nevada, Respondent.

No. 79861
|
FILED JULY 08, 2021

Synopsis

Background: Defendant was convicted in the Eight Judicial District Court, Clark County, Ronald J. Israel, J., of two counts each of sexual assault of a minor under 14 years of age and lewdness with a child under the age of 14 and sentenced to 35 years to life in prison. After denial of his motion for new trial defendant appealed.

Holdings: The Supreme Court, Parraguirre, J., held that:

district court's comment to jury before opening statements that "defendant had been arrested by the police department" and "that the police department did not go out and select somebody at random to prosecute" constituted misconduct that undermined defendant's presumption of innocence;

defendant was deprived of his ability to demonstrate that prejudice resulted from jury's misconduct when juror used internet search engine to define the term "common sense" and shared the definition with other jurors that constituted extraneous dictionary definition;

as matter of first impression, prosecutor's remark in closing argument that there were "two people that know what happened and victim told you what happened" was an indirect reference to defendant's failure to testify in violation of the Fifth Amendment and constituted prosecutorial misconduct;

issue of defendant's guilt was close, as factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial;

judicial, juror, and prosecutorial misconduct that occurred in defendant's trial were so substantial that they undermined defendant's credibility and defense, as factor in determining whether cumulative error prejudiced defendant's due process rights to a fair trial; and

cumulative effect of errors caused by judicial, juror, and prosecutorial misconducts denied defendant's due process right to a fair trial and warranted reversal of conviction.

Reversed and remanded.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

***1265** Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts each of lewdness with a child under the age of 14 and sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Attorneys and Law Firms

Darin F. Imlay, Public Defender, and Deborah L. Westbrook, Chief Deputy Public Defender, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Taleen Pandukht and Sandra DiGiacomo, Chief Deputy District Attorneys, Clark County, for Respondent.

BEFORE THE SUPREME COURT, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

Appellant Gustavo Adonay Gunera-Pastrana received an aggregate sentence of 35 years to life in prison after being convicted of two counts each of sexual assault of a minor under 14 years of age and lewdness with a child under the age of 14. Despite the gravity of these crimes, the issue of guilt was close because the State presented no physical evidence to prove that Gunera-Pastrana committed the offenses. Moreover, serious errors—judicial, juror, and prosecutorial misconduct—affected the verdict. The cumulative effect of these errors violated Gunera-Pastrana's due process right to a fair trial. Thus,

we reverse the judgment of conviction and remand for a new trial. In doing so, we clarify law pertaining to judicial, juror, and prosecutorial misconduct.

FACTS

The following facts, although the parties dispute them, led to the verdict. Gunera-Pastrana lived with his girlfriend and her two children—J.J.M., a boy, and M.M., a girl. M.M. had surgery to remove an ovary, leaving her with scars above her genitals. One day, Gunera-Pastrana was alone with M.M., who was 12 years old, and reached into her pants under the pretense that he needed to check her scars. Instead, Gunera-Pastrana rubbed M.M.'s genitals. Weeks later, he kissed M.M. in a sexual manner. On a third occasion, he digitally penetrated M.M.'s vagina and performed cunnilingus on her. M.M. told J.J.M. that she was raped. M.M. then told her mother, who called the police.

***1266** *PROCEDURAL HISTORY*

Gunera-Pastrana was charged under NRS 201.230 with two counts of lewdness with a child under the age of 14 years for touching M.M.'s genitals and kissing her. He was also charged under NRS 200.366(1)(b) with two counts of sexual assault of a minor under the age of 14 years for digitally penetrating M.M.'s vagina and performing cunnilingus on her. The jury found him guilty on all counts. He was sentenced to serve an aggregate prison term totaling 35 years to life.

DISCUSSION

Judicial misconduct

During admonishments before opening statements, the district court told the jury, "the Defendant is presumed innocent," but then asked,

> [W]hat do you really mean by presumption of innocence when we know that the Defendant has been arrested by the police department and we know that the District Attorney is prosecuting the Defendant[?] *And we also know that the police department didn't go out and select somebody at random to prosecute.*
>
> So we know that you know these things, and you could legitimately ask well, *how can we maintain this presumption of innocence when we know that he's been arrested for something and we know that the District Attorney is prosecuting him*[?] Ladies and gentlemen, I hope that what I have to say here will help you understand exactly what we mean by this presumption of innocence.

(Emphases added.) The district court later told jurors that they must find Gunera-Pastrana guilty beyond a reasonable doubt and instructed the jury on the presumption of innocence, but the court never explained the meaning of its comment "that the police department didn't go out and select somebody at random to prosecute."

Gunera-Pastrana argues that the district court committed misconduct by undermining the presumption of innocence. He did not, however, preserve the error for appellate review by objecting below. The State argues that the district court's comments did not prejudice Gunera-Pastrana's substantial rights because the district court separately instructed the jury that the jury must presume he is innocent unless his guilt is proven beyond a reasonable doubt.

We apply plain-error review to unpreserved claims of judicial misconduct, *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995), and unpreserved constitutional errors, *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015). For plain-error review, "an appellant must demonstrate that: (1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (internal quotation marks omitted).

The judicial canons require a judge to "uphold and apply the law." NCJC Canon 2.2. "In reviewing a claim of judicial misconduct, we consider the particular circumstances and facts surrounding the alleged misconduct to determine whether it was of such a nature as to have prejudiced the defendant's right to a fair trial." *Azucena v. State*, 135 Nev. 269, 272, 448 P.3d 534, 537 (2019). "The influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." *Quercia v. United States*, 289 U.S. 466, 470, 53 S.Ct. 698, 77 L.Ed. 1321 (1933) (internal

quotation marks omitted). Thus, we have explained that "[w]hat may be innocuous conduct in some circumstances may constitute prejudicial conduct in a trial setting." *Parodi*, 111 Nev. at 367, 892 P.2d at 589.

"A defendant in a criminal action is presumed to be innocent until the contrary is proved [beyond a reasonable doubt] ...." NRS 175.191. "The presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *see also* Nev. Const. art. 1, § 8. To this end, the United States Supreme Court "has declared that one accused of a crime is entitled to have his guilt ***1267** or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." *Taylor v. Kentucky*, 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978).

Undermining the defendant's presumption of innocence constitutes judicial misconduct. The district court's comment that "we know that the Defendant has been arrested by the police department" and "that the police department didn't go out and select somebody at random to prosecute" undermined Gunera-Pastrana's presumption of innocence because it improperly underscored the facts of his arrest and prosecution. *See id.* at 485, 98 S.Ct. 1930; *see also Haywood v. State*, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) ("[V]erbal references [to a defendant's in-custody status] may provide an appearance of guilt that a jury mistakenly might use as evidence of guilt.").

Because "[t]he influence of the trial judge on the jury is necessarily and properly of great weight," *Quercia*, 289 U.S. at 470, 53 S.Ct. 698 (internal quotation marks omitted), the district court's comment invited the jury to consider the facts of Gunera-Pastrana's arrest as evidence of his guilt. Thus, the district court's comment constitutes misconduct because its "words and conduct [were] likely to mold the opinion of the members of the jury to the extent that" Gunera-Pastrana may have been prejudiced. *Azucena*, 135 Nev. at 272, 448 P.3d at 538 (internal quotation marks omitted). As we have explained, the district court "should exercise restraint over judicial conduct and utterances." *Id.* at 273, 448 P.3d at 538 (quoting *State v. Miller*, 274 Kan. 113, 49 P.3d 458, 467 (2002)). We conclude that this misconduct constitutes plain error.

However, we further conclude that this error did not prejudice Gunera-Pastrana's substantial rights because the jury was separately instructed on the presumption of innocence in a manner consistent with existing law. *See Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (explaining that we presume that juries follow their instructions); *see also Morales v. State*, 122 Nev. 966, 972, 143 P.3d 463, 467 (2006) (holding that an unpreserved violation of the defendant's presumption of innocence did not warrant reversal). Thus, this error alone does not warrant reversal. *Juror misconduct*

At trial, M.M. testified against Gunera-Pastrana, but she had trouble remembering the precise sequence of each instance of sexual misconduct. In closing, the State repeatedly argued that, although M.M. did not remember the order of each instance of sexual misconduct, the jury should nonetheless apply common sense to evaluate her testimony. The district court also instructed the jury to apply common sense to its deliberations. After the verdict was announced, the jury foreman told the bailiff "that it took [g]oogling common sense ... to reach a verdict." The district court told the parties about the jury's googling, noting that "both sides were ... heavily emphasizing common sense [in closing]."

The district court held an evidentiary hearing, and the jury foreman testified that two jurors googled the definition of "common sense" on their cell phones—despite being instructed not to use the internet—and read the definitions to other jurors. He also testified that "[t]he [g]oogl[ing] was done toward the end of deliberation" and that the jury had already reached a verdict on the lewdness charges. After the foreman testified, the district court suggested to the parties that there was no reason to question other jurors. Thus, the jurors who actually googled "common sense" were not questioned as to what definition of the term they used. Gunera-Pastrana moved for a new trial, but the district court denied his motion. The district court concluded that the term "common sense" was not in any of the charges and "was inconsequential and extraneous to the finding of guilt," but the court inexplicably omitted from the order denying the motion its previous statement on the record that "both sides were ... heavily emphasizing common sense [in closing]."

Gunera-Pastrana argues that the district court erred by not analyzing the prejudicial effect of the extraneous evidence in the context of the trial as a whole. He adds that the ***1268** district court found on the record that both parties relied heavily on the term "common sense" in closing but disregarded that finding in its order denying his motion for a new trial. The State concedes that jurors googling "common sense" was misconduct but argues that the term

was not in any of the charges and there was no resulting prejudice.

"A denial of a motion for a new trial based upon juror misconduct will be upheld absent an abuse of discretion by the district court," *Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003), but we review de novo whether a jury's use of extraneous information was prejudicial, *Jeffries v. State*, 133 Nev. 331, 336, 397 P.3d 21, 27 (2017). To "prevail on a motion for a new trial based on juror misconduct, the defendant must present admissible evidence sufficient to establish: (1) the occurrence of juror misconduct, and (2) a showing that the misconduct was prejudicial." *Meyer*, 119 Nev. at 563-64, 80 P.3d at 455. In *Meyer v. State*, we explained that the jury's "exposure to extraneous information via independent research ... must be analyzed [for prejudice] in the context of the trial as a whole to determine if there is a reasonable probability that the information affected the verdict." *Id.* at 565, 80 P.3d at 456 (footnote omitted). To guide this analysis, we explained that the district court should consider "how the material was introduced to the jury (third-party contact, media source, independent research, etc.), the length of time it was discussed by the jury, and the timing of its introduction (beginning, shortly before verdict, after verdict, etc.)." *Id.* at 566, 80 P.3d at 456. These factors, however, are not exhaustive. *Jeffries*, 133 Nev. at 335, 397 P.3d at 26.

In this case, the jury's use of Google to define the term "common sense" is sufficiently analogous to the use of an extraneous dictionary definition to warrant application of the *Meyer* framework. While *Meyer* explained that the jury's use of an extrinsic dictionary definition is "unlikely to raise a presumption of prejudice," 119 Nev. at 565 & n.28, 80 P.3d at 456 & n.28, it left open the question of how the district court should analyze that issue. We now clarify that the district court should apply the *Meyer* framework and a juror who proffered an extraneous dictionary definition should be questioned as to what definition was applied, *see State v. Williamson*, 72 Haw. 97, 807 P.2d 593, 597 (1991), so that the district court can ascertain whether "the jury might have been misled" by the definition, *People v. Karis*, 46 Cal.3d 612, 250 Cal.Rptr. 659, 758 P.2d 1189, 1208 (1988). In assessing whether the definition applied by jurors was prejudicial, the relevant inquiry remains "whether the average, hypothetical juror would be influenced by the juror misconduct," *Meyer*, 119 Nev. at 566, 80 P.3d at 456, and whether "there is a reasonable probability that [the information] affected the verdict," *id.* at 565, 80 P.3d at 456.

Although the State argues that no prejudice resulted because the term "common sense" was not in any of the charged crimes, we reject its position that prejudice can result only if an extraneous dictionary definition pertains to a term in the charges. As the district court stated on the record, both sides heavily emphasized the term in closing. Moreover, the district court instructed the jury to apply common sense to its deliberations. Because the term was emphasized at trial, the jury's use of Google to ascertain its meaning could have prejudiced Gunera-Pastrana. The crux of this analysis, then, is whether there was a reasonable probability that the definition the jurors applied "affected the verdict." *Id.* The district court suggested to the parties that there was no need to question the jurors who used Google, so there is no record of what definition the jury applied. Thus, Gunera-Pastrana was deprived of his ability to demonstrate that prejudice resulted from the jury's misconduct. Thus, we conclude that the jury's misconduct contributes to cumulative error.

Prosecutorial misconduct

At the end of the State's closing argument, the prosecutor asserted, "There really are two people who know exactly what happened in that living room and that bedroom that can talk about it. And that's [M.M.] and the—." Gunera-Pastrana objected, and the district court sustained the objection. The State then *repeated*, "There's two people that ***1269** know what happened, and [M.M.] told you what happened. She told you what he did to her."

Gunera-Pastrana argues that the State's comments constitute prejudicial prosecutorial misconduct because the State indirectly commented on his decision not to testify in violation of the Fifth Amendment. U.S. Const. amend. V; *see also* Nev. Const. art. 1, § 8. The State answers that it did not indirectly comment on Gunera-Pastrana's failure to testify and that its comments were not of such a nature that the jury would naturally and necessarily take them that way. It adds that, even if the comments were improper, the jury was instructed to draw no inferences of guilt from the defendant's failure to testify, so any error was harmless.

We apply a two-step analysis in our review of prosecutorial misconduct claims. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). "First, we must determine whether the prosecutor's conduct was

improper. Second, if the conduct was improper, we must determine whether the improper conduct warrants reversal." *Id.* (footnote omitted). "With respect to the second step of this analysis, this court will not reverse a conviction based on prosecutorial misconduct if it was harmless error." *Id.*

The Fifth Amendment and the Nevada Constitution alike forbid a prosecutor from directly commenting on the defendant's decision not to testify. *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965); *see also* Nev. Const. art. 1, § 8. To determine whether an *indirect* reference violates the Fifth Amendment, we examine "whether 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." *Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991) (quoting *United States v. Lyon*, 397 F.2d 505, 509 (7th Cir. 1968)). "The standard for determining whether such remarks are prejudicial is whether the error is harmless beyond a reasonable doubt." *Id.*

In *Harkness*, the State commented that, "If we have to speculate and guess about what really happened in this case, whose fault is it if we don't know the facts in this case?" *Id.* at 802, 820 P.2d at 760. The State also said, "[W]e know so little about the case really in terms of what the defendant told us, which naturally raises the logical question, what is he hiding?" *Id.* at 803, 820 P.2d at 760. In holding that the State violated the Fifth Amendment, we reasoned that "the question 'whose fault is it if we don't know the facts in this case?' suggests that the accused, rather than the [S]tate, has the burden of proving or disproving the crime." *Id.* at 804, 820 P.2d at 761.

We have not addressed whether comments like the prosecutor's in this case—i.e., "[t]here's two people that know what happened, and [the victim] told you what happened"—are indirect references to the defendant's failure to testify. Three persuasive opinions have held that similar comments are an indirect reference to a defendant's failure to testify. See *Bowler v. United States*, 480 A.2d 678, 682-84 (D.C. 1984) ("[Y]ou see there were two people there that day, Mr. Bowler and Mr. Jackson. And Mr. Jackson is dead now, so he can't talk."); *State v. Williams*, 673 S.W.2d 32, 35 (Mo. 1984) ("There's only two people back there that know[ ] exactly what happened and can tell you—who know[ ] exactly what happened back there."); *State v. Miller*, 76 N.M. 62, 412 P.2d 240, 245-46 (1966) ("There's only two people that actually know what happened in the liquor store that night. One of those persons is dead ...."). We find the foregoing cases persuasive. Thus, we clarify that remarking that "[t]here's two people that know what happened," with one of those people being a defendant who has invoked the right not to testify, is an impermissible indirect reference because it is "of such a character that the jury would naturally and necessarily take it to be comment on the defendant's failure to testify." *Harkness*, 107 Nev. at 803, 820 P.2d at 761 (internal quotation marks omitted).

Here, like the prosecutorial statements in the foregoing persuasive cases, the State indirectly referenced Gunera-Pastrana's failure to testify by arguing that only two people know what happened, and M.M. ***1270** was the only one of the two to testify. Thus, these comments were of such a character that the jury may have naturally and necessarily taken them to be a comment on Gunera-Pastrana's failure to testify, thereby suggesting that he had the burden of disproving these crimes. More troubling, the prosecutor repeated her comment after the district court sustained Gunera-Pastrana's objection. Accordingly, we conclude that this indirect reference to Gunera-Pastrana's failure to testify violated the Fifth Amendment and Nevada Constitution, and constituted prosecutorial misconduct.

The State argues that this error was harmless because the jury was instructed that it could not draw any inference of guilt from the fact that Gunera-Pastrana did not testify. This argument is contrary to our precedent. *See id.* at 804-05, 820 P.2d at 762 ("Although the jury was instructed to draw no inferences from appellant's silence, this instruction was not a sufficient cure for the prosecutor's unconstitutional remarks [on the defendant's failure to testify]."). Moreover, as explained below, we need not decide whether the separate jury instruction rendered this error harmless beyond a reasonable doubt because cumulative error warrants reversal.

Cumulative error

Although the State's misconduct alone potentially warrants reversal, the foregoing errors could have cumulatively prejudiced Gunera-Pastrana's due process right to a fair trial. *See DeChant v. State*, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000) ("Although we have concluded that... [one trial error] alone would warrant reversal, we have also analyzed the cumulative effect of the errors at trial."). Thus, our analysis turns to

Gunera-Pastrana's argument that cumulative error warrants reversal.

"The cumulative effect of errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (internal quotation marks omitted). We consider three factors when reviewing for cumulative error: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Id.* (internal quotation marks omitted).

The issue of guilt was close

Gunera-Pastrana argues that the issue of guilt was close because M.M.'s testimony changed significantly over time. The State argues that the issue of guilt was not close because overwhelming evidence supported the verdict.

M.M.'s testimony revealed three inconsistencies that led the parties to dispute her credibility. First, according to testimony from M.M.'s mother and a police officer, M.M. said that Gunera-Pastrana kissed her the day she told her mother about the sexual misconduct. M.M. separately testified at the preliminary hearing that immediately after Gunera-Pastrana kissed her, she told her mother about the sexual misconduct. At trial, however, M.M. testified that Gunera-Pastrana kissed her two weeks before she told her mother about the misconduct. Second, M.M. testified at the preliminary hearing that the cunnilingus and digital penetration occurred weeks before she told her mother. At trial, however, M.M. testified that these acts occurred the day before she told her mother. Third, M.M. testified at the preliminary hearing that Gunera-Pastrana touched her beneath her underwear, but testified at trial that the touching occurred over her underwear.

Given M.M.'s conflicting testimony, the parties disputed her credibility.[1] However, no physical evidence proved that Gunera-Pastrana committed these crimes. Thus, the issue of guilt came down to whether M.M.'s allegations were truthful. Based on M.M.'s conflicting testimony and the lack of physical evidence to prove the crimes, we conclude that the issue of guilt was close.

[1] We recognize that other witnesses testified against Gunera-Pastrana. However, this testimony was based on M.M.'s statements, which were ultimately inconsistent.

Three substantial errors undermined Gunera-Pastrana's defense

Gunera-Pastrana argues that the quantity and character of the errors warrant ***1271** reversal. The State argues that Gunera-Pastrana presented no meritorious claim of error.

As we concluded, judicial, juror, and prosecutorial misconduct occurred at trial. The judicial misconduct violated Gunera-Pastrana's presumption of innocence by underscoring the facts of his arrest and prosecution. Jurors committed misconduct by googling a definition of "common sense" after the parties disputed the credibility of M.M.'s testimony and the State urged the jury to nonetheless apply common sense to find Gunera-Pastrana guilty. The State committed misconduct by insinuating that Gunera-Pastrana was less believable because he invoked his right not to testify. Moreover, the State *repeated* its argument that Gunera-Pastrana failed to testify after the district court sustained his objection. These errors "together had the effect of unfairly undermining [Gunera-Pastrana]'s credibility and defense in a rather close case." *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); *see also Valdez*, 124 Nev. at 1197, 196 P.3d at 482 (reversing for cumulative error where "the quantity and character of the errors was substantial"). Thus, we conclude that these errors were substantial.

The charged crimes were grave

Gunera-Pastrana argues that the crimes he was convicted of were grave, which the State concedes. The crimes here were grave because they led to an aggregate sentence of 35 years to life in prison.

The errors cumulatively denied Gunera-Pastrana a fair trial

"[W]here the government's case is weak, a defendant is more likely to be prejudiced by the effect of cumulative errors." *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996). Here, the issue of guilt was close because—with no physical evidence to prove the crimes—the verdict came down to whether the jury believed M.M.'s testimony.[2] The judicial, juror, and

prosecutorial misconduct was substantial because it undermined Gunera-Pastrana's credibility and defense. Gunera-Pastrana was convicted of grave crimes. Accordingly, we conclude that the cumulative effect of errors denied Gunera-Pastrana's due process right to a fair trial.[3]

[2] In *Franks v. State*, we explained that, in the context of sufficiency-of-the-evidence review, a sexual assault victim's testimony "need not be corroborated." 135 Nev. 1, 7, 432 P.3d 752, 757-58 (2019). Our holding is consistent with *Franks* because we are reviewing whether the cumulative effect of trial errors denied Gunera-Pastrana the right to a fair trial, which requires us to ascertain whether the issue of guilt was close rather than the sufficiency of the evidence.

[3] Gunera-Pastrana also argues that (1) the district court gave erroneous lewdness and flight instructions, (2) the State committed misconduct by asking improper leading questions, and (3) he was denied a fair venire because the jury commissioner did not comply with NRS 6.045(3)(c). While we have considered these arguments, we need not reach them given the disposition of this appeal.

CONCLUSION

"A criminal defendant has a fundamental right to a fair trial secured by the United States and Nevada Constitutions." *Watters v. State*, 129 Nev. 886, 889, 313 P.3d 243, 246 (2013) (internal quotation marks omitted). Indeed, "[i]t is elementary that a fair trial in a fair tribunal is a basic requirement of due process." *Weiss v. United States*, 510 U.S. 163, 178, 114 S.Ct. 752, 127 L.Ed.2d 1 (1994) (internal quotation marks omitted). Cumulative error here violated Gunera-Pastrana's due process right to a fair trial. We therefore reverse the judgment of conviction and remand for a new trial.

We concur:

Stiglich, J.

Silver, J.

All Citations

490 P.3d 1262, 137 Nev. Adv. Op. 29

490 P.3d 1272
Supreme Court of Nevada.

The STATE of Nevada, Appellant,
v.
John Joseph SEKA, Respondent.

No. 80925
|
FILED JULY 08, 2021

Synopsis

Background: Following convictions for murder and robbery, the District Court, Clark County, Kathleen E. Delaney, J., granted defendant's motion for new trial. State appealed.

The Supreme Court, Silver, J., held that new DNA evidence was not favorable to defendant, and thus defendant was not entitled to new trial 19 years after conviction.

Reversed.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

***1273** Appeal from a district court order granting a motion for a new trial in a criminal matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Attorneys and Law Firms

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BEFORE THE SUPREME COURT, PARRAGUIRRE, STIGLICH, and SILVER, JJ.

OPINION

By the Court, SILVER, J.:

John "Jack" Seka was convicted in 2001 of two counts of murder and two counts of robbery related to the 1998 killings of his boss Peter Limanni and contract worker Eric Hamilton. Both bodies were transported in work vehicles and dumped in remote desert areas. Although substantial circumstantial and physical evidence pointed to Seka as the killer, no physical evidence, aside from fingerprints on a board covering Hamilton's body, connected Seka to the desert locations where the bodies were found. Genetic marker analysis (DNA) testing at the time of trial could only exclude Seka from DNA collected from a few pieces of evidence. But DNA testing performed in 2018 and 2019 both excluded Seka from DNA on several pieces of evidence and discovered other DNA profiles on some of that evidence. In 2020, based on these new DNA test results, the district court granted a new trial.

NRS 176.515(1) allows a court to grant a new trial within two years after the original trial "on the ground of newly discovered evidence." But NRS 176.09187(1) allows a defendant to move for a new trial at any time where DNA test results are "favorable" to the defendant. We have never addressed what constitutes "favorable" results under that statute. We now clarify that, consistent with *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991), new DNA test results are "favorable" where they would make a different result reasonably probable upon retrial. We conclude that the new evidence here fails to meet this requirement, and we reverse the district court's order granting a new trial.

I.

Peter Limanni established Cinergi HVAC, Inc., in May 1998. The business, located at 1933 Western Avenue in Las Vegas, was funded by investors Takeo Kato and Kaz Toe. Limanni hired his friend Jack Seka to help out with the business, paying Seka in cash. Limanni and Seka lived together at Cinergi.[1] Limarmi typically drove the business's brown Toyota truck, while Seka drove one of the company vans.

[1] According to Seka, no one else lived with them at the business.

The business did poorly, and by the beginning of that summer Kato and Toe wanted their investment returned. Instead, Limanni decided to open a cigar shop at Cinergi's address, and he, along with Seka, began building a wooden walk-in humidor to display the cigars.

Limanni also began dating Jennifer Harrison that August. He told Harrison and others that he could disappear and become a new person. Limanni closed his bank accounts on November 2 after removing large sums of money. On November 4, Limanni visited ***1274** Harrison at her home and spoke of his plans for the cigar shop. As he left, he mentioned calling Harrison the next day and going with her to lunch. That same day, Limanni picked Seka up from the airport and drove him back to Cinergi after Seka returned from visiting family back East.

The morning of November 5, Harrison was unable to reach Limanni. Harrison drove to Cinergi and arrived around noon to find Seka passed out on the floor and a girl on the couch. A few hundred dollars in cash was lying on the desk. Limanni's clothes, belt, and shoes were in his room, but Limanni was not there. Harrison also found a bullet cartridge on the floor, which did not look as though it had been fired. Limanni's dog, whom Limanni took everywhere, was also at Cinergi. At the time, Harrison believed Limanni had simply disappeared, as he'd previously threatened to do. Seka dissuaded her from filing a missing person report.

On the morning of November 16, a truck driver noticed a body lying in a remote desert area between Las Vegas Boulevard South and the I-15, south of what is now St. Rose Parkway. The body, a male, was located approximately 20 feet off Las Vegas Boulevard South, in the middle of two tire tracks that made a half circle off and back onto that road. He had been shot through the back, in the left flank, and in the back of the right thigh with a .357 caliber gun. There was no evidence of skin stippling, suggesting the bullets were not fired at a close range. The victim was wearing a "gold nugget" ring and had a small laceration on his right wrist. Seven pieces of lumber had been haphazardly stacked on the body. The victim had a piece of paper in his pocket with the name "Jack" and a telephone number. Detectives learned the victim was Eric Hamilton, who struggled with drug use and mental illness and had come from California to Nevada for a fresh start. According to his sister, Hamilton had been doing construction work for a local business owner. Detectives determined Hamilton had died sometime in the prior 24 hours. They traced the telephone number in his pocket to Cinergi.

Notably, a cigarette butt was found a few feet from the body. A Skoal tobacco container, a second cigarette butt, a beer bottle, and a second beer bottle were found at varying distances of approximately 15 to 120 feet away from the body. All of the items were located in the desert area within several yards of Las Vegas Boulevard South.

The following day, a break-in was reported at 1929 Western Avenue, a vacant business next door to Cinergi. The front window was broken, and the glass and carpet were bloodied. There were also blood drag marks, and three bullets and bullet fragments. A bloodied dark blue jacket contained bullet holes that matched Hamilton's injuries. A baseball hat and a "gold nugget" bracelet were also found at the scene. An officer checked the perimeter that morning and looked into the communal dumpster, which contained only a few papers. A nearby business owner indicated the dumpster had been recently emptied.

While the police were investigating 1929 Western, Seka drove up in Cinergi's Toyota truck—Limanni's work vehicle. The truck had been recently washed. Officers talked to Seka, who seemed nervous. Seka told them he worked at Cinergi with Limanni, who was in the Reno area with his girlfriend. Officers asked Seka if they could check inside Cinergi to see if anyone was injured, and Seka agreed. Officers became concerned after spotting a bullet on the office desk and some knives, and they handcuffed Seka and searched the business. In the room being remodeled as a humidor, they found lumber that matched the lumber covering Hamilton's body. They also found a bullet hole in the couch, a .32 cartridge bullet in the toilet, and both .357 and .32 bullets in the ceiling. Officers looked above the ceiling tiles and found a wallet containing Limanni's driver's license, social security card, and birth certificate as well as credit cards and a stolen purse. In a garbage can inside, they found Limanni's photographs alongside some papers and personal belongings. The officers eventually left to go to lunch, unhandcuffing Seka and leaving him at Cinergi. They were gone for a little over an hour.

When the officers returned, they noticed that the bullet that had been on the desk was missing. Seka opined that the building owner had removed it, but the building owner denied ***1275** having been inside or having touched the bullet. Officers also checked the dumpster again and this time saw the bottom of the dumpster was now filled with clothing, papers, cards, and photographs, some of it in Limanni's name. Some of the items were burnt. Detectives also investigated and impounded the Toyota

truck Seka drove up to the premises with, which had apparent blood inside of the truck and on a coil of twine inside.

Officers Mirandized Seka, who agreed to be interviewed at the detective bureau. Seka told the detective that Limanni had vanished weeks ago and that Seka was trying to keep up the business, alone. He described a man named "Seymore" who had done odd jobs for Cinergi and claimed he last spoke to Seymore in late October, when Seymore called Seka's cell phone to ask about doing odd jobs. Detectives determined "Seymore" was Hamilton. The detective interviewing Seka told Seka he was a murder suspect, at which point Seka "smiled" and stated, "You're really starting to scare me now. I think you'd better arrest me or take me home. Do you have enough to arrest me right now?" The detective explained that officers would wait until the forensic evidence returned before making an arrest, and then he drove Seka back to Cinergi.

Seka told detectives he had a dinner appointment and needed a vehicle. Detectives explained they were impounding the Toyota truck but told Seka that he could take a company van. At the time, there were two vans: a solid white van and a van with large advertising decals. Detectives handed Seka the keys to the solid white van, and Seka made a comment that suggested he would rather take the decaled van. Becoming suspicious, detectives searched the decaled van and found blood droplets in the back. They allowed Seka to leave in the solid white van; Seka promised to return following dinner. But Seka did not return. Instead he told property manager Michael Cerda he was leaving and asked Cerda to look after the dog. Seka also asked Harrison if he could borrow her car, telling her he needed to leave town to avoid prosecution for murder and that he was "going underground." Eventually, Seka returned to the East Coast to stay with his girlfriend.

Limanni's body was discovered December 23 in California, approximately 20 feet from Nipton Road in an isolated desert area near the Nevada border, Limanni was wearing only boxer shorts. Faded tire tracks showed a vehicle had driven away from the body. The body's condition indicated Limanni had been dead for several weeks. He had been shot at least 10 times with a .32 caliber gun. Seven shots were to the head.

Seka was arrested in Pennsylvania in March 1999. The murder weapons, a .32 caliber firearm and a .357 caliber firearm, were never found.

II.

The State charged Seka with two counts of murder with use of a deadly weapon (open murder) and two counts of robbery with use of a deadly weapon, and filed notice of its intent to seek the death penalty. The case went to trial from February 12 to March 1, 2001. The State's theory of the case was that Seka killed Limanni after learning Limanni was going to abandon the business and betray Seka by leaving him alone to deal with the fallout of the failed business. The State argued Hamilton may have either helped Seka or simply been an innocent bystander who was shot as he attempted to flee.

Some of Seka's friends testified Limanni treated Seka well, but Jennifer Harrison recalled Limanni treating Seka poorly and testified that Limanni always referred to Seka as "his nigger." Harrison also explained Limanni controlled Seka's access to money and often ordered Seka to run menial errands. Seka once told Harrison that Limanni's anger and name-calling was "just the tip of the iceberg." Harrison further testified that she called Seka the morning Limanni disappeared, and Seka reported Limanni had left early that morning. Harrison thought Seka seemed "really down," and Seka told Harrison that he had just discovered his girlfriend was cheating on him. But Seka's girlfriend testified that nothing had happened between them during Seka's visit and that Seka had not been upset with her.

***1276** Notably, Seka's friend of 12 years, Thomas Cramer, testified to once overhearing Limanni treat Seka poorly during a phone call. Then, during the time that Seka was hiding from being apprehended by the police for murder, Cramer asked Seka about the rumor that he killed Limanni. Seka responded saying, "They didn't even find the body." On another occasion, Seka threatened Cramer by saying, "Do you want me to do to you what I did to Pete Limanni?" Finally, Cramer testified Seka told him that Limanni had come at Seka with a gun, and Seka had wrested the gun from Limanni and shot him in self-defense. During cross-examination by Seka's attorneys, Cramer was impeached by acknowledging to the jury that he had been treated for alcohol addiction and depression, had been diagnosed with major depressive disorder and PTSD, was on medication, and admitted that he had previously been treated at mental hospitals. He also admitted to being upset with Seka, who was friends with Cramer's girlfriend and helped her secure a restraining order against Cramer. Seka was also instrumental in having Cramer put into a mental institution.

During trial, the evidence established that a .32 caliber firearm was used to kill Limanni, while a .357 caliber

firearm was used to kill Hamilton. Both types of ammunition were found at Cinergi, where Seka had been living and working. The evidence further suggested that only one gun had been used at each shooting. The evidence also showed Limanni's body had been transported in the decaled company van, while Hamilton's body had been transported in the bed of the brown Toyota pickup truck. The tires on the Toyota truck made impressions similar to the tire tracks near Hamilton's body. DNA from a glass shard further established that Hamilton was the victim killed at 1929 Western, the business next to Cinergi. Of the wood covering Hamilton's body, two pieces bore Seka's prints, and one bore Limanni's. Beer bottles in Cinergi's trash yielded both Seka's and Hamilton's prints. But prints on the beer bottle found in the desert area near Hamilton's body did not match Seka, and DNA evidence from Hamilton's fingernails excluded Seka as a contributor. The State did not argue that Seka dropped the trash found near Hamilton's body.

During closing arguments, the State theorized that Seka killed Limanni after learning Limanni was going to abandon the business and betray Seka by leaving him alone to deal with the fallout of the failed business. The State argued Hamilton may have either helped Seka or simply been an innocent bystander who was shot as he attempted to flee. But defense counsel theorized that Cinergi's investors, who had lost a substantial sum on Cinergi and disliked Limanni, came to the business after Seka had moved out, took Limanni out into the desert and killed him, and also shot Hamilton, an innocent bystander. Defense counsel argued that no evidence implicated Seka in the murders, that Seka had no motive to kill the victims, and that the State's case against Seka was not believable. Defense counsel contended Limanni was a con man and highlighted discrepancies and weaknesses in the circumstantial evidence to undermine the State's case and suggest alternative theories.[2] Relevant here, defense counsel pointed out, through photographs in evidence showing Seka smoking, that the cigarette butts found near Hamilton's body were a different kind than those Seka smoked and therefore did not tie Seka to the crime.

[2] For example, defense counsel argued that Cinergi investors lied to detectives; Cramer's testimony of Limanni gurgling blood was inconsistent with the lack of blood at Cinergi; Cramer suffered from mental illness and developed the story to get Seka away from Cramer's girlfriend; Cramer changed his story between the preliminary hearing and trial; testimony suggested other people had access to and frequented Cinergi; Seka was too small to have singlehandedly put Limanni's 200-pound corpse in the vehicle, drive him to the state line, and bury him; Seka would not have left his own phone number in Hamilton's pocket had he killed Hamilton; etc.

The jury found Seka guilty of first-degree murder with use of a deadly weapon and robbery in regard to Hamilton, and of second-degree murder with use of a deadly weapon and robbery as to Limanni, but the jury deadlocked at the penalty phase. Seka thereafter stipulated to life imprisonment without the possibility of parole to avoid the death penalty.

***1277** III.

Seka filed a direct appeal in May 2001, and we affirmed the conviction. Seka thereafter petitioned for a writ of habeas corpus, which the district court denied, and we affirmed the denial.

In 2017, Seka requested a DNA test of evidence collected at Hamilton's remote desert crime scene and the surrounding area. Seka argued that had items collected by detectives yielded exculpatory evidence at trial, he would not have been convicted, particularly in light of the evidence implicating Cinergi investors and undermining Cramer's testimony of Seka's confession. The district court granted Seka's request, and the following items were tested for DNA in late 2018 and early 2019:

(1) Two cigarette butts found near Hamilton's body. Testing in 1999 failed to find any testable DNA. Testing in 2018 failed to obtain DNA from one cigarette butt, but a partial profile from the second cigarette butt did not match either Hamilton or Seka, and both were excluded as contributors.[3]

[3] The State put the results from the second cigarette butt into the CODIS system, a database of DNA profiles and other samples from various arrestees and offenders, but did not find any matches.

(2) Hamilton's fingernail clippings. Testing in 1998 excluded Seka as a contributor to the DNA from the clippings on one hand. The 2018 DNA testing likewise excluded Seka as a contributor to the DNA from the clippings on both hands but found possible DNA from another person, although it was such a small amount of DNA[4] that it could have been transferred from something as benign as a handshake or DNA may not have actually

existed.

[4] The forensic scientist explained that the test results showed 99 percent of the DNA coming from Hamilton as the DNA contributor and 1 percent of the DNA coming from an unknown contributor.

(3) Hairs found underneath Hamilton's fingernails. In 1998, the DNA profile included Hamilton and excluded Seka. The 2018 testing likewise found only Hamilton's DNA on the hairs.[5]

[5] Statistically, it was 3.24 billion times more likely that the DNA was Hamilton's than that of a different, unknown contributor.

(4) The Skoal tobacco container found near Hamilton's body. The 2019 testing showed two contributors, but Hamilton and Seka were excluded. The forensic scientist explained that an old technique used to find latent fingerprints, "huffing," may have been used on this item and may have contaminated the DNA profile. Moreover, because at the time of the original trial the State did not have the capability to test for "touch DNA," the scientists may not have worn gloves while examining the evidence, or crime scene analysts may have used the same gloves and same fingerprint dusting brush while processing evidence, thereby adding to or transferring DNA.

(5) A beer bottle found off the road in the desert in the vicinity of Hamilton's body. The 2019 DNA testing excluded Hamilton and Seka but included a female contributor. As with the Skoal tobacco container, the forensic scientist testified that huffing and other outdated procedures may have contributed unknown DNA onto the item.

(6) The baseball hat found at 1929 Western. The 2019 DNA testing showed three contributors, including Hamilton, but the results were inconclusive as to Seka. The forensic scientist explained the cap was kept in an unsealed bag along with a toothbrush also found at 1929 Western. Critically, he further testified that it was impossible to know how many times the bag had been opened or closed during the jury trial or whether the hat had been contaminated, such as by jurors holding it or talking over it.

Based on these DNA results, Seka moved for a new trial, arguing the new results both exculpated Seka and implicated an unknown person in the crimes. The district court found that "[t]he multiple unknown DNA profiles are favorable evidence" and granted the motion.

Arguing the new DNA evidence does not warrant a new trial, the State appeals.

***1278** IV.

NRS 176.515(1) allows a court to grant a new trial "on the ground of newly discovered evidence." That statute generally requires a defendant to move for a new trial within two years of the verdict.[6] NRS 176.515(3). An exception applies where the newly discovered evidence comes from DNA testing, in which case the defendant may move for a new trial at any time if the evidence is "favorable" to the defendant. NRS 176.09187(1). But NRS 176.09187 does not define the term "favorable." We review the district court's decision to grant a new trial for an abuse of discretion. *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284 (1991). But we review issues involving statutory interpretation de novo. *Weddell v. H20, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012).

[6] We note that generally the district court judge who presided at trial should be the judge who hears and determines the motion for a new trial whenever possible, as the trial judge is in the best position to determine whether new evidence is "favorable" to the defendant, *see* NRS 176.09187. We encourage the district courts to be exceptionally mindful of this and be very familiar with the trial record if the trial judge is unavailable to preside over a motion for a new trial.

We have never addressed what makes DNA evidence "favorable" under NRS 176.09187(1) or the circumstances under which new DNA evidence warrants a new trial. At the outset, we note "courts have uniformly held that the moving party bears a heavy burden" on a motion for a new trial on newly discovered evidence. *INS v. Abudu*, 485 U.S. 94, 110, 108 S.Ct. 904, 99 L.Ed.2d 90 (1988). And over a century ago we set forth elements for determining whether newly discovered evidence in general warrants a new trial. *See* *Sanborn*, 107 Nev. at 406, 812 P.2d at 1284-85 (citing *McLemore v. State*, 94 Nev. 237, 239-40, 577 P.2d 871, 872 (1978)); *see also Oliver v. State*, 85 Nev. 418, 424, 456 P.2d 431, 435 (1969); *Whise v. Whise*, 36 Nev.

16, 24, 131 P. 967, 969 (1913). In *Sanborn* we explained

> the evidence must be: newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.

107 Nev. at 406, 812 P.2d at 1284-85. As these factors are conjunctive, *id.*, a new trial must be denied where the movant fails to satisfy any factor.

We interpret NRS 176.09187's mandate that new evidence be "favorable" in concert with this long-honored caselaw.[7] *Cf. First Fin. Bank N.A. v. Lane*, 130 Nev. 972, 978, 339 P.3d 1289, 1293 (2014) ("This court will not read a statute to abrogate the common law without clear legislative instruction to do so."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 318-19 (2012) (addressing the presumption that a statute will not be read to alter the common law absent the statute's clear intent to do so). We conclude that to warrant a new trial, the "favorable" DNA evidence must do more than merely support the defendant's position or possibly alter the outcome of trial. *See Whise*, 36 Nev. at 24, 131 P. at 969 ("[I]t is not sufficient that the new evidence, had it been offered at trial, *might* have changed the judgment." (emphasis added)). The new DNA evidence must be material to a key part of the prosecution or defense, or so significant to the trial overall, such that had it been introduced at trial, a different result would have been reasonably probable. *See id.* ("Newly discovered evidence, to have any weight in the consideration of a trial court, must be material or important to the moving party ... such as to render a different result reasonably certain.").

[7] Seka acknowledges the term "favorable" in NRS 176.09187 is synonymous with *Sanborn's* standard.

The weight of the new DNA evidence will ultimately depend on the facts and circumstances of each individual case, including the sufficiency of the evidence adduced at trial. *Cf.* ***1279** *State v. Parmar*, 283 Neb. 247, 808 N.W.2d 623, 631-34 (2012) (comparing and contrasting cases where the new DNA evidence "probably would [or would not] have produced a substantially different result if the evidence had been offered and admitted at... trial"); see *also* *Walker v. State*, 113 Nev. 853, 873, 944 P.2d 762, 775 (1997) (concluding evidence would support the defendant's argument but ultimately was not of a caliber that would likely lead to a different result). But we stress that newly discovered DNA evidence cannot be considered favorable where it does not undermine the jury's verdict and is cumulative under the facts of the case.[8] *Cf. Cutler v. State*, 95 Nev. 427, 429, 596 P.2d 216, 217 (1979) (concluding cumulative evidence did not warrant a new trial); *Bramlette v. Titus*, 70 Nev. 305, 312, 267 P.2d 620, 623-24 (1954) (same). Newly discovered evidence is also not favorable where it has no relevance to the circumstances of the crime. *Cf. Mortensen v. State*, 115 Nev. 273, 287, 986 P.2d 1105, 1114 (1999) (explaining the new evidence did not relate to the circumstances of the murder and did not inculpate a new suspect or exculpate the defendant). Nor is newly discovered evidence favorable where it impeaches a witness without contradicting or refuting any of the trial testimony supporting the verdict. *Cf. id.* at 288, 986 P.2d at 1114 (concluding introducing the evidence "would simply be an attempt to discredit" the witness where that evidence did not contradict or refute the witness's trial testimony). Likewise, the newly discovered evidence will not be favorable if it merely goes to an issue that was fully explored at trial and is not sufficiently material to make a different verdict probable. *Cf. D'Agostino v. State*, 112 Nev. 417, 423-24, 915 P.2d 264, 267-68 (1996) (concluding newly discovered evidence about benefits offered to a witness did not warrant a new trial where the witness's criminal background and cooperation with police had been explored at trial); *see also Simmons v. State*, 112 Nev. 91, 103, 912 P.2d 217, 224 (1996) (concluding newly discovered evidence that was relevant to the question of where the victim was killed did not warrant a new trial where substantial evidence already pointed to the murder scene).

[8] Although *LaPena v. State*, Docket No. 73826 (Order of Affirmance, October 11, 2018), is unpublished, it is also instructive here. There, we considered newly discovered DNA evidence that impeached a key witness's testimony of the

murder but concluded the DNA evidence did not warrant a new trial where the witness's testimony had been impeached at trial by the medical examiner. *Id.* Moreover, an additional, unknown DNA profile on the cord used to strangle the victim did not warrant a new trial where it merely showed that an unknown person had handled the cord at some unknown time. *Id.*

With the exception of Seka's fingerprints on the wood stacked on Hamilton's body in the desert, the State at the 2001 trial presented no other physical evidence from where the body was found to tie Seka to the murders, instead relying on the circumstantial evidence. The DNA testing in 2018 and 2019 produced six new pieces of DNA evidence,[9] taken from Hamilton's fingernail clippings and hair under his fingernails; from a tobacco container, beer bottle, and cigarette butt found in the vicinity of his body; and from a hat found at Hamilton's murder scene. As set forth in detail below, although some of the evidence newly tested yielded other, unknown profiles, none of it exculpated Seka of the murders, necessarily implicated another suspect in the crimes, or otherwise materially supported his defense. Critically, too, the new DNA evidence from the scene where Hamilton's body was dumped was cumulative of the evidence adduced at trial as no DNA evidence inculpated Seka to that scene in 2001 and the new DNA results likewise do not inculpate Seka to that crime scene. Moreover, the new DNA evidence did not contradict or refute the totality of the evidence supporting the verdict. Thus, for the following reasons, the new DNA evidence was not favorable to the defense within the meaning of NRS 176.09187.[10]

9 Although the State argues the evidence is not "new" because similar evidence was presented at trial, we note the DNA tests performed in 2018 and 2019 were not available at the time of trial and the new DNA tests were able to find additional profiles, making those test results newly discovered evidence that could not have been discovered at the time of trial.

10 Seka also argues that a number of fingerprints taken from items at Cinergi and evidence around Hamilton's body were not tested and contends those fingerprints may have implicated another perpetrator. Because the narrow question before us is whether the new DNA evidence supports the granting of a new trial, we do not address the untested fingerprints.

***1280** First, as to the hairs found underneath Hamilton's fingernails, updated DNA testing showed only that those were Hamilton's hairs, mirroring the DNA results at the time of trial, and is cumulative here. As to the DNA collected from Hamilton's fingernail clippings, the bullet and lack of stippling evidence shows Hamilton was shot in the back from a distance, seemingly as he fled from the killer. There is no evidence of a struggle, reducing the evidentiary value of any newly discovered DNA under his fingernails.[11] Moreover, the fingernail clippings provided so little DNA that it is possible another profile might not actually exist, further reducing the evidence's already dwindling value.

11 Although Seka distinguishes between the blood tested at trial and the epithelial cells tested in 2018, this distinction is not materially relevant under the facts here, where Seka was excluded as a contributor on both types of evidence.

The beer bottle, cigarette butt, and Skoal tobacco container were spread along the shoulder of a major road at increasing distances of up to 120 feet from Hamilton's body and may well have been nothing more than trash tossed by drivers or pedestrians in the desert area. The State did not argue at trial that Seka dropped those items, and to the extent DNA testing yielded unknown DNA profiles, the new DNA evidence shows only that an unidentified person touched those items at some unknown time.[12] Thus, any link to the killer is speculative at best. Moreover, testing at the time of trial used outdated techniques and procedures that may have contaminated any DNA on those items, further calling into question their evidentiary value. And the jury was already aware that the cigarette butts found near Hamilton were different than those that Seka smoked, making the new DNA test results on that evidence cumulative.

12 Notably, too, the beer bottle produced a female profile, and Seka has never argued that the killer was a woman.

Finally, the DNA on the hat has no probative value here. Although that testing produced other profiles, it was inconclusive as to Seka, and, moreover, the hat was not properly sealed and may have been contaminated before and during trial, including by the jury, making the presence of additional DNA profiles of no relevance under these circumstances.

Thus, at most this new DNA evidence showed only that another person may have come in contact with some of those items. It does not materially support Seka's defense, as it is cumulative of the evidence already adduced at trial excluding Seka as a contributor to DNA profiles or fingerprint evidence. The State did not rely upon any of these items at trial to argue Seka's guilt, further reducing the evidentiary value of the new DNA evidence, and, moreover, nothing supports that the killer actually touched any of the evidence tested in 2018 and 2019. Nor did any of the new DNA evidence implicate another killer or exonerate Seka under the totality of all of the evidence adduced in this case.

Importantly, none of this new evidence from Hamilton's crime scenes affects the evidence supporting the guilty verdict, where at trial no physical evidence of DNA tied Seka to the crime scenes and the State's case was completely circumstantial. It is clear from the circumstantial evidence that Hamilton was killed next door to Seka's business and residence on Western Avenue, and his body was transported and dumped in a remote desert area. The .357 bullet casings found at Cinergi were consistent with the caliber of gun that was used to shoot Hamilton next door, and Hamilton's blood was found at 1929 Western and in the truck Seka was driving the morning after Hamilton's body was discovered. Moreover, the truck's tire impressions were similar to the tire tracks found near Hamilton's body—tracks that drove off and back on the road consistent with the body being quickly dumped. Although crime scene analysts routinely gather items found around a body in hopes of implicating a killer, under these particular circumstances—where the body was driven to a remote area and dumped off the side of the ***1281** road—the random trash items in the desert with unknown DNA contributors do not undermine the other evidence against Seka.

Moreover, the physical and circumstantial evidence overwhelmingly supported a guilty verdict as to both murders. Limanni was killed by a .32 caliber weapon, and Hamilton was killed by a .357 caliber weapon—and both types of ammunition were found at Cinergi, where Seka worked and lived. Hamilton was killed next door to Cinergi, and the bullet fragments suggest Limanni was killed at Cinergi, a supposition corroborated by Seka's own confession to Cramer. Both Limanni's and Hamilton's bodies were dumped off a road in the desert. Limanni's body was transported in the company van Seka preferred to drive before Limanni disappeared, and Hamilton's body was transported in the Toyota truck that Seka was driving after Limanni disappeared—a truck that had been cleaned shortly before officers responded to Hamilton's murder scene. Hamilton had a note with Seka's name and business number in his pocket, and his body was covered in wood taken from Cinergi that contained Seka's fingerprints. Beer bottles found in the garbage the day after Hamilton's body was discovered had both Hamilton's and Seka's fingerprints, suggesting the two had been drinking at Cinergi just prior to the altercation at 1929 Western. Limanni's belongings were hidden at Cinergi, which Seka had access to after Limanni disappeared. Limanni made plans with Harrison for the day he went missing, and Seka was the last person to see Limanni alive. Specifically, Harrison testified that when Limanni left her home the night before he disappeared, the couple discussed calling each other and going to lunch the next day. But when Harrison was unable to reach Limanni the following morning and went to Cinergi searching for Limanni, she found a large amount of cash (notably, Limanni had just withdrawn his money from his bank accounts), all of Limanni's clothing, Limanni's dog (whom Limanni took everywhere), a bullet on the floor, and Seka—but not Limanni. Seka—whom Limanni had picked up at the airport the prior day—told Harrison that Limanni had left early that morning. And when Limanni failed to return, Seka discouraged Harrison from filing a missing person report. All of this evidence points to Seka as the killer.

Further, Seka's statements were contradicted by other evidence, undermining his truthfulness and, by extension, further implicating him in the crimes. For example, Seka claimed that Hamilton had worked at Cinergi in mid-October, but other evidence established Hamilton moved to Las Vegas in late October or early November. When officers searching Hamilton's murder scene asked Seka about Limanni, Seka told them that he believed Limanni was in the Reno area with his girlfriend, even though Seka knew this was untrue from his conversations with Harrison. Officers noticed a bullet on a desk in Cinergi when they first arrived, yet it mysteriously went missing after Seka arrived at the scene. Thereafter, Seka suggested to the police that the bullet's disappearance might be due to the building owner removing it, yet the owner confirmed to the police when questioned that he had not been inside the building when the bullet went missing. And when Harrison noticed Seka's upset demeanor the morning Limanni disappeared, Seka blamed his mood on his girlfriend, even though his girlfriend later testified nothing had happened between them that would have upset Seka.

Finally, there was substantial evidence of Seka's guilty conscience. Officers discovered someone had attempted to hide Limanni's personal papers in Cinergi's ceiling,

and Seka had access to Cinergi after Limanni went missing. Circumstances suggested Seka removed the bullet on the desk that initially caught the officer's attention. A .32 caliber bullet was found in the toilet at Cinergi, as if Seka, the person living and working at Cinergi, had attempted to dispose of incriminating evidence down the toilet. The dumpster behind the business had been emptied shortly before officers arrived to investigate Hamilton's murder scene, and an officer observed that it was nearly empty that morning, yet by afternoon after Seka arrived at the location, that same dumpster was filled with Limanni's personal belongings and papers, some of them burned, even though officers were at that time only searching for clues as to Hamilton's death and were unaware of ***1282** Limanni's disappearance. After Seka learned he was a suspect in Hamilton's murder, Seka attempted to leave the scene in the decaled van that held evidence of Limanni's murder. Seka told officers he would return to Cinergi after dinner, but instead Seka fled the state. Seka also told Harrison he was fleeing to avoid prosecution. And Seka made incriminating statements to his longtime friend, Cramer, and eventually confessed Limanni's murder to Cramer.[13] All of this evidence ties Seka to Limanni's death and ultimately ties him to Hamilton's death as well.

[13] Seka argues on appeal that Cramer's testimony was not credible. However, the defense attacked Cramer's credibility at trial and the jury nevertheless convicted Seka, and we do not reweigh the evidence on appeal. *Clancy v. State*, 129 Nev. 840, 848, 313 P.3d 226, 231 (2013).

Whether newly discovered DNA evidence will warrant a new trial in a murder case is a fact-intensive inquiry. Under different facts, DNA evidence such as that discovered here could warrant a new trial. But the newly discovered DNA evidence was cumulative in this case, and the unknown DNA profiles on miscellaneous desert debris cannot, under these facts, be considered favorable. And although Seka points to discrepancies and weaknesses in the evidence adduced at trial and to speculative evidence that disgruntled investors were more likely suspects than himself, the totality of all of the physical and circumstantial evidence adduced at trial nevertheless pointed to Seka and supports the jury's verdict.

Accordingly, the new DNA evidence does not make a different outcome reasonably probable here and is not "favorable" to the defense as necessary to warrant a new trial.[14] We therefore conclude the district court abused its discretion by granting Seka a new trial based on the newly discovered DNA evidence, and we reverse the district court's decision.

[14] Notably, too, Seka was *also* convicted of robbing the victims, and the jury therefore believed beyond a reasonable doubt that Seka not only murdered Limanni and Hamilton, but robbed them as well.

V.

Under NRS 176.09187(1), a party may move for a new trial at any time where DNA test results are "favorable" to the moving party. Consistent with *Sanborn v. State*, 107 Nev. 399, 406, 812 P.2d 1279, 1284-85 (1991), we hold that new DNA test results are "favorable" where they would make a different result reasonably probable upon retrial. Because the new evidence here fails to meet this standard, we reverse the district court's order granting a new trial.

We concur:

Parraguirre, J.

Stiglich, J.

All Citations

490 P.3d 1272, 137 Nev. Adv. Op. 30

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485 P.3d 1254
Supreme Court of Nevada.

Steven Lawrence DIXON, Appellant,
v.
The STATE of Nevada, Respondent.

No. 77535
|
FILED MAY 06, 2021

Synopsis
Background: Defendant was convicted in the District Court, Humboldt County, Michael R. Montero, J., of fourth-degree arson, and he appealed.

Holdings: The Supreme Court, Cadish, J., held that:

state's use of peremptory challenge to exclude prospective alternative juror because of his gender violated Equal Protection Clause;

in matter of first impression, prosecution's discriminatory use of peremptory challenge to strike prospective alternative juror is subject to harmless error review; and

trial court's rejection of defendant's *Batson* objection was harmless error.

Affirmed.

Procedural Posture(s): Appellate Review; Jury Selection Challenge or Motion.

***1255** Appeal from a judgment of conviction, pursuant to a jury verdict, of fourth-degree arson. Sixth Judicial District Court, Humboldt County; Michael Montero, Judge.

Attorneys and Law Firms

Matthew J. Stermitz, Public Defender, Humboldt County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Michael Macdonald, District Attorney, and Maximilian Stovall, Deputy District Attorney, Humboldt County, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By the Court, Cadish, J.

***1256** The discriminatory use of a peremptory challenge during jury selection constitutes structural error requiring reversal and remand for a new trial. In this case, we consider whether the same is true where the discriminatory peremptory challenge was used to remove a prospective alternate juror and no alternate deliberated with the jury. We conclude there are compelling reasons to apply harmless-error review in those circumstances. Doing so here, we affirm the judgment of conviction.

BACKGROUND

Appellant Steven Dixon went to trial on charges of fourth-degree arson and child abuse, neglect, or endangerment. During jury selection, after both the State and the defense passed the venire for cause, the district court allowed both sides to exercise their peremptory challenges outside the venire's presence.

After the jury was selected, the district court allowed each side to exercise a peremptory challenge as to the three remaining prospective alternate jurors—two of whom were female and one of whom was male. The State exercised its challenge against the male prospective alternate juror, Mr. Lara. The defense objected pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), claiming "Mr. Lara is obviously Hispanic and I certainly didn't hear him say anything that would indicate he would be anything other than fair to both sides." Without making a finding regarding a prima facie case of discrimination, the first step of a *Batson* analysis, the district court asked the State if it wished to respond. Accepting the court's invitation, the prosecutor explained his reason for using the State's peremptory challenge to remove Mr. Lara. As relevant here, the prosecutor referred to Mr. Lara's gender and the

prosecutor's desire to balance the jury's makeup with a female:

> [A]t the moment the jury is heavily weighted in favor of men. I'd like to have at least a female alternate on it. The other two [prospective alternates], Ms. Graham and Ms. Delong, I think would be favorable.
>
> I don't know much about Mr. Lara; however, I do know enough about Ms. Graham and Ms. Delong. And I'd like to increase their chances of being on the jury, obviously, it has nothing to do with race.

That explanation prompted a discussion between defense counsel and the district court during which defense counsel argued that the prosecutor's gender-based explanation also violated *Batson:*

> [DEFENSE]: Apparently it has something to do with gender. It's a slippery slope to the top.
>
> THE COURT: Well, [defense counsel], you've made a *Batson* challenge for race. [The prosecutor] has presented his explanation for that challenge. Do you wish to further respond?
>
> [DEFENSE]: Well, my response is that he's used gender, which is an impermissible basis in itself. So, you know, that's not permissible either.
>
> THE COURT: [Defense counsel], I'm confused by this. I guess I have to ask, are you claiming because of your client's race that a—
>
> [DEFENSE]: No.
>
> THE COURT: —juror should not be stricken based on their race?
>
> [DEFENSE]: Just has to do with the juror himself.
>
> THE COURT: The juror himself.
>
> [DEFENSE]: It doesn't attach to my client's race or gender. Our allegation was that it was based on the fact that he was Hispanic, and could be because there didn't seem to be any disqualifies in the voir dire. And his response was, well, it's not race based, it's gender based. And gender based is not a—that's also a *Batson* violation. So I think Mr. Lara can stand, or you've got error.
>
> THE COURT: You can take that up, if you want. But I'm going to find there was a mutual [sic] explanation that was clear and reasonably specific, and I find that there's no—there's no—the State is not striking Mr. Lara based on his race.
>
> ***1257** [DEFENSE]: Just his gender.

The district court excused Mr. Lara, and the matter proceeded to trial. The alternate juror did not participate in the jury's deliberations, and Dixon was ultimately convicted of fourth-degree arson. This appeal followed.

DISCUSSION

The Equal Protection Clause prohibits the use of peremptory challenges to discriminate based on race or gender.[1] *Batson*, 476 U.S. at 89, 106 S.Ct. 1712 (race); *J.E.B.*, 511 U.S. at 129, 114 S.Ct. 1419 (gender). When a party objects to the alleged use of a race- or gender-based peremptory challenge, a district court must resolve the objection using a three-step process. *See Batson*, 476 U.S. at 93-98, 100, 106 S.Ct. 1712; *see also Libby v. State (Libby II)*, 115 Nev. 45, 50, 975 P.2d 833, 836 (1999) (applying the *Batson* process to a claim of gender-based discrimination). The process consists of (1) the opponent of the peremptory challenge making a prima facie showing of discrimination; (2) if the prima facie showing is made, the proponent presenting a nondiscriminatory explanation for the peremptory challenge; and (3) the district court determining whether the opponent has proven purposeful discrimination. *Libby II*, 115 Nev. at 50, 975 P.2d at 836. At the final step, "[t]he district court must undertake a sensitive inquiry into such circumstantial and direct evidence of intent as may be available and consider all relevant circumstances before ruling on a *Batson* objection and dismissing the challenged juror." *Conner v. State*, 130 Nev. 457, 465, 327 P.3d 503, 509 (2014) (internal quotation marks omitted). A *Batson* objection should be sustained where "it is more likely than not that the challenge was improperly motivated." *Williams v. State*, 134 Nev. 687, 692, 429 P.3d 301, 307 (2018) (internal quotation marks omitted). We give great deference to a district court's findings regarding a *Batson* objection "and will only reverse if the district court clearly erred." *Id.* at 688, 429 P.3d at 305.

[1] The Equal Protection Clause protects not only "individual defendants from discrimination in the selection of jurors," *Powers v. Ohio*, 499 U.S. 400, 406, 111 S.Ct. 1364, 113 L.Ed.2d 411

(1991), but also individual jurors who "possess the right not to be excluded ... on account of race" or gender. *Id.* at 409, 111 S.Ct. 1364; *J.E.B. v. Alabama*, 511 U.S. 127, 140-41, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

When Dixon objected to the State's use of a peremptory challenge to remove Mr. Lara, the district court asked the State if it wished to respond, without first determining whether Dixon had met his burden at *Batson's* first step to make a prima facie showing of discrimination. The State responded with its explanation for the peremptory challenge. Therefore, step 1 is moot. *See id.* at 690-91, 429 P.3d at 306-07 ("Where, as here, the State provides a race-neutral reason for the exclusion of a veniremember before a determination at step one, the step-one analysis becomes moot and we move to step two.").

At step 2—a neutral explanation for the strike—the State said that it wanted a female alternate.[2] The State's explanation ***1258** was clearly gender-based and thus impermissible. And although defense counsel initially objected to the peremptory challenge as being motivated by race, that did not give the State cover to instead discriminate based on gender. Once the State offered a clearly discriminatory reason for exercising the peremptory challenge, the district court had no choice but to find that the State had not met its burden at step 2. The district court thus should have sustained the *Batson* objection.

[2] We decline the State's invitation to adopt the dual-motivation analysis, as the State has not shown that it presented a permissible, neutral explanation for the strike. As the United States Supreme Court has admonished, "the proponent of a strike must give a clear and reasonably specific explanation of [the] legitimate reasons for exercising the challenges." *Purkett v. Elem*, 514 U.S. 765, 768-69, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (internal citations and quotation marks omitted); *see also State v. Giles*, 407 S.C. 14, 754 S.E.2d 261, 265 (2014) ("The proponent of the challenge must provide an objectively discernible basis for the challenge that permits the opponent of the challenge and the trial court to evaluate it."). The State's alternate reason for the strike—that "it did not have sufficient information to know whether Mr. Lara would make a good juror" but that it "thought both remaining female [prospective alternate] jurors would make good jurors"—does not satisfy those requirements. And without the transcript of the voir dire, we cannot further consider the State's explanation because it is unclear what information was disclosed by the three prospective alternates or what questions, if any, the State asked Mr. Lara. *See Ex parte Branch*, 526 So. 2d 609, 624 (Ala. 1987) (listing evidence that can show the prosecutor's explanation was pretextual, including "a lack of questioning to the challenged juror, or a lack of meaningful questions" and "[d]isparate examination of members of the venire"); *Slappy v. State*, 503 So. 2d 350, 355 (Fla. Dist. Ct. App. 1987) (recognizing the prosecutor's disparate examination of a struck juror or the prosecutor's failure to examine, or a perfunctory examination of, a struck juror to be factors "weigh[ing] heavily against the legitimacy of any race-neutral explanation").

"Discriminatory jury selection in violation of *Batson* generally constitutes 'structural' error that mandates reversal." *Diomampo v. State*, 124 Nev. 414, 423, 185 P.3d 1031, 1037 (2008). However, the State argues we should apply harmless-error review because Mr. Lara was a prospective alternate juror and no alternate deliberated on the jury. Dixon contends that structural error should still apply as with other *Batson* violations because the harm from a discriminatorily chosen jury extends beyond the defendant and the excused individual to affect the entire community and the integrity of the courts. *See Conner v. State*, 130 Nev. 457, 462, 327 P.3d 503, 507 (2014) (recognizing discriminatory jury selection affects more than the accused and the excused juror but also "invites cynicism respecting the jury's neutrality, and undermines public confidence in adjudication" (internal quotation marks omitted)).

"The Supreme Court has not said whether or not *Batson* requires automatic reversal when a prosecutor wrongly excludes an alternate juror, but no alternate joins deliberations." *Carter v. Kemna*, 255 F.3d 589, 591 (8th Cir. 2001). Other courts are split on the issue. Those courts that have rejected harmless-error review in that circumstance have done so for reasons similar to our reasoning in *Conner*—that the potential harm caused by discriminatory jury selection goes beyond the defendant and the prospective alternate juror. *See, e.g., United States v. Harris*, 192 F.3d 580, 587-88 (6th Cir. 1999) (finding harmless-error review inappropriate because "the harm inherent in a discriminatorily chosen jury inures not

only to the defendant, but also to the jurors not selected because of their race, and to the integrity of the judicial system as a whole" and "[b]ecause the process of jury selection—even the selection of alternate jurors—is one that affects the entire conduct of the trial"). However, a number of courts have applied harmless-error review where the challenged veniremember was a prospective alternate, concluding that there is no possible prejudice to the defendant where the alternate does not deliberate. *See, e.g.*, *United States v. Lane*, 866 F.2d 103, 106 n.3 (4th Cir. 1989) (claiming in a footnote that if the case had involved an alternate and no alternate deliberated, then the defendant "would not have been prejudiced by the peremptory challenge to [the excused juror], regardless of the stated reason"); *Nevius v. Sumner*, 852 F.2d 463, 468 (9th Cir. 1988) ("No alternate jurors were called upon to serve in [defendant's] case, however; the challenge was harmless."); *Roberts v. Singletary*, 794 F. Supp. 1106, 1125 (S.D. Fla. 1992) ("Since none of the [alternates] were called upon to replace any of the twelve jurors actually seated, there can be no possible prejudice to the defendant for failing to have [the excused juror] as a second alternate."); *People v. Turner*, 8 Cal.4th 137, 32 Cal.Rptr.2d 762, 878 P.2d 521, 539 (Cal. 1994) ("[N]o alternate jurors were ever substituted in, and hence it is unnecessary to consider whether any *Wheeler*[/*Batson*] violation occurred in their selection. Moreover, any *Batson* violation could not possibly have prejudiced the defendant."), *abrogated on other grounds by People v. Griffin*, 33 Cal.4th 536, 15 Cal.Rptr.3d 743, 93 P.3d 344 (2004); *State v. Carter*, 889 S.W.2d 106, 109 (Mo. Ct. App. 1994) (stating "*Batson* does not stand for the proposition there is a Constitutional right to be an alternate juror" and concluding the defendant's and the alternate's rights were not violated by the alternate's exclusion); *State v. Ford*, 334 S.C. 444, 513 S.E.2d 385, 387 (App. 1999) ("Any *Batson* violation in regards to a possible alternate juror is harmless where an alternate was not needed for deliberations.").

We are persuaded that harmless-error review should be applied in the circumstances ***1259** presented here. The United States Supreme Court has been clear that "if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." *Rose v. Clark*, 478 U.S. 570, 579, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). The rare errors that are deemed "structural" and therefore require automatic reversal typically "affect[ ] the framework within which the trial proceeds" and "infect the entire trial process," rendering it "fundamentally unfair," *Neder v. United States*, 527 U.S. 1, 8, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (internal quotation marks omitted), or have effects that "are too hard to measure," *McCoy v. Louisiana*, 584 U.S. ——, ——, 138 S. Ct. 1500, 1512, 200 L.Ed.2d 821 (2018). As relevant here, we have held that "[d]iscriminatory jury selection in violation of *Batson* constitutes structural error, or error that affects the framework of a trial ... [, and] such error is intrinsically harmful," thus requiring automatic reversal. *Brass v. State*, 128 Nev. 748, 752, 291 P.3d 145, 148 (2012). But where the *Batson* violation involves a prospective alternate and no alternate participates in deliberations, the discrimination did not directly impact the jury's makeup and the defendant was not tried by a jury whose members were selected pursuant to discriminatory criteria. The effects of the error are thus not too hard to measure—we can be assured that a *Batson* violation involving a prospective alternate had no effect on the deliberations as to a defendant's guilt where no alternate participated in deliberations.[3] *See People v. Rodriguez*, 50 Cal.App.4th 1013, 58 Cal. Rptr. 2d 108, 121 (1996) ("With the benefit of hindsight, we can determine whether the defendant suffered any harm as a result of the [district] court's error only because no alternate juror was ever called upon to decide the defendant's guilt or innocence."). As a result, the fundamentals for harmless-error review are present—"[h]armless-error analysis ... presupposes a trial, at which the defendant, represented by counsel, may present evidence and argument before an impartial judge and jury." *Rose*, 478 U.S. at 578, 106 S.Ct. 3101.

[3] Indeed, we have applied harmless-error review where a defendant was denied the opportunity to individually voir dire an alternate juror about exposure to publicity during trial because the alternate was "not involved in the ultimate decision of the case." *Libby v. State*, 109 Nev. 905, 913-14, 859 P.2d 1050, 1055-56 (1993), *vacated on other grounds by Libby v. Nevada*, 516 U.S. 1037, 116 S.Ct. 691, 133 L.Ed.2d 650 (1996).

There is no constitutional right to alternate jurors, nor is there a right to be an alternate juror. See *Carter*, 889 S.W.2d at 109. And while we are cognizant that discriminatory selection of an alternate juror does not reflect well on the judicial system, we also must consider the "human, social, and economic costs of reversal and retrial." *Williams*, 134 Nev. at 696, 429 P.3d at 310. Thus, it is only under the specific facts of this

case—where a discriminatory peremptory challenge was made against a prospective alternate juror and no alternate was called upon to deliberate—that we believe the practicality of harmless-error review is warranted: "The practical objective of tests of harmless error is to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error. The grand objective is to conserve the vitality of the rules and procedures designed to assure a fair trial." *Rodriguez*, 58 Cal. Rptr. 2d at 122 (internal quotation marks omitted).

Although the district court clearly erred in rejecting Dixon's *Batson* objection to the State's use of a peremptory challenge to remove a prospective alternate juror based on gender, the error had no effect on the outcome of Dixon's trial and was therefore harmless because no alternate deliberated with the jury. We affirm the judgment of conviction.

We concur:

Pickering, J.

Herndon, J.

All Citations

485 P.3d 1254, 137 Nev. Adv. Op. 19

485 P.3d 1249
Supreme Court of Nevada.

In the MATTER OF the Petition of Craig Thomas TIFFEE.
Craig Thomas Tiffee, Appellant,
v.
The State of Nevada, Respondent.

No. 79871
|
FILED MAY 06, 2021

Synopsis

Background: Petitioner, who had successfully withdrawn his initial guilty plea to felony sex offense and later pled guilty to gross misdemeanor unlawful contact with a child, filed petition to seal his criminal records. The District Court, Clark County, Christina D. Silva, J., denied petition on grounds that felony and misdemeanor offenses were not subject to sealing and that public policy concerns weighed against sealing. Petitioner appealed.

Holdings: The Supreme Court, Cadish, J., held that:

district court could not consider felony offense in reviewing petition;

unlawful contact with child is not crime for which sealing is precluded under record-sealing statute;

petitioner was entitled to presumption in favor of record sealing; and

State failed to present evidence of lack of rehabilitation, and thus failed to rebut presumption.

Reversed and remanded with instructions.

Procedural Posture(s): Expungement Proceeding.

***1250** Appeal from a district court order denying a petition to seal criminal records. Eighth Judicial District Court, Clark County; Cristina D. Silva, Judge.

Attorneys and Law Firms

TCM Law Group and Thomas C. Michaelides, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Jonathan E. VanBoskerck, Chief Deputy District Attorney, Clark County, for Respondent.

BEFORE THE SUPREME COURT, CADISH, PICKERING, and HERNDON, JJ.

OPINION

By The Court, CADISH, J.

In this appeal, we consider whether the district court properly denied a petition to seal criminal records. Appellant Craig Tiffee ***1251** entered into an agreement with the State, under which he agreed to plead guilty to a felony sexual offense that falls into a category for which criminal records are not subject to sealing under NRS 179.245.[1] As provided in the plea agreement, however, Tiffee withdrew his guilty plea upon successfully completing probation and instead entered a guilty plea to unlawful contact with a child, a gross misdemeanor. He later filed the underlying petition to seal his criminal records, which the district court denied, concluding that both crimes to which appellant pleaded guilty fell under categories of crimes that were precluded from record sealing under NRS 179.245(6).

[1] The 2017 version of NRS 179.245 controlled when appellant filed his petition to seal his criminal record. 2017 Nev. Stat., ch. 378, § 7, at 2413. The Legislature subsequently amended NRS 179.245, 2019 Nev. Stat., ch. 633, § 37, at 4405, which became effective on July 1, 2020. However, nothing of import to this appeal changed with the 2019 amendments.

In so doing, the district court misapplied the statutes. Because appellant withdrew his guilty plea to the felony sexual offense and the gross misdemeanor crime of unlawful contact with a child is not listed in the applicable statute as an offense for which the records must remain open, the statutory presumption in favor of sealing criminal records under NRS 179.2445(1) applies.

Although the State opposed the petition, the district court did not apply the presumption or evaluate whether the State rebutted it. We conclude that on this record, the State failed to rebut the presumption and appellant is entitled to sealing. We therefore reverse the district court's order and remand with instructions to grant Tiffee's petition.

FACTS AND PROCEDURAL HISTORY

The Henderson Police Department (HPD) arrested appellant Craig Thomas Tiffee following an undercover operation wherein an HPD detective posed as a 15-year-old and agreed to meet Tiffee at a designated location for sex. Ultimately, Tiffee entered into a guilty plea agreement with the State, under which he agreed to plead guilty to luring children or mentally ill persons with the use of technology with the intent to engage in sexual conduct, a felony under NRS 201.560(4). Tiffee successfully completed probation, which, under the terms of the plea agreement, allowed him to withdraw his guilty plea and instead enter a guilty plea to unlawful contact with a child, a gross misdemeanor under NRS 207.260(4)(a). Pursuant to the plea agreement, the State acknowledged Tiffee's right to do so and cooperated in this process.

Tiffee later filed the underlying petition to seal his criminal records. The State opposed, arguing that NRS 179.245(6) precluded the district court from sealing records pertaining to a conviction of felony luring. Alternatively, the State argued that, even if the district court concluded that Tiffee's criminal records were sealable, it should not seal them because of the seriousness of the underlying offense and because Tiffee had not demonstrated that he was rehabilitated. After a hearing, the district court denied Tiffee's petition, concluding that both the crime he initially pleaded guilty to and the later pleaded crime constituted sexual offenses and crimes against a child, the records of which are not subject to sealing, and that public policy concerns also weighed against sealing.

DISCUSSION

"We review a district court's decision to grant or deny a petition to seal a criminal record for an abuse of discretion." *In re Aragon*, 136 Nev. Adv. Op. 75, 476 P.3d 465, 467 (2020). A district court abuses its record sealing discretion when it commits a legal error. *Id.* Whether the district court committed legal error here turns on whether a withdrawn guilty plea is implicated in Nevada's criminal record sealing statutes, the proper construction of NRS 179.245, which lists categories of crimes of which records may not be sealed, and what type of evidence the State must present to rebut the presumption in favor of sealing criminal records under NRS 179.2445(1).

A withdrawn guilty plea ceases to exist for all purposes and cannot justify the denial of a petition to seal criminal records after a subsequent guilty plea

NRS 179.245(6)(a) and (b), respectively, preclude the sealing of records relating ***1252** to convictions of crimes against a child and sexual offenses. Tiffee argues that the district court erred by relying on his withdrawn guilty plea to deny his petition to seal criminal records. While he concedes that NRS 179.245(6) would preclude the sealing of a felony luring conviction, Tiffee argues that he withdrew that plea, and the district court should have confined its analysis to the offense of which he stands convicted. The State argues that the records pertaining to Tiffee's initial guilty plea to felony luring are ineligible for sealing under NRS 179.245(6)(b) because that crime is listed as a sexual offense under that statute. *See* NRS 179.245(8)(b)(16) (defining as a sexual offense "[l]uring a child or a person with mental illness pursuant to NRS 201.560, if punishable as a felony"). In so doing, the State suggests that a withdrawn guilty plea is still operative for purposes of evaluating a petition to seal the associated criminal records.

Upon completing probation, Tiffee successfully withdrew his initial guilty plea to the felony sexual offense and entered a new guilty plea to a gross misdemeanor offense, such that the withdrawn plea—and the conviction based on it—no longer exist. *See* *People v. Superior Court (Garcia)*, 131 Cal.App.3d 256, 182 Cal. Rptr. 426, 428 (1982) ("Familiar and basic principles of law reinforced by simple justice require that when an accused withdraws his guilty plea the *status quo ante* must be restored."); *see also* 22 C.J.S. *Criminal Procedure and Rights of Accused* § 262 (2016) ("The situation, on the withdrawal of a plea, is the same as though the plea had not been entered."). Accordingly, Tiffee legally and factually returned to the situation he occupied before he entered the initial guilty plea, subject to the subsequent guilty plea. Instead of relying upon Tiffee's withdrawn guilty plea, the district

court should have limited its inquiry under NRS 179.245(1) to the gross misdemeanor offense to which Tiffee ultimately pleaded guilty and of which he stands convicted. Therefore, to the extent the district court relied on Tiffee's withdrawn guilty plea in resolving his petition to seal criminal records, we conclude it erred.

Gross misdemeanor unlawful contact with a child is not a crime for which record sealing is precluded under NRS 179.245(6)

Gross misdemeanor unlawful contact with a child is not listed as a nonsealable sexual offense under NRS 179.245. *See* NRS 179.245(8)(b). As an alternative basis for denying Tiffee's petition, the district court concluded that the unlawful contact with a child conviction pertained to "a crime perpetrated against [a] child," the records of which are ineligible for sealing under NRS 179.245(6)(a).

Upon de novo review, we conclude that the district court's interpretation was in error. *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007) (applying de novo review to issues of statutory construction). For purposes of the record sealing statute, "crime against a child" is defined as set forth in NRS 179D.0357, which enumerates specific offenses not including gross misdemeanor unlawful contact with a child. *See* NRS 179.245(8)(a). As we recently held, a "[district] court may not independently evaluate the facts to make its own decision about whether the conviction relates to a 'crime against a child,' but instead must look to the crimes identified in the statute as being precluded from record sealing." *Aragon*, 136 Nev. Adv. Op. 75, 476 P.3d at 467-68; *see Leven*, 123 Nev. at 403, 168 P.3d at 715 (recognizing that we enforce a statute according to its terms when its language is clear and unambiguous). We explained in *In re Aragon*, "[h]ad the Legislature intended to preclude the sealing of criminal records relating to [a particular offense], it would have expressly done so by including it in [the] list of convictions that a defendant may not petition to seal." 136 Nev. Adv. Op. 75, 476 P.3d at 467. Therefore, the district court erroneously concluded that the records pertaining to Tiffee's guilty plea to gross misdemeanor unlawful contact with a child were ineligible for sealing under NRS 179.245(6).[2]

[2] The district court also cited to NRS 179.255 in its order denying Tiffee's petition. NRS 179.255(l)-(2) provides the process that a person may use to seal records of "alleged criminal conduct" where (1) the court dismissed the charges, (2) the prosecutor declined to prosecute the charges, (3) a jury acquitted the defendant, or (4) the court set aside a conviction. None of those circumstances apply here, as Tiffee withdrew his initial guilty plea and entered a guilty plea to a lesser offense. Accordingly, to the extent that the district court relied on NRS 179.255, that statute does not support denying Tiffee's record sealing petition.

***1253** *Tiffee is entitled to the presumption in favor of sealing criminal records under NRS 179.2445(1)*

A person who meets the statutory requirements to seal his or her criminal records is entitled to a rebuttable presumption that the records should be sealed. NRS 179.2445(1). Tiffee successfully completed probation in 2012 and entered a guilty plea to gross misdemeanor unlawful contact with a child that same year. *Cf.* NRS 179.2445(2) (providing that the presumption that records should be sealed does not apply when a defendant is dishonorably discharged from probation). He filed the petition to seal his criminal records in 2019. Thus, Tiffee complied with the two-year waiting period to seal records pertaining to a gross misdemeanor conviction under NRS 179.245(1)(d). It also appears that Tiffee included a copy of his verified criminal record in his petition as required by NRS 179.245(2)(a).[3]

[3] Neither party included a copy of Tiffee's verified criminal record in the appendices. Tiffee asserts that he complied with the controlling procedures under NRS 179.245. The State does not contest this assertion.

Additionally, Tiffee's petition included information that completely identifies the records and a list of agencies that possess records of the conviction. *See* NRS 179.245(2)(c)-(d). Finally, as discussed above, none of the statutory exceptions to sealing eligibility apply. Thus, the record shows that Tiffee complied with all statutory requirements, and he is entitled to the statutory presumption in favor of sealing his criminal records.

The State failed to rebut the presumption in favor of sealing criminal records under NRS 179.2445(1)

The State contends that even if Tiffee's criminal records were eligible for sealing, the district court properly declined to seal them because Tiffee failed to demonstrate that he is rehabilitated and because of the seriousness of the underlying offense. However, those arguments are unavailing, as the statutory scheme does not impose such requirements or restrictions and instead presumes records for certain categories of crimes should be sealed.

First, NRS 179.2445(1) clearly and unambiguously provides that the presumption in favor of sealing eligible criminal records applies in favor of the petitioner and against the State. *See Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366, 184 P.3d 378, 386 (2008) ("In general, rebuttable presumptions require the party against whom the presumption applies to disprove the presumed fact."). Therefore, it was the State's burden to provide evidence to rebut the presumption, not Tiffee's burden to provide additional evidence in support of sealing.

Second, although NRS 179.2445(1) does not, on its face, expressly state what type of evidence the State (or any party who objects) must present to rebut the presumption in favor of sealing criminal records, the criminal record sealing statutes exist within a common statutory scheme, and we may discern what type of showing the State must make by reviewing the statutory scheme in its entirety. *S. Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (explaining that when "interpret[ing] provisions within a common statutory scheme," we must read them in harmony and in accordance with the overall purpose of the statutes). As NRS 179.2405 provides, "the public policy of this State is to favor the giving of second chances to offenders who *are rehabilitated* and the sealing of the records of such persons in accordance with [the governing statutes]." (Emphasis added.) NRS 179.2445 elaborates on this public policy, providing the conditions a petitioner must meet for the presumption that criminal records should be sealed to apply. If the petitioner complies with the governing statutes—here NRS 179.2445 and NRS 179.245—then courts must presume that the petitioner is, in fact, rehabilitated. To rebut this presumed ***1254** fact, we hold that the State must present some affirmative proof demonstrating that a petitioner is not rehabilitated despite complying with the statutory provisions governing criminal record sealing.

Here, the State merely presented evidence of the facts relating to Tiffee's underlying crime, but such evidence does not demonstrate that a petitioner is not rehabilitated for purposes of sealing criminal records. *Cf.* NRS 179.2445(2) (providing that a dishonorable discharge from probation removes the presumption that the court should order criminal records sealed). Rehabilitation happens, if at all, *after* the underlying offense, and thus a lack of rehabilitation can only be shown by evidence of subsequent activities that would so demonstrate. As the State failed to present such evidence here, and in fact argued that it was Tiffee's burden to further show that he was rehabilitated, it did not rebut the presumption in favor of sealing Tiffee's criminal records.[4]

[4] The State's claim that the seriousness of the crime provides a basis for either not applying the presumption or rebutting it is contrary to the statutory language, which lists categories of crimes (and exceptions thereto) for which it is presumed records should be sealed. NRS 179.2445(1); NRS 179.245(6). As this crime is within the scope of those eligible for sealing, the nature of the crime is already accounted for by the Legislature in making that determination and cannot be used to rebut the statutory presumption.

CONCLUSION

When, like here, a defendant withdraws a guilty plea, the plea legally and factually ceases to exist and the defendant returns to the situation he or she was in prior to entering the plea. Thus, district courts may not rely upon a withdrawn guilty plea or an associated conviction when evaluating whether to seal a petitioner's criminal records under NRS 179.245, but instead must confine their analysis to the crimes contained in the operative judgment of conviction. Furthermore, we reiterate that in evaluating whether an offense is "[a] crime against a child" or "[a] sexual offense" under NRS 179.245(6)(a)-(b), courts must abide by the express list of such offenses that the Legislature provided in NRS 179.245(8)(b) and NRS 179D.0357. Additionally, when the statutory requirements are met and a presumption in favor of sealing applies, it can only be rebutted by evidence that the petitioner is not rehabilitated, which cannot be shown by the facts underlying the conviction, but instead must be based on subsequent events tending to show a lack of rehabilitation despite the petitioner's compliance with the governing statutes. Here, Tiffee's crime fell within a category to which the presumption applies, and the

evidence presented by the State provided nothing to rebut that presumption by showing a lack of rehabilitation. Accordingly, we reverse the district court's order and remand the matter with instructions to grant Tiffee's petition to seal his criminal records.

Pickering, J.

Herndon, J.

All Citations

485 P.3d 1249, 137 Nev. Adv. Op. 20

We concur:

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485 P.3d 750
Supreme Court of Nevada.

Abebaw Tesfaye KASSA, Appellant,
v.
The STATE of Nevada, Respondent.

No. 76870
|
FILED APRIL 29, 2021

Synopsis

Background: After defendant was found guilty but mentally ill (GBMI) on charges of first-degree felony murder and first-degree arson, he filed motion to vacate the GBMI verdicts and find him not guilty by reason of insanity. The District Court, Clark County, Michelle Leavitt, J., denied motion, and defendant appealed.

Holdings: The Supreme Court, Pickering, J., held that:

evidence supported trial court's denial of defendant's motion for judgment of acquittal under statute providing that court could, on motion of defendant or on its own motion, which was made after jury returned verdict of GBMI, set aside verdict and enter judgment of acquittal if evidence was insufficient to sustain conviction;

evidence showed that defendant understood the nature and capacity of his act in setting fire to home for purposes of *M'Naghten* test for "not guilty by reason of insanity" defense; and

evidence showed that defendant appreciated that his conduct in setting fire to home was wrongful for purposes of *M'Naghten* test for "not guilty by reason of insanity" defense.

Affirmed.

Silver, J., dissented and filed opinion in which Hardesty and Stiglich, JJ., joined.

Procedural Posture(s): Appellate Review; Post-Trial Hearing Motion.

***753** Appeal from a judgment of conviction, pursuant to a jury verdict, finding appellant guilty but mentally ill on charges of first-degree murder and first-degree arson. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Attorneys and Law Firms

Marchese Law Office and Jess R. Marchese, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and David L. Stanton and Charles W. Thoman, Chief Deputy District Attorneys, Clark County, for Respondent.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

A jury found appellant Abebaw Tesfaye Kassa guilty but mentally ill on charges of first-degree felony murder and first-degree arson. Kassa contests the validity of his convictions on the basis that the district court misinstructed the jury on voluntary intoxication, and otherwise erred by denying his motion to vacate the jury's guilty verdict and find him not guilty by reason of insanity. But there is sufficient evidence in the record to support Kassa's convictions, and we disagree that the district court abused its discretion in giving the challenged instruction. Accordingly, we affirm.

I.

Early one morning in 2016, Kassa set fire to the transitional home for persons with mental illness where he had been living without incident for just over a month. Kassa's fellow residents escaped, but the housekeeper, Lolita Budiao, was badly burned and died several days later. Kassa had delayed Budiao's escape by deliberately trapping her in a bathroom while the fire engulfed the home. Kassa himself fled, without injury, through a window as law enforcement arrived at the scene. He tried to run from the officers and resisted arrest when they ultimately caught and restrained him.

The State charged Kassa with first-degree felony murder and first-degree arson. At trial, Kassa admitted setting the fire and causing Budiao's death. But he raised, as an affirmative defense, his alleged legal insanity at the time. Specifically, Kassa alleged that he was suffering from schizophrenic auditory hallucinations when he set the fire—voices were telling him that he had died in a car accident five years prior, that his body was being kept breathing and used by others for nefarious purposes, and that he needed to set and burn in the fire to end his exploitation. Kassa introduced expert testimony by two psychiatrists who had examined him in the years since the fire to support this defense.

The State countered the defense experts by introducing medical records of Kassa, noting statements he made to the medical care providers attending him shortly after the fire. These records reflect that at that time—notably, prior to Budiao's death, when the prospect of murder charges arose—Kassa reported that before the fire he had been ***754** snorting "Spice," a synthetic version of marijuana with wide-ranging and potentially hallucinogenic effects. He also reported on the intoxicating mental effects from his use of the Spice, stating that this drug use left him "feeling disturbed and unable to sleep." Based in part on this evidence, the State proposed jury instruction no. 20 regarding voluntary intoxication, which advised jurors that voluntary intoxication—in contrast to a mental disease or defect—did not render any resulting conduct "less criminal." The instruction further advised that this was so even where "the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity." The district court provided this instruction over Kassa's objection.

The jury found Kassa guilty but mentally ill (GBMI) on both counts. NRS 175.533 allows a jury to find a defendant GBMI when the jury finds the defendant guilty beyond a reasonable doubt of the offense, and that "due to a disease or defect of the mind, the defendant was mentally ill at the time of the commission of the offense," though falling short of the demanding legal insanity standard that would support a verdict of not guilty by reason of insanity (NGRI). With such a finding, the jury determines that a defendant's mental illness does not excuse his or her criminal conduct; accordingly, the result is not an acquittal, but a guilty verdict that signals certain allowances in sentencing. *See* *Finger v. State*, 117 Nev. 548, 554, 27 P.3d 66, 70 (2001) (noting that with a GBMI verdict, "the district court may suggest that the prison system provide certain types of treatment to the convicted individual").

Kassa moved the district court to vacate the GBMI verdicts and find him not guilty by reason of insanity. Following a hearing, the district court denied the motion. The district court sentenced Kassa to serve concurrent prison terms totaling 20 years to life in the aggregate. This appeal followed.

II.

At trial, Kassa conceded that he intentionally started a fire; that he intended that fire to cause death; that he started that fire with knowledge that others were in the home; that he held Budiao captive in a bathroom to prevent her from escaping or extinguishing the fire; and that Budiao died as a result. And even beyond Kassa's admissions, the State presented testimony from multiple eyewitnesses supporting the State's factual account. From this testimony, the jury could have reasonably inferred Kassa's intent to commit the crimes as charged. The crux of the case below was therefore not whether Kassa committed the acts the State alleged, with the intent to cause harm, but whether his conduct was excused from criminal liability based on an NGRI defense. *See* *Finger v. State*, 117 Nev. at 568, 27 P.3d at 80 (stating that " 'legal insanity' simply means that a person has a complete defense to a criminal act").

For Kassa's alleged insanity to give him a complete defense to the charged crimes, his condition must satisfy the specific and demanding *M'Naghten* test—that is, "[d]ue to a disease or defect of the mind," he suffered from delusions such that he did not "(1) [k]now or understand the nature and capacity of his ... act; or (2) [a]ppreciate that his or her conduct was wrong." NRS 174.035(6)(b); *see* *Finger*, 117 Nev. at 556-57, 27 P.3d at 72-73 (discussing *M'Naghten's Case*, 8 Eng. Rep. 718, 722, 10 Cl. & Fin. 200, 209-10 (1843), and describing the resulting test). Following his conviction, Kassa moved the district court for a judgment of acquittal pursuant to NRS 175.381(2), based on his supposed satisfaction of *M'Naghten*. But NRS 175.381(2) sets a high bar—if the record contains evidence on which any rational juror might convict, then its demanding standard is not met, *State v. Purcell*, 110 Nev. 1389, 1394, 887 P.2d 276, 279 (1994)—that the district court found Kassa failed to clear.

De novo review applies to an appeal from an order denying a motion for a judgment of acquittal, insofar as the appellate court must determine whether the district court applied the correct legal standard in deciding the

motion. *Evans v. State*, 112 Nev. 1172, 1193, 926 P.2d 265, 279 (1996); *see* *United States v. Gagarin*, 950 F.3d 596, 602 (9th Cir. 2020) (noting that the court reviews de novo a denial of a motion for acquittal ***755** under analogous Fed. R. Crim. P. 29). However, the Seventh Circuit Court of Appeals has rightly assessed that, phrased in these terms, "this standard of review is slightly deceiving." *United States v. Johns*, 686 F.3d 438, 446 (7th Cir. 2012). Because the district court decides a motion for a judgment of acquittal under NRS 175.381(2) based on a sufficiency of the evidence standard, *Purcell*, 110 Nev. at 1394, 887 P.2d at 279; *see* *Evans*, 112 Nev. at 1193, 926 P.2d at 279, appellate review of an order denying such a motion "is in essence the same as a review of the sufficiency of the evidence." *Johns*, 686 F.3d at 446. Accordingly, Kassa's path to reversal is onerous.

A.

The record supports the district court's decision: A reasonable juror could have looked at the evidence and concluded that Kassa did not satisfy *M'Naghten.* Foremost, as the jury instructions emphasized, whether or not Kassa suffers from a mental illness, the State's case still benefits from an initial presumption of his *legal sanity*—it was Kassa's burden to rebut this by a preponderance of the evidence. NRS 174.035(6); *see* *Clark v. State*, 95 Nev. 24, 26, 588 P.2d 1027, 1028 (1979). And "[t]he presumption of [legal] sanity operates most critically, of course, at the time the offense is committed." *Ford v. State*, 102 Nev. 126, 135, 717 P.2d 27, 33 (1986). Accordingly, while the State did not deny the proffered evidence of Kassa's history of delusions and hallucination, neither this nor his psychiatric diagnosis established his legal insanity for the purposes of his NGRI defense—the *M'Naghten* test hinges on the temporal and causal connection between Kassa's mental illness and the crime. *Id.* at 136, 717 P.2d at 33.

Had the jury credited the testimony of Kassa's two psychiatrists, an NGRI verdict might have been reached.[1] But as Kassa conceded at oral argument before this court, the jury was under no obligation to accept the experts' testimony. And circumstances here likely led the jury to be somewhat skeptical. As a foundational matter, two years after the fire—and long after he was charged with arson and murder—Kassa denied to the testifying psychiatric experts that he had used drugs before committing the crime. But in opening and closing arguments, the State noted that medical records made two days after the fire—records that Kassa stipulated to admitting at trial, which his experts confirmed the existence and contents of during their testimony, and which he did not include in his appellate record[2]—reflect that while in the hospital after the fire Kassa "gives a ... detailed account of using ... Spice, via snorting it." It appears that those nearly contemporaneous records additionally stated that, "Patient reports he had recently been snorting Spice. Reports it was a powder-like substance and that he had a history of using this in the past as well.... [H]e reports feeling disturbed and unable to sleep after snorting it ...."

[1] Though, for the reasons discussed below, a reasonable juror could have accepted the expert testimony in whole and still rejected Kassa's NGRI defense.

[2] Where records are missing from the appellate record, we presume the materials support the district court's decision. *See* *Sasser v. State*, 130 Nev. 387, 393 & n.8, 324 P.3d 1221, 1225 & n.8 (2014).

A reasonable juror could have elevated these medical records—made shortly after the fire, before Budiao died, without any ulterior investigative purpose, and before serious criminal charges were brought—over the testifying expert opinions, based as they were on self-serving information Kassa supplied two years after the event. *See* *Clark*, 95 Nev. at 28, 588 P.2d at 1029-30 (finding that the jury reasonably rejected an NGRI defense where "[t]he expert opinions were largely based on information supplied to the psychiatrists by appellant over a year subsequent to the commission of the crime, which information was markedly sharp in contrast to statements given police more proximate to [the crime]"). This is especially so given that Kassa's own expert agreed that, based on his review of the records noted above, he "could not rule out the use of Spice at the time" Kassa set the fire. And to the extent the jury reasonably believed that Kassa's ingestion of Spice created his alleged delusion or otherwise ***756** led to his admitted arson, they likewise correctly rejected his NGRI defense—*M'Naghten's* causal requirement, that the operative delusion result from a "mental disease or defect," would not be satisfied under such conditions. *State v. Fisko*, 58 Nev. 65, 79, 70 P.2d 1113, 1118

(1937) (stating that "voluntary intoxication furnishes no excuse for crime committed under its influence") (quoting 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 400 (7th ed. 1882)), *overruled in part on other grounds by* *Fox v. State*, 73 Nev. 241, 316 P.2d 924 (1957); *see* NRS 174, 035(10)(a) (stating that an exonerating "[d]isease or defect of the mind" for purposes of Nevada's *M'Naghten* test "does not include a disease or defect which is caused solely by voluntary intoxication").

B.

All this said, there is no need to rely on the record evidence of Kassa's Spice use to support the jury's verdict. Sufficient evidence alternatively supports that Kassa fell short of *M'Naghten* in any case. *Cf. Rhyne v. State*, 118 Nev. 1, 10, 38 P.3d 163, 169 (2002) (noting "that a jury may return a general guilty verdict on an indictment charging several acts in the alternative even if one of the possible bases of conviction is unsupported by sufficient evidence"). *M'Naghten* sets "a very narrow standard." *Finger*, 117 Nev. at 577, 27 P.3d at 85. Under *M'Naghten*, "[d]elusional beliefs can only be the grounds for legal insanity when the facts of the delusion, if true, would justify the commission of the criminal act." *Id.* And, even accepting at face value that Kassa suffered under the delusions he claimed, and that they were caused by a defect of the mind rather than substance abuse, a reasonable juror could have determined that they did not meet this exacting requirement.

Of note, Kassa presented somewhat conflicting testimony as to the content of his delusions. One psychiatrist reported that Kassa said he lit the fire "to die fully" and end outside control of his reanimated body, while the other suggested that those same outside forces had directed him to set the fire. But in either case, with regard to the first part of the *M'Naghten* test, there is substantial record support for the inference that Kassa understood "the nature and capacity of his ... act," NRS 174.035(6)(b)(1). Kassa knew that he was setting a fire, adding "clothing and furniture, a chair and possibly something from the sofa" as kindling, and that this would cause the home he and others lived in to burn. Indeed, his purpose in setting the fire was that it be deadly. It is therefore unsurprising that one of Kassa's own psychiatric experts testified that Kassa failed to "show impairment in this sub element" because he "knew that fires burned" and believed that he "required a fire that would burn his body." This alone would justify the jury in rejecting Kassa's NGRI defense under the first *M'Naghten* pathway. *See Buford v. State*, 300 Ga. 121, 793 S.E.2d 91, 94 (2016) (holding that evidence was sufficient to support rejection of defendant's NGRI defense where one of two testifying experts was uncertain as to whether the defendant met the test's requirements).

As to the second part of the *M'Naghten* test, a jury could have also inferred that Kassa appreciated that his conduct was wrongful. Most notably, Kassa trapped Budiao in the bathroom, despite her screaming pleas to be released, specifically because he knew she would stop him and extinguish the fire. Beyond this, as Kassa's own testifying expert noted, Kassa escaped from the burning house through a window, then resisted arrest. Though one of Kassa's experts suggested that he escaped the fire when the smell of smoke triggered some sort of survival reflex in him, a reasonable jury still could infer Kassa's appreciation of wrongfulness from these facts. *See Edwards v. State*, 90 Nev. 255, 260, 524 P.2d 328, 332 (1974) (noting that an attempt to flee the scene of a crime "is a circumstance supportive of an inference of guilt").

Accordingly, even if the jury believed that Kassa had the delusions either of his psychiatrists described, and even if they believed those delusions were caused by a "defect of the mind," NRS 174.035(10)(a), and not Spice use, the evidence demonstrates that Kassa knew that he was setting a house ***757** on fire, the house was occupied by others, and the occupants would want to stop him. He likewise knew enough to escape from the fire and to attempt to evade arrest. And more fundamentally, neither his delusional need "to die fully" nor his need to satisfy certain unnamed external forces controlling him amount to a *legal defense* for his intentionally starting a deadly fire, in the early morning, in a dwelling occupied by sleeping individuals who were, even in the context of his delusion, completely innocent. *See* *Finger*, 117 Nev. at 576, 27 P.3d at 85 (explaining that defendant is entitled to acquittal under the *M'Naghten* test only "if the facts as he believed them to be in his delusional state would justify his actions"). Accordingly, any suggestion that the testimony by Kassa's experts necessitated his acquittal is misdirected: "Even when experts are unanimous in their opinion," which was not the case here, "the factfinder may discredit their testimony—or disregard it altogether—and rely instead on other probative evidence from which to infer the defendant's sanity." 2 Catherine Palo, *Criminal Law Defenses* § 173 (Supp. 2020); *see also* *Clark*, 95 Nev. at 28, 588 P.2d at 1029 (noting that expert "testimony is not binding on the trier of fact, and the jury was entitled to believe or disbelieve the expert witnesses"). The district court did not err by denying Kassa's motion for acquittal.

III.

Kassa's second argument in favor of reversal centers on jury instruction no. 20, and specifically the insertion of the second sentence therein:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition. *This is so even when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity*. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

(Emphasis added.) This instruction is based in large part on NRS 193.220; the additional language regarding the interplay between voluntary intoxication and NGRI defenses is from *Fisko*, 58 Nev. at 79, 70 P.2d at 1118.

Generally, "[t]he district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Newson v. State*, 136 Nev. 181, 185, 462 P.3d 246, 249-50 (2020) (internal quotation marks omitted). That said, "we review de novo whether a particular instruction ... comprises a correct statement of the law." *Hager v. State*, 135 Nev. 246, 257, 447 P.3d 1063, 1072 (2019) (alterations and internal quotation marks omitted). And even if an instruction is given in error, reversal is not required unless a different result would be likely, absent the contested instruction. *See* *Allred v. State*, 120 Nev. 410, 416, 92 P.3d 1246, 1251 (2004).

The substance of Kassa's objection is somewhat unclear. To the extent he suggests that a court may never allow jury instructions that vary from the applicable statutory language, this is untenable. *See* *Runion v. State*, 116 Nev. 1041, 1050-51, 13 P.3d 52, 58-59 (2000) (admonishing district courts to tailor instructions to the case, rather than merely quote applicable statutes). Kassa also seems to argue that the district court should not have permitted any instruction regarding voluntary intoxication and its impact on an NGRI defense. But this ignores that he raised no objection—even on appeal—to instructions no. 14 (instructing that in the NGRI context, "[v]oluntary use of drugs or alcohol do not constitute a severe mental disease or defect. The voluntary use of drugs or alcohol must be disregarded.") and 17 (instructing that a " '[d]isease or defect of the mind' does not include a disease or defect which is caused solely by voluntary intoxication"). These cover the same subject matter as instruction no. 20.

In any case, Kassa could not demonstrate any prejudice from the district court's inclusion of these instructions, such that reversal would be justified. *See* *Allred v. State*, 120 Nev. 410, 416, 92 P.3d 1246, 1251 (2004). Indeed, these instructions actually ***758** opened an additional avenue by which the jury might have acquitted him, had his attorney so argued the alleged facts. Arson, which also served as the basis for the State's felony murder charge, is a specific intent crime, *see* *Ewish v. State*, 110 Nev. 221, 228, 871 P.2d 306, 311 (1994), *on reh'g*, 111 Nev. 1365, 904 P.2d 1038 (1995), and voluntary intoxication can defeat specific intent, *see* NRS 193.220.

Kassa may also have intended to object to instruction no. 20 on the grounds that its use of the phrase "temporary insanity" was prejudicially confusing. It is true that NGRI defenses only require that the defendant be legally insane at the moment of the offense; that is, it has no bearing whether the alleged insanity was temporary or long-running. But instruction no. 20 only integrates related and correct statements of law. *See* NRS 193.220; *Fisko*, 58 Nev. at 79, 70 P.2d at 1118. And in any case, reading the instructions as a whole, *Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997), it is clear that the concepts instruction no. 20 distinguishes are that of a causal mental disease or defect and voluntary intoxication, of which only the former will suffice for an acquittal under *M'Naghten.*

Indeed, in its closing argument to the jury, the State clearly made correct use of the language of instruction no. 20 (in conjunction with instructions no. 14 and 17):

> Now, what's the importance of the Spice.... In order to be [legally] insane, your delusional mental state must be derived from the mental defect, here schizophrenia. It cannot be derived from the ingestion of alcohol and narcotics. Now, you could be absolutely insane and use drugs and alcohol, and that still is a legal defense for legal insanity, but the cause, where the conduct and the delusional state comes from must come from the mental illness and not from the Spice.

Accordingly, to the extent there was anything potentially confusing in instruction no. 20, the context of the related unobjected-to instructions and the State's explanation of the same offered sufficient clarification. *See Nunnery v. State*, 127 Nev. 749, 786, 263 P.3d 235, 259 (2011) (finding district court did not abuse its discretion in issuing particular jury instruction "[b]ecause three other instructions informed the jury that the State bore the burden of proof and the same need not be stated in every instruction").

Finally, Kassa argues that our statement in *Nevius v. State*—that "for a defendant to obtain an instruction on voluntary intoxication as negating specific intent, the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings," 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985)—in fairness should apply equally to the State. But whether or not Kassa is correct that *Nevius* can be logically extended to require a burden of production on the State in the odd instance that the State raises a theory of intoxication is beside the point. Here, the State satisfied this burden. As discussed above, Kassa stipulated to the admission of medical records reporting his statements to health care providers two days after the fire, in which Kassa admitted his Spice use and spoke of the unsettling, intoxicating effect that such use had on his mental state. Although Kassa did not include the medical records as part of the record on appeal—an omission that weighs against his claim of evidentiary insufficiency, *see* note 2, *supra*—his expert also spoke to the intoxicating effects that Spice can have on a person's mental state, including causing a person to feel paranoid, hear voices, and have delusions and/or hallucinations. Kassa's experts further admitted they could not exclude Spice as a potential cause of his alleged delusions and noted the contents of his medical records stating the same. And in any case, as indicated above, Kassa raised no objection to instructions no. 14 and 17 on this basis, neither here nor in the district court. This would likewise operate to defeat this claim. *Cf. Gaxiola v. State*, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005) (noting that "[g]enerally, the failure to clearly object on the record to a jury instruction precludes appellate review" (internal quotation marks omitted)).

For these reasons, we affirm the judgment of the district court.

We concur:

Parraguirre, J.

Cadish, J.

Herndon, J.

SILVER, J., with whom HARDESTY, C.J., and STIGLICH, J., agree, dissenting:

***759** I would reverse the judgment of conviction adjudicating appellant Abebaw Kassa guilty but mentally ill of first-degree murder and first-degree arson and remand the matter for a new trial. In my view, the district court abused its discretion by instructing the jury on voluntary intoxication because the State did not present sufficient evidence to warrant a voluntary intoxication instruction under *Nevius v. State*, 101 Nev. 238, 249, 699 P.2d 1053, 1060 (1985). And the district court compounded that error by giving a confusing and legally inaccurate form of the instruction (no. 20), as proposed by the State. Contrary to Nevada law, the challenged instruction implied that the jury could determine that Kassa was insane at the time of the offense but nevertheless find him criminally liable. *Cf.* NRS 194.010(4) (excepting from criminal liability "[p]ersons who committed the act charged or made the omission charged in a state of insanity"). Moreover, instruction no. 20 contradicted and conflicted with other instructions that addressed the relationship between intoxication and insanity (nos. 14 and 17). The majority correctly notes that our test for legal insanity is "specific and demanding," Majority Opinion at 754, which is exactly why this court has described insanity as "a term of art" and "stress[ed] the need for experts and juries to be

correctly advised on the M'Naghten standard." *Finger v. State*, 117 Nev. 548, 577, 27 P.3d 66, 85 (2001). I believe the instructional error was not harmless, as these contradictory instructions likely confused the jury about a highly technical area of criminal law. Because the jury's deliberative process was inexorably tainted by the error, I respectfully dissent.

In 2016, Kassa lived in a community-based group home for individuals suffering from mental illness. The home specialized in assisting semi-independent individuals with their basic life skills, e.g., hygiene, nutrition, and compliance with medication needs. Kassa resided in the home for approximately one month without incident. During the early morning hours of July 27, 2016, Kassa started a fire in the home that claimed the life of the live-in caretaker. The State charged Kassa with first-degree arson and felony murder. Kassa entered a plea of not guilty by reason of insanity (NGRI). To meet the standard of legal insanity, Kassa bore the burden of proving that, due to a mental defect or disease, he "was in a delusional state at the time of the alleged offense," NRS 174.035(6)(a), that resulted in his inability to "(1) [k]now or understand the nature and capacity of his ... act; or (2) [a]ppreciate that his ... conduct was wrong, meaning not authorized by law," NRS 174.035(6)(b).

Before trial, mental health evaluators assessed Kassa and determined he was psychotic and incompetent to stand trial. After approximately six months of treatment and antipsychotic medication in a maximum security forensic hospital, Kassa regained competence and proceeded to trial. The defense retained Dr. Gregory Brown to evaluate Kassa and provide expert psychiatric testimony at trial. Dr. Brown diagnosed Kassa as schizophrenic and concluded he was legally insane when he started the fire. After Kassa filed notice of his entry of an NGRI plea, the State requested and obtained an independent psychological evaluation of Kassa from Dr. Steven Zuchowski. After evaluating Kassa, Dr. Zuchowski likewise diagnosed Kassa with schizophrenia, concluded that he was legally insane when he set the fire, and testified for the defense at trial.

In discussing his conclusions, Dr. Brown explained that individuals with schizophrenia typically develop symptoms during their mid-to-late 20s, including disorganized thinking, sensory hallucinations that seem real, and delusions related to fixed-false beliefs. Mental health professionals first diagnosed Kassa as schizophrenic in 2011, and he reported experiencing auditory hallucinations since 2008. Dr. Brown detailed multiple schizophrenic episodes in Kassa's mental health history. In one incident, Kassa called 9-1-1 on himself because voices were telling him to hurt someone. Emergency responders found ***760** him lying in his bedroom closet and took him for a mental health evaluation. During another incident, emergency responders found Kassa screaming incoherently after voices told him that his mother died, though his mother was still alive. At one point, authorities involuntarily admitted Kassa to a mental health facility. During the inpatient admission, Kassa described other instances of hearing voices coming from a radio and hearing "heavenly things." Authorities determined Kassa was psychotic and treated him with antipsychotic medication. Dr. Brown found that Kassa's psychiatric history conformed to the diagnosis of schizophrenia and ruled out potential malingering.

Regarding Kassa's legal sanity at the time of the fire, Dr. Brown explained that Kassa suffered from two distinct delusions. First, Kassa believed that he died in a 2013 car accident because voices told him he had died and because he could not locate his pulse. Further, Kassa believed that he was unable to control his body because external forces were animating his dead body and making him breathe artificially. Kassa understood the concept of fire and believed it necessary to destroy his already dead body. Dr. Brown opined that this delusion prevented Kassa from understanding that his actions were wrong. Ultimately, Dr. Brown concluded that Kassa's schizophrenia and delusional state when he started the fire met the NGRI standard.

Dr. Zuchowski, the State's handpicked psychiatrist, testified similarly, explaining that Kassa's mental health history conformed to a diagnosis of schizophrenia. And he concluded that Kassa suffered under a fixed-false belief that he was already dead and experienced "command-oriented hallucinations." Dr. Zuchowski described Kassa's belief that he was already dead and in heaven. While Dr. Zuchowski found that Kassa understood he was starting a fire, he concluded that Kassa did not understand that other people could be harmed or that the fire would have serious consequences. Accordingly, Dr. Zuchowski concluded that Kassa, in the depths of his psychotic delusion, did not appreciate the wrongfulness of his actions.

In the face of this overwhelming presentation of evidence that Kassa was legally insane when he started the fire—including from the State's chosen expert—the prosecution did not present any contrary expert testimony. Instead, the State focused on the idea that Kassa was intoxicated, not insane, at the time of the fire, pointing to a notation in the medical records about Kassa's use of Spice. However, Dr. Brown testified that nothing about

the admitted medical records, including the notation about Spice usage, would change his conclusions. And Dr. Zuchowski did not see any evidence that drug use caused Kassa's psychotic episodes, concluding that the description of the event was consistent with the diagnosis of schizophrenia. But the State persisted in arguing that

> [Kassa is] claiming that he's insane, anything to rebut that, including extreme intoxication, including temporary insanity[,] ... the State should be allowed to argue that if [Kassa is] intoxicated to the point where he's even temporarily insane he's[,] ... and I hate to use a double negative, but he's not not guilty by reason of insanity.

This argument highlights the confusion created by the State commingling temporary insanity and voluntary intoxication with instruction no. 20. Kassa objected generally to giving any voluntary intoxication instruction. After the district court found the instruction proper, he further objected to the State's proposed injection of language that discussed voluntary intoxication causing a "temporary insanity," as it would confuse the jury.

This court has explained that, to warrant giving a voluntary intoxication instruction, "the evidence must show not only the defendant's consumption of intoxicants, but also the intoxicating effect of the substances imbibed and the resultant effect on the mental state pertinent to the proceedings." *Nevius*, 101 Nev. at 249, 699 P.2d at 1060. In *Nevius*, the defendant presented evidence that "showed only that he consumed intoxicants." *Id.* Specifically, "Nevius testified that the four men had a bottle of wine with them ... and that [he] had smoked marijuana." *Id.* Because the defendant did not establish the intoxicating effect of the wine and marijuana, ***761** or the effect on his mental state as it related to the criminal charge, this court concluded the district court properly rejected the defendant's voluntary intoxication instruction. *Id.* While the majority does not conclude one way or the other, in my view, the law—and specifically the *Nevius* standard in this case—should apply equally to the State when it requests an instruction like the one given in this case. I also disagree with the majority that the State nevertheless "satisfied this burden." Maj. Op. at 758.

Here, the State did not even establish that Kassa consumed Spice. The State relied solely on a notation in Kassa's medical records and paraphrased it during closing arguments. Specifically, the State commented that "[Kassa] gives a pretty detailed account of using *some type of substance*, Spice, via snorting it.... Reports it was a powder-like substance and that he had a history of using this in the past as well. Then he reports feeling disturbed and unable to sleep after snorting it, *the substance he refers to as Spice*." (Emphases added.) Accordingly, Kassa admitted to using "some type of substance" that he called "Spice" and felt agitated and had trouble sleeping afterwards.

But this account of Kassa's alleged intoxication is problematic. First, the description "of using some type of substance" fails to show what substance, if any, Kassa actually ingested. Additionally, although the medical records referred to "Spice," Dr. Zuchowski posited that Kassa described being "anointed with some kind of an incense or perfume the day prior to the fire at church ... and that may have been misinterpreted as Spice use."[1] Second, even assuming Kassa ingested Spice, the State presented no compelling evidence that established the intoxicating effects. Because Kassa suffered under a delusion that he was already dead and his body was animated by external forces, his description of "feeling disturbed and unable to sleep" sheds little light on his "mental state pertinent to the proceedings." *Nevius*, 101 Nev. at 249, 699 P.2d at 1060. Further, Dr. Brown explained that the substance can cause "widely differing effects on individuals" depending on the chemical makeup.[2] The effects range from feeling "mellow and relaxed" to causing paranoia and hallucinations. Thus, the State did not establish what, if any, substance Kassa consumed, the amount ingested, or how the effects he described related to the offense. Accordingly, I conclude that the district court abused its discretion by instructing the jury on voluntary intoxication.

1 Kassa utilized a translator at trial. Dr. Brown testified that during his interview with Kassa—whose native language was Amharic, "a Semitic language that is an official language of Ethiopia," *Merriam-Webster's Collegiate Dictionary* 40 (11th ed. 2014)—he spoke "good English overall" but needed certain words repeated.

[2] *See* Major Catherine L. Brantley, *Spice, Bath Salts, Salvia Divinorum, and Huffing: A Judge Advocate's Guide to Disposing of Designer Drug Cases in the Military*, 2012-Apr. Army Law. 15, 16 (2012) (explaining that "[Spice] produces euphoria, psychosis, respiratory problems, and low blood pressure; however, lower doses usually result in calming sensations"). Moreover, Kassa's description of ingesting Spice by snorting a powdered substance is dubious because "Spice is a green leafy substance that resembles marijuana.... [It] is comprised of a combination of different plant materials." *Id.* (defining Spice).

Although I do not believe that a voluntary intoxication instruction should have been given at all, because one was given it should have, at the very least, correctly instructed the jury, particularly given that the instruction requested by the State referred to the highly technical NGRI defense. *See* *Finger*, 117 Nev. at 576-77, 27 P.3d at 85 (explaining that "[l]egal insanity has a precise and extremely narrow definition in Nevada law"). In my view, instruction no. 20 misstated the law, *see* *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007) ("[W]hether a proffered instruction is a correct statement of the law presents a legal question which we review de novo."), and confused the "very narrow standard" that we apply to the insanity defense, *Finger*, 117 Nev. at 577, 27 P.3d at 85. Jury instruction no. 20 states the following:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition. *This is so even when the intoxication is so extreme as to make the person unconscious of what he is doing or to create a temporary insanity.* But whenever the actual existence of any particular ***762** purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, evidence of intoxication may be taken into consideration in determining such purpose, motive or intent.

(Emphasis added.) I disagree with the majority that "instruction no. 20 only integrates related and correct statements of law." Maj. Op. at 758. Although the instruction largely tracks NRS 193.220,[3] the second sentence does not appear in that statute. The first and second sentence in the instruction, read together, imply that temporary insanity is not a defense. That is incorrect, as Nevada law allows the insanity defense to be based on insanity during a temporary interval of time, i.e., temporary insanity. NRS 174.035(6)(a) (requiring the defendant to prove he "was in a delusional state *at the time of the alleged offense"* (emphasis added)); *see also* *Miller v. State*, 112 Nev. 168, 174, 911 P.2d 1183, 1186-87 (1996) ("[A] person can benefit from the M'Naghten insanity defense if he shows he was insane during the temporal period that coincides with the time of the crime. Technically and semantically, such a finding is temporary insanity." (citation omitted)). The defense of temporary insanity reflects the fluid state of mental health. Put another way, a defendant can be legally sane before or after a criminal act and also legally insane at the time of the offense. *See Insanity*, *Black's Law Dictionary* (11th ed. 2019) (defining "temporary insanity" as "[i]nsanity that exists only at the time of a criminal act").

[3] NRS 193.220 explains the circumstances in which a jury may consider voluntary intoxication and the limits on its relevance:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his or her condition, but whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute a particular species or degree of crime, the fact of the person's intoxication may be taken into consideration in determining the purpose, motive or intent.

The record reflects that the State and the district court relied on *State v. Fisko*, 58 Nev. 65, 70 P.2d 1113 (1937), *overruled on other grounds by* *Fox v. State*, 73 Nev. 241, 247, 316 P.2d 924, 927 (1957), for the second sentence in the instruction. But that case conflated the defenses of temporary insanity and diminished capacity. *See* *id.* at 78-79, 70 P.2d at 1118 (describing defendant's diminished capacity defense based on voluntary intoxication as "temporary insanity" that "furnishes no excuse for [the] crime committed" (quoting 1 Joel Prentiss Bishop, *Commentaries on the Criminal Law* § 400 (7th ed. 1882))). As this court explained in *Miller*, 112 Nev. at 173-74, 911 P.2d at 1186-87, those defenses are mutually exclusive because diminished capacity can be present only in the absence of insanity

whereas temporary insanity requires proof of insanity. *See Diminished Capacity*, *Black's Law Dictionary* (11th ed. 2019) (defining "diminished capacity" as "[a]n impaired mental condition—short of insanity—that is caused by intoxication, trauma, or disease and that prevents a person from having the mental state necessary to be held responsible for a crime"). The language that the State appropriated from *Fisko* also implies that intoxication alone can "create a temporary insanity." 58 Nev. at 79, 70 P.2d at 1118 (quoting Bishop, *supra,* § 400). But under Nevada law, voluntary intoxication cannot alone result in legal insanity, temporary or not. *See* NRS 174.035(10)(a) (" 'Disease or defect of the mind' [for purposes of the insanity defense] does not include a disease or defect which is caused solely by voluntary intoxication."). Accordingly, I believe the State's inclusion of language from an archaic treatise, published over 120 years before Nevada's codification of the *M'Naghten* standard, was contrary to Nevada law as it no longer comports with our contemporary insanity jurisprudence. I would therefore overrule *Fisko* to the extent it implies that voluntary intoxication alone can cause temporary insanity. Thus, I conclude that instructing the jury that "voluntary intoxication" can "create a temporary insanity" is an incorrect statement of the law and an abuse of discretion by the district court.

The question then is whether the instructional error was harmless. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *Nay*, 123 Nev. at 333-34, 167 P.3d at 435 (explaining that instructional errors generally are subject to harmless-error ***763** review). Here, the relationship between the insanity defense and voluntary intoxication was of critical importance because Kassa presented expert testimony that he was legally insane at the time of the crimes and the State contends that it presented evidence that Kassa ingested an intoxicating substance before the crimes. That relationship was concisely and clearly addressed in jury instruction no. 17, which followed an instruction explaining that the insanity defense requires proof of a disease or defect of the mind and quoted NRS 174.035(10)(a): " 'Disease or defect of the mind' does not include a disease or defect which is caused solely by voluntary intoxication." But jury instruction no. 20 then muddied the waters, suggesting that voluntary intoxication on its own *could* give rise to temporary insanity while implying that temporary insanity is not a defense. Unfortunately, none of the other instructions clarified the matter. In fact, another instruction (no. 14) compounded the potential for confusion by telling the jury that "[t]he voluntary use of drugs or alcohol must be disregarded in determining whether the defendant could appreciate the nature and quality of his acts or the moral wrongfulness of his acts." That instruction misstates the law and conflicts with the correct statement of the law set forth in jury instruction no. 17.[4] Under Nevada law, voluntary intoxication cannot be the *sole* cause of a mental disease or defect to support an insanity defense, but it may be a contributing factor for the jury to consider.

[4] The majority correctly notes that Kassa did not object to instruction no. 14. But in my view, reading the instructions as a whole only clarifies the error in instruction no. 20, instead of curing it. *See Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997) (providing that "[t]aken as a whole, the jury instructions d[id] not cure" an erroneous instruction).

The jury thus was faced with internally inconsistent and confusing instructions. Indeed, one need only look to the State's comments in support of instruction no. 20 to see the problem: "the insanity—this case is confusing in and of itself." Or as the State told the jury, "You have the instructions. They're a little bit complicated ...." Yet the State chose to compound that confusion and further complicate the proceedings with its proffered instruction. We should not expect jurors "to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." *Crawford v. State*, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005). This is particularly true where even the State found the case confusing.

Further, the majority isolates comments in the State's rebuttal argument that noted "[Kassa's] delusional mental state must be derived from the mental defect, here schizophrenia. It cannot be derived from the ingestion of alcohol and narcotics." Maj. Op. at 757–58.[5] But I believe the majority overrates the clarifying effect of this statement, as the State negated that principle by first telling the jury in closing argument, "You have an instruction [no. 20] that tells you that no act committed by a person while in a state of voluntary intoxication shall be deemed less ... criminal by reason of his condition, and that's so, *even when the intoxication is so extreme as to cause temporary insanity*." (Emphasis added.) This statement encapsulates the flaw in instruction no. 20 and the resulting prejudice, i.e., that the jury could conclude that Kassa was both temporarily insane and criminally liable. *Cf. Finger*, 117 Nev. at 568, 27 P.3d at 80 (providing that " 'legal insanity' simply means that a

person has a complete defense to a criminal act based upon the person's inability to form the requisite criminal intent").

[5] In full, the State made the following comment:

> Now, what's the importance of the Spice?... In order to be [legally] insane, your delusional mental state must be derived from the mental defect, here schizophrenia. It cannot be derived from the ingestion of alcohol and narcotics. Now, you could be absolutely insane and use drugs and alcohol, and that still is a legal defense for legal insanity, but the cause, where the conduct and the delusional state comes from must come from the mental illness and not from the Spice.

Finally, regarding the majority's position that the voluntary intoxication instruction actually ***764** benefited Kassa, I again disagree.[6] While "[i]t is true that voluntary intoxication may negate specific intent," *Nevius*, 101 Nev. at 249, 699 P.2d at 1060, it also opened up an avenue for the State to confuse the jury and persuade them to disregard the overwhelming, and one-sided, evidence of Kassa's legal insanity by instead focusing attention on the specter of Spice. This is reflected in the State's use of the term "Spice" 14 times during its closing and rebuttal arguments. Ultimately, under the circumstances presented here, I do not believe the error in giving jury instruction no. 20 was harmless beyond a reasonable doubt, as the erroneous emphasis on the alleged use of Spice certainly affected the jury's verdict. *See Miller*, 112 Nev. at 175, 911 P.2d at 1187 (reversing a conviction where the prosecution and district court misinterpreted the insanity defense and hopelessly confused the jury).

[6] To the extent the majority suggests Kassa could have argued a specific-intent defense to arson, the district court appeared to preclude such an argument. While discussing jury instruction no. 20, Kassa commented that if the State proves voluntary intoxication, "that vitiates the specific intent. There's no arson. There's no felony murder." In response, the district court stated, "No.... See you put his sanity at issue.... [S]o intoxication would negate the sanity issue, and since you put his sanity at issue, I think [the instruction is] appropriate ...."

In sum, I conclude that the district court erred in giving a voluntary intoxication instruction and compounded that error by giving an instruction that misstated and confused the intricate and precise standard for legal insanity, thus making jury instruction no. 20 more injurious than instructive. Further, I conclude the error likely affected the jury's verdict and therefore was not harmless beyond a reasonable doubt. Accordingly, I would reverse the judgment of conviction and remand for a new trial based on the instructional error.

We concur:

Hardesty, C.J.

Stiglich, J.

All Citations

485 P.3d 750, 137 Nev. Adv. Op. 16

488 P.3d 646
Court of Appeals of Nevada.

Ralph Edmond GOAD, Appellant,
v.
The STATE of Nevada, Respondent.

No. 79977-COA
|
FILED APRIL 29, 2021

Synopsis
Background: Defendant was convicted in the District Court, Washoe County, David A. Hardy, J., of murder with the use of a deadly weapon. Defendant appealed.

Holdings: The Court of Appeals, Gibbons, C.J., held that:

trial court's failure to order competency hearing sua sponte violated defendant's due process rights, and

order vacating trial court's judgment and remanding with instructions for trial court to hold retrospective competency hearing, if feasible, was warranted.

Vacated and remanded.

Tao, J., filed an opinion concurring in part and dissenting in part.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***649** Appeal from a judgment of conviction, pursuant to a jury verdict, of murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Attorneys and Law Firms

John L. Arrascada, Public Defender, and Kathryn Reynolds, Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; Christopher J. Hicks, District Attorney, and Kevin Naughton, Appellate Deputy District Attorney, Washoe County, for Respondent.

BEFORE GIBBONS, C.J., TAO and BULLA, JJ.

OPINION

By the Court, GIBBONS, C.J.:

***650** The United States and Nevada Constitutions prohibit trying a criminal defendant while he is mentally incompetent. An incompetent defendant lacks the requisite mental cognizance to receive a fair trial and appreciate the rights associated therewith. A defendant cannot, among other things, effectively assist counsel, confront witnesses, or intelligently decide whether to testify or remain silent. Thus, both the United States and Nevada Supreme Courts have recognized that conviction of an incompetent criminal defendant violates due process.

The right to stand trial while competent being paramount, the United States Supreme Court has recognized a procedural due process right to a hearing to determine whether a defendant is competent if sufficient doubt of competency arises at any time. The Nevada Supreme Court has embraced this right by requiring a trial court to order a competency hearing sua sponte when any evidence before the court—in isolation or in light of other evidence—gives rise to reasonable doubt as to the defendant's competency. Nevada prescribes statutory procedures that trial courts must follow when determining whether doubt is reasonable. If there is such doubt, the court must conduct a competency hearing; neither the defendant nor defense counsel can waive the right to a hearing. The Nevada Supreme Court has consistently remedied violations of a defendant's right to a competency hearing with reversal of the conviction and remand for a new trial but has not mandated that a new trial is the only permissible remedy.

This case presents three questions that Nevada competency jurisprudence has yet to answer or clarify. First, does reasonable doubt exist where a defendant has a history of mental health issues and use of psychoactive medications, been deprived of an unknown medication during trial, and becomes debilitated during trial? Second, is a trial court required to consider evidence of incompetence adduced during pretrial proceedings in its

reasonable doubt determination if a different judge adjudicated pretrial matters? Third, is it permissible to remedy a violation of a defendant's right to a competency hearing by remanding the case to the trial court to determine whether the defendant was incompetent during trial?

We now extend Nevada's procedural due process requirement of a hearing to determine competency to novel factual circumstances and apply a new remedy. Accordingly, we conclude that (1) reasonable doubt exists as to a defendant's competency where the defendant has a history of mental health issues and psychoactive medication use, is deprived of medication during trial, and becomes debilitated thereafter; (2) a trial court must consider any evidence of incompetence in the record when determining whether reasonable doubt exists notwithstanding whether the case is transferred from another judge; and (3) we may remedy a violation of a defendant's right to a competency hearing by remanding the case to the trial court to determine whether the defendant was incompetent during trial, but the trial court must first determine if the competency hearing is feasible before holding it.

FACTS AND PROCEDURAL HISTORY

Appellant Ralph Edmond Goad and Theodore Gibson lived in apartments located in the same hallway of an apartment building in Reno. Goad and Gibson were apparently close friends and frequently spent time together. Both Goad and Gibson were in their seventies and received Social Security benefits through a payee counseling service that managed income from Social Security on behalf of beneficiaries who were unable to manage their own finances. Near the end of 2018, the payee service closed. Goad received his last payment from the payee service in November 2018. On January 11, 2019, Goad received a notice of eviction for nonpayment of rent. He was locked out of his apartment on January 30.

On February 13, employees of the apartment building found Gibson's dead body in his apartment. According to the autopsy report, ***651** Gibson suffered a total of 250 stab wounds to the face, head, neck, and other parts of his body. Inside the apartment, police found Gibson's wallet on the floor with its contents strewn about and containing no cash. Police recovered scissors and a knife from inside Gibson's apartment with Gibson's blood on them. Police found Goad's DNA on the handle of the scissors. Police later recovered Goad's clothes from his apartment, on which police detected Gibson's blood. Police obtained video surveillance footage of the hallway in which Gibson's and Goad's apartments were located. The footage shows Gibson entering his apartment on January 18, which was the last time Gibson was seen alive, and Goad entering and exiting Gibson's apartment multiple times between January 18 and January 22. Goad was arrested in Sacramento on March 7.

The State charged Goad with murder with the use of a deadly weapon. The State moved to admit evidence of Goad's finances, including documents regarding his eviction. Goad opposed the motion. In its reply, the State included a transcript of the police interrogation of Goad following his arrest. During the interrogation, Goad discussed his finances and recounted his mental health history, including mental health hospitalizations, doctors struggling to diagnose his mental conditions, and psychoactive medications that he had been prescribed to stabilize his conditions. Among other things, Goad stated,

> they said [I was in the mental hospital] because depression.... But, um, the nurses would tell ya you got something else. They'd tell the doctor to write that down.... Some years they'd say it was this and give me these pills.... And some years they'd say it was that and give me those pills. The only thing that really worked was Amitriptyline for sleep. And, uh, 1 milligram of Ativan three times a day to stop the shakes [, which are from] this and that. See, I've been a nervous wreck all my life.
>
> ...
>
> No, I'm definitely not fine. ... I don't know [what's wrong,] I just don't get along like, um, I'm different.... [I just don't get along with people] because I can't sleep right and I'm nervous all the time.
>
> ...
>
> [I take] Amitriptyline and the Ativan. The Amitriptyline is for depression and sleep. And the Ativan is for bad nervous, anxiety. It's much better than Valium. Valium just makes you sleepy. Ativan calms you down like that.
>
> ...
>
> [The last time I took my medications was] 7 years ago, 'cause when they took me out of the mental hospital and gave me that payee, she was independent, so I wasn't allowed to go back and see a doctor or get medicine anymore. So it was good in a way. But I wasn't able to get any medication anymore. So 7 years,

> I went without medicine.
>
> ...
>
> [When I'm not on medication, I] get angry [and] have to drink beer to calm down.... [When] the beer wears off, it makes you angry 'cause now I gotta walk to the store and buy more beer to calm down again.

In this case, one judge presided over all pretrial matters, and the case was transferred to another judge for trial. The trial judge acknowledged during trial that he was not entirely familiar with what occurred pretrial by stating, "I did not conduct the pretrial hearings," and "I reflected on the fact that I don't know everything that was argued in front of" the pretrial judge.

On the first day of trial, during jury selection but outside the presence of the prospective jurors, the court, defense counsel, and the State briefly discussed Goad's mental health and whether the State would seek admission of the transcript of the police interrogation of Goad. The State informed the court that it would not seek to introduce the transcript at trial. The parties discussed the interrogation transcript again after opening statements because defense counsel quoted a line from the transcript in his opening statement but could not provide a viable theory for admission of the transcript at trial.

At around 2 p.m. on the third day of Goad's trial, the district court and counsel discussed Goad's condition and demeanor ***652** outside the presence of the jury. The court explained that "there had been some inquiries about Mr. Goad's health." Court staff informed the court that, according to medical staff at the jail, Goad had not received his medication that morning and that it was "the type that cannot wait [to be administered] until the end of" the day. Therefore, Goad needed to be transported immediately to the sheriff's office in order to receive the medication. The district court and the parties did not discuss the name or effects of the medication Goad was deprived of on the third day of trial.

After staff came forward, the court solicited comments from the State and defense counsel on the matter. Both informed the court that Goad appeared infirm that morning and that his condition worsened as the day progressed. Defense counsel reported that Goad had been "degrading in his physical [condition]." The State reported that, when Goad came into the courtroom on the morning of the third day of trial, "he did not sit down, he stood there with a look that I think was objectively concerning to the [S]tate."

The district court expressed that it had also observed a change in Goad's demeanor. The court stated, "I've watched Mr. Goad a little bit more today, hoping that he doesn't fall out. I do not believe there is any gamesmanship, legal strategy, being pursued at all." The court added, "Mr. Goad is entitled to be present and well as he both observes trial and participates with his attorneys privately." The court then recessed for the day in order for Goad to be transported to receive his medication.

On the morning of the fourth day of trial, defense counsel asked the district court to canvass Goad because Goad refused to interact with or even acknowledge defense counsel that morning. The court replied that it was "not going to conduct some form of informal mini[-]mental examination from the bench" and that the trial would "proceed with or without Mr. Goad's presence or participation." Nevertheless, the court began asking Goad questions, and Goad gestured to inform the court that he was unable to speak. The court thereafter reported Goad's gestures for the record, including Goad's nods affirming that he was aware of what the judge does, who his attorneys were, and that he desired to proceed with trial. The court's questions did not specifically address the factors for determining incompetence set forth in NRS 178.400(2).[1] Court staff informed the court that the infirmary at the jail had medically cleared Goad for trial. The district court then resumed trial.

[1] *See* NRS 178.400(2) (" '[I]ncompetent' means that the person does not have present ability to (a) [u]nderstand the nature of the criminal charges against the person; (b) [understand the nature and purpose of the court proceedings; or (c) [a]id and assist the person's counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.").

Later, the court asked Goad's counsel to comment on his condition. Defense counsel stated, "it's as if the medication that he was given yesterday has a time frame in which it actually has its effect. Because I have noticed a marked difference now with respect to Mr. Goad and his ability to communicate with me." Counsel continued, "[i]t's as if...this morning [the medication] hadn't fully activated."

The jury ultimately found Goad guilty of murder with the use of a deadly weapon. The district court later sentenced Goad to life in prison without the possibility of parole and a consecutive sentence of 36 to 240 months for the use of a deadly weapon.[2] This appeal followed.

[2] This court only reviews the record that was before the district court on the third and fourth days of trial, when Goad endured the effects of missing his medication. However, the dissent asserts "Goad has never been found legally incompetent" based on comments from Goad's sentencing hearing and oral argument before this court, which were not in the record before the district court on the third and fourth days of trial. Even so, at sentencing, the court commented Goad was the subject of "five separate proceedings in which somebody sought to have him involuntarily committed because of mental health concerns that he may be a harm to himself or others."

On appeal, Goad argues that the district court (1) violated his federal due process and Nevada constitutional rights by failing to order a competency hearing, (2) abused its ***653** discretion by admitting evidence of his financial situation,[3] and (3) abused its discretion by admitting photos of Gibson's clothing that he was wearing when he was killed.[4] We conclude the district denied Goad due process by failing to conduct a competency hearing when reasonable doubt arose about Goad's competency. Accordingly, we vacate Goad's judgment of conviction and remand for appropriate hearings.[5]

[3] The district court admitted the evidence of Goad's finances and eviction as res gestae evidence under NRS 48.035(3), but denied the State's motion as to its alternative theory that the evidence consisted of prior bad acts that qualified under the motive exception in NRS 48.045(2). However, on appeal, Goad argues that the district court admitted this evidence under the motive exception to the rule prohibiting prior bad act evidence; that is, Goad does not challenge the admission of the evidence under NRS 48.035(3). Thus, Goad waived any alleged error. *See* *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that, by failing to raise an argument on appeal, a party thereby waives the argument); *see also* *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

[4] Goad moved to preclude admission of photographs of Gibson's blood-soaked clothes with holes corresponding to his stab wounds, arguing the photos were substantially more unfairly prejudicial than probative because they were gruesome. The district court ruled the photographs were admissible because they assisted the State's forensic pathologist with her testimony and were not unfairly prejudicial. We conclude that there was no abuse of discretion because the photographs of the blood-soaked clothes were not substantially more unfairly prejudicial than probative, and they assisted the State's pathologist to testify as to the stab wounds. *See* *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187,192 (1997); *cf. Harris v. State*, 134 Nev. 877, 880, 432 P.3d 207, 211 (2018) (holding photographs of a crash scene were prejudicial because they showed mutilated bodies in the aftermath of a crash scene), *cert denied*, 587 U.S. ——, 139 S. Ct. 2671, 204 L.Ed.2d 1076 (2019).

[5] We do not reach Goad's claim of cumulative error in light of our disposition.

ANALYSIS

Goad argues that the district court denied him due process under the United States and Nevada Constitutions when it failed to order a competency hearing. He contends reasonable doubt about his competency arose because he was deprived of a necessary medication, refused to interact with defense counsel, and was unable to speak. Goad emphasizes that defense counsel, the State, and the district court agreed that he was unable to be present on the afternoon of the third day of trial due to his declining condition. Goad further argues that the court's canvass of Goad on the fourth day of trial did not dispel the reasonable doubt, especially because the court failed to ask Goad why he could not speak or why he refused to interact with his counsel.

The State argues that a competency hearing was unnecessary. The State claims that the canvass the district court performed at the request of defense counsel, Goad's comprehension of the canvass, Goad's desire to proceed with the trial, that the infirmary medically cleared Goad on the morning of the fourth day of trial, and Goad's ability to write in lieu of speaking all dispelled any doubt.

The State further argues that the Nevada Supreme Court rejected a due process claim analogous to Goad's in *Lipsitz v. State*, 135 Nev. 131, 442 P.3d 138 (2019). We disagree with the State.

We first address the due process requirement for a competency hearing, its relationship to Nevada's competency statutes, and evaluate the district court's compliance with each. We then conclude that a retrospective competency hearing is an acceptable remedy for denial of a defendant's right to a competency hearing, and further adopt a test for determining whether a retrospective competency hearing is feasible and may proceed in lieu of reversal and a new trial.

Due process

Federal due process jurisprudence and Nevada law govern Goad's claim that the district court violated his right to procedural due process by failing to order a competency hearing. *See* *Melchor-Gloria v. State*, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983); Nev. Const. art. 1, § 8. A district court's determination of whether a competency hearing is required is reviewed for abuse of discretion. ***654** *Olivares v. State*, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008). A district court abuses its discretion and denies due process when reasonable doubt as to the defendant's competency arises and it fails to order a competency hearing. *Id.*

"The Due Process Clause of the Fourteenth Amendment provides that a criminal defendant may not be prosecuted if he or she lacks competence to stand trial." *Lipsitz*, 135 Nev. at 135, 442 P.3d at 142. A defendant is competent if he "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and [if] he has a rational as well as factual understanding of the proceedings against him." *Melchor-Gloria*, 99 Nev. at 179-80, 660 P.2d at 113 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960) (internal quotations omitted)); *see also* NRS 178.400(2); *Odle v. Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001) ("[C]ompetence to stand trial does not consist merely of passively observing the proceedings. Rather, it requires the mental acuity to see, hear[,] and digest the evidence, and the ability to communicate with counsel in helping prepare an effective defense."). There are two "due process rights related to competency to stand trial. The first is the traditional right not to be tried or convicted while legally incompetent. The second ... is the right to be accorded a competency hearing when sufficient evidence of incompetency is adduced before the trial court." *Doggett v. Warden*, 93 Nev. 591, 595, 572 P.2d 207, 210 (1977) (citations omitted). This appeal primarily concerns the latter.

Nevada statutory law prescribes a procedure that trial courts must follow in order to determine whether doubt as to a defendant's competency amounts to reasonable doubt necessitating a competency hearing. *See* NRS 178.405(1) (providing that a court must suspend the proceedings when doubt arises until the question of competency is determined); NRS 178.415 (prescribing the procedures a court must follow in conducting a competency hearing). "Under Nevada's competency procedure, if *any* 'doubt arises as to the competence of the defendant, the court shall suspend the ... [trial] until the question of competence is determined.' " *Scarbo v. Eighth Judicial Dist. Court*, 125 Nev. 118, 121-22, 206 P.3d 975, 977 (2009) (quoting NRS 178.405(1)) (emphasis added). During the suspension, the court must "hold a hearing to fully consider [such] doubts and to determine whether further competency proceedings under NRS 178.415 are warranted." *Olivares*, 124 Nev. at 1149, 195 P.3d at 869. "Further competency proceedings under NRS 178.415 are warranted when there is reasonable doubt regarding a defendant's competency." *Scarbo*, 125 Nev. at 121-22, 206 P.3d at 977 (internal quotations omitted).

Nevada's competency statutes

It is unclear whether the district court was attempting to comply with NRS 178.405(1) on the third day when it paused the proceedings, solicited comments about Goad's behavior, and ultimately recessed for the day. However, due process requires us to find error where a defendant did not receive a competency hearing if reasonable doubt existed as to his competency, regardless of whether the district court complied with NRS 178.405(1). Nevertheless, we note that NRS 178.405 and NRS 178.415 prescribe a framework for compliance with the due process reasonable doubt standard that trial courts are required to follow.[6] Unequivocal and diligent adherence to these statutes will naturally guide district courts to a reliable determination of whether a formal competency hearing is necessary and, ultimately, ***655** whether the defendant is incompetent.[7] *See Olivares*, 124 Nev. at 1149, 195 P.3d at 869 ("In addition to the doubts that have been raised, the district court may consider all available information, including any prior competency reports and any new information calling the defendant's

competency into question.").

[6] *See, e.g., Humphreys v. State*, Docket No. 52525, 2009 WL 4279722, at *4 (Order of Affirmance, Nov. 25, 2009) ("Nevada's governing statutes, as interpreted by this court, set up a two-stage procedure that the district court must follow whenever the question of a defendant's competency has been raised: First, the district court must evaluate if there is any doubt as to the defendant's competency. If there is, the court must suspend the proceedings and hold a hearing to consider fully the doubts. Second, if as a result of considering fully those doubts, the district court finds there is reasonable doubt regarding a defendant's competency, the district court must order a full competency evaluation pursuant to the provisions of NRS 178.415." (citations omitted)).

[7] The dissent does not discuss NRS 178.405 or NRS 178.415, but asserts our decision encourages "fishing expeditions" in which we "imagine" evidence will surface. The dissent's comments belie the prescriptions of NRS 178.415, which specifically invite new evidence for the purpose of determining competency. NRS 178.415 requires a district court to appoint two psychologists or psychiatrists, or one of each, to "examine" the defendant, and the court must receive their "report of the examination." NRS 178.415(1), (2). Both the prosecution and the defendant may "introduce other evidence including, without limitation, evidence related to treatment to competency and the possibility of ordering the involuntary administration of medication ...." NRS 178.415(3).

Procedural due process

We now turn to whether Goad was entitled to a competency hearing as a matter of procedural due process.[8] In Nevada, "[a] formal competency hearing is constitutionally compelled any time there is 'substantial evidence' that the defendant may be mentally incompetent to stand trial. In this context, evidence is 'substantial' if it 'raises a reasonable doubt about the defendant's competency to stand trial.' " *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (quoting *Moore v. United States*, 464 F.2d 663, 666 (9th Cir. 1972)). "The trial court's sole function in such circumstances is to decide whether there is any evidence which, assuming its truth, raises a reasonable doubt about the defendant's competency."[9] *Id.* A court must consider evidence of incompetence in the aggregate, rather than separately or in isolation. *Drope v. Missouri*, 420 U.S. 162, 179-80, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975). "Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence," *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (quoting *Moore*, 464 F.2d at 666), and the court must, "sua sponte, ... order a competency hearing," *Krause*, 82 Nev. at 463, 421 P.2d at 951. "If [evidence raising a reasonable doubt] exists, the failure of the court to order a formal competency hearing is an abuse of discretion and a denial of due process."[10] ***656** *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (citing *Pate v. Robinson*, 383 U.S. 375, 385 (1966)). A defendant cannot waive his right to a competency hearing and, accordingly, does not waive his right to a competency hearing by failing to request one. *Krause*, 82 Nev. at 463, 421 P.2d at 951; *see also Pate*, 383 U.S. at 384, 86 S.Ct. 836.

[8] The State correctly acknowledged during oral argument before this court that if Goad was incompetent at any point during trial, he was denied substantive due process. However, Goad argues on appeal that he was denied procedural due process insofar as he did not receive a hearing to determine his competency, not that he was incompetent in fact and denied his substantive due process right not to stand trial while incompetent. As Goad stated during oral argument, the procedural due process right to a hearing to determine competency—which protects and ensures the substantive right not to stand trial while incompetent—has been treated *like* it is structural. The Nevada Supreme Court has historically remedied a district court's failure to provide a competency hearing when reasonable doubt arose by reversing and remanding for a new trial, but it has not ruled that such error is structural. *See, e.g., Olivares*, 124 Nev. at 1149, 195 P.3d at 869; *Fergusen v. State*, 124 Nev. 795, 806, 192 P.3d 712, 720 (2008); *Williams v. Warden*, 91 Nev. 16, 17, 530 P.2d 761, 761-62 (1975); *Krause v. Fogliani*, 82 Nev. 459, 463, 421 P.2d 949, 951 (1966).

9 The dissent missapplies *Melchor-Gloria* to argue reasonable doubt about competency is solely a question of fact that is entirely "within the discretion of the trial court." The very next line in *Melchor-Gloria* states, "[t]he court's discretion in this area, however, is not unbridled." 99 Nev. at 180, 660 P.2d at 113. Indeed, in the ensuing paragraph, *Melchor-Gloria* sets forth two jointly sufficient criteria for finding abuse of discretion and violation of due process: evidence giving rise to a reasonable doubt about competency, and failure to order a competency hearing. Reasonable doubt is *not evaluated* for abuse of discretion; rather, it is a criterion for *finding* an abuse of discretion. The dissent thus inverts the abuse of discretion standard as it pertains to the reasonable doubt (puts the cart before the horse). We do not evaluate whether reasonable doubt existed for abuse of discretion; according to *Melchor-Gloria*, we find abuse of discretion where reasonable doubt existed and the district court failed to order a competency hearing. Since both criterion are present here, we must find an abuse of discretion in this case.

10 The dissent asserts *Melchor-Gloria* states "three things courts must weigh to determine whether a full competency hearing is required—the defendant's history of irrational behavior, his demeanor at trial, and [any] prior medical opinion of his competence to stand trial ... " *Melchor-Gloria* states this information in a parenthetical citing to *Drope*, 420 U.S. at 180, 95 S.Ct. 896. However, *Drope* states that these factors "are all relevant in determining whether further inquiry is required, but that even one of these factors standing alone may, in some cases, be sufficient." *Id.* *Drope* also notes that there are no "fixed or immutable" factors for the trial court to address because "the inquiry is often a difficult one in which a wide range of manifestations and subtle nuances are implicated." *Id.* Thus, the dissent mischaracterizes *Melchor-Gloria* as positing an exclusive list of sources from which a district court may infer reasonable doubt. *Drope* shows that these are potential sources used to assess doubt as to competency, not exclusive factors.

Moore, the United States Court of Appeals for the Ninth Circuit opinion from which *Melchor-Gloria* adopted its language regarding reasonable doubt, dictates that an appellate court reviews a district court's reasonable doubt determination (or lack thereof) based on the evidence "before the court" at the time when reasonable doubt purportedly arose. 464 F.2d at 666. Federal precedent further indicates that any evidence in the record is properly "before the [trial] court" at any given time. *See United States v. Brugnara*, 856 F.3d 1198, 1215 (9th Cir. 2017) ("Such reasonable [doubt] exists when there is substantial evidence in the record ...." (internal quotations omitted)); *Hernandez v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991) (finding that a court's pretrial determination of doubt properly excluded a psychological report that was not in the record at the time the determination was made); *United States v. Veatch*, 674 F.2d 1217, 1223 (9th Cir. 1981) (stating that the court reviewed "the entire record that was before the district court" to determine whether reasonable doubt existed). Thus, when read in light of *Moore*, *Melchor-Gloria*'s broad requirement that a district court must consider "whether there is any evidence" "from any source" in its reasonable doubt determination extends to evidence of incompetence in the record corresponding to the defendant's case, including evidence adduced pretrial or before a different judge. 99 Nev. at 180, 660 P.2d at 113; *Moore*, 464 F.2d at 666.

Reasonable doubt

The foregoing authority compels us to conclude that the district court denied Goad due process because reasonable doubt existed on the third and fourth days of trial and the court did not hold a competency hearing. Pursuant to *Moore* and *Melchor-Gloria*, the district court was required to consider any evidence of incompetence in the record to conclude there was no reasonable doubt.[11] *Moore*, 464 F.2d at 666; *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113. For example, the interrogation transcript was among the evidence before the district court; i.e., in the record, on the third and fourth days of

trial. Thus, the court was required to consider any information in the transcript pertinent to Goad's competency in its reasonable doubt determination, including Goad's possible history of mental health hospitalizations, the fact that doctors struggled to diagnose him, and his past use of various psychoactive medications.

[11] The district court never stated on the record that a reasonable doubt did or did not exist as to Goad's competency; however, a trial court impliedly determines there is no reasonable doubt as to a defendant's competency if it fails to exercise its sua sponte duty to order a competency hearing. *See* *Drope*, 420 U.S. at 181, 95 S.Ct. 896 ("[A] trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standard of competence to stand trial."); *Moore*, 464 F.2d at 666 ("At any time ... evidence [raising a reasonable doubt as to defendant's competency] appears, the trial court *sua sponte* must order an evidentiary hearing on the competency issue."); *Fergusen*, 124 Nev. at 802, 192 P.3d at 717; *Krause*, 82 Nev. at 463, 421 P.2d at 951.

We understand that, as a practical matter, district courts do not typically scrutinize every item in the record of every case. However, the Nevada Supreme Court has not limited the scope of the evidence that *Melchor-Gloria* requires a district court to consider. At a minimum, *Melchor-Gloria* requires a district court to consider evidence in the record, given that *Moore*, the case from which the supreme court adopted the standard announced in *Melchor-Gloria*, specifies ***657** that the record is among the sources of evidence a district court must consider. Yet, the district court must also consider the defendant's behavior at trial, which may not be reflected in the record. *See* *Drope*, 420 U.S. at 180, 95 S.Ct. 896 ("[E]vidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry is required ....") Thus, the burden of holding district courts to account for evidence of incompetence in the record is neither novel nor exhaustive of a district court's duty to ensure a defendant is competent during trial.

Additionally, the burden established by the Nevada Supreme Court in *Melchor-Gloria* is apt given that it ultimately serves to protect the right to be competent while one stands trial. The right to a hearing to determine competency safeguards the substantive due process right not to stand trial while incompetent, which is

> rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, confront, and to cross-examine witnesses, and the right to testify on one's own behalf or remain silent without penalty for doing so.

Riggins v. Nevada, 504 U.S. 127, 139-40, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (Kennedy, J., concurring). If we allow a district court to overlook portions of the record, we risk curtailing the evidence of incompetence that will come to the court's attention. *See Fergusen*, 124 Nev. at 802, 192 P.3d at 718 (stating that a district court may not assign the determination of whether a defendant is competent to a different judge during trial because doing so would interrupt the trial judge's ongoing assessment of the defendant's competence). This would decrease the likelihood that a court will find reasonable doubt exists as to the defendant's competency, and the right to a competency hearing would become dependent upon the trial court's diligence in reviewing the record. This is particularly so in cases where the defendant's behavior during trial could seem negligible in isolation, but when considered in light of evidence in the record that was submitted pretrial, the doubtfulness as to competency may become palpable.

The evidence of Goad's incompetence that was properly before the district court gave rise to a reasonable doubt in the aggregate. As stated, the district court was required to consider any evidence of incompetence in the record and its own observations in light of other evidence or observations bearing on Goad's competence in reaching its reasonable doubt determination. *See* *Drope*, 420 U.S. at 179-80, 95 S.Ct. 896. In the aggregate, the crime of which Goad was accused—stabbing his elderly friend 250 times and repeatedly visiting the victim's apartment following the victim's death;[12] Goad's apparent history of mental health issues and psychoactive medication use; the fact that Goad was deprived of medication on the third day of trial; and the fact that Goad became debilitated on the third day of trial—which was corroborated by defense counsel, the State, and the district court—collectively

suggested that Goad was deprived of a medication that stabilized his mental health, was suffering from withdrawals, or was somehow adversely affected by not having taken the medication. Thus, the evidence of Goad's incompetence gave rise to a reasonable doubt as to whether Goad was competent ***658** on the third day of trial.[13] *See* *Melchor-Gloria*, 99 Nev. at 179-80, 660 P.2d at 113; *see also* NRS 178.400(2); *People v. Moore*, 408 Ill.App.3d 706, 349 Ill.Dec. 248, 946 N.E.2d 442, 448 (2011) (providing that a "bona fide doubt" arose when the "chemically-dependent" defendant, who needed antidepressants to be fit for trial, was "suddenly made to go off his medication," and that the trial court could not shirk its sua sponte duty to order a competency hearing by placing the burden on defense counsel to inquire into the matter).

12 Although the extreme nature of the stabbings of which Goad was accused and his returns to the crime scene do not prove that he was incompetent at trial, the fact that he apparently engaged in such irrational behavior is a factor a district court must weigh in determining whether reasonable doubt exists. *See* *Drope*, 420 U.S. at 179, 95 S.Ct. 896 (stating that the trial court failed to give proper weight to record evidence, including the victim's testimony that the defendant allegedly attempted to choke her to death on the Sunday prior to trial); *id.* (stating that the trial court may not ignore "the uncontradicted testimony of a history of pronounced irrational behavior"); *Doggett*, 93 Nev. at 595, 572 P.2d at 209 (citing *Pate*, 383 U.S. 375, 86 S.Ct. 836) (stating that the Supreme Court held in *Pate v. Robinson* that there was a reasonable doubt about Pate's competency in part due to "uncontradicted testimony of defendant's long history of disturbed and violent episodes, including the slaying of his infant son and an attempted suicide").

13 The dissent states that, by "aggregating," we mean that a district court must "conduct a full-blown hearing and investigation." Indeed, "that's not how the legal test works[.]" However, this is not how we applied the aggregating principle. The aggregating principle requires a trial court to consider evidence of potential incompetence in light of other such evidence rather than in isolation when determining reasonable doubt. *See* *Chavez v. United States*, 656 F.2d 512, 517-18 (9th Cir. 1981). In isolation, being deprived of medication does not imply that the medication could affect Goad's competency; the medication conceivably could have treated a purely physical ailment that does not impact competency. Applying the aggregating principle, it becomes more likely that the deprivation of medication affected his competency because the district court must consider the deprivation in light of other evidence, including Goad's behavior, the court's worry that Goad "might fall out," that Goad has historically relied on psychoactive medication to stabilize his mental health, and the urgency with which staff had to administer Goad's medication. *See* 40 Am. Jur. 2d *Proof of Facts* 171, § 10 cmt. (2021 Update) ("It would seem prudent to require a competency hearing any time a defendant is taking medication or drugs which may have an effect on his mental capabilities. This would protect the defendant's interests and also save the state considerable time and expense by obviating the situation in which a lengthy trial would be nullified due to a subsequent determination that the defendant was legally incompetent to stand trial.").

Goad's competency only became more doubtful on the fourth day of trial when he inexplicably lost his ability to speak and refused to acknowledge his counsel despite never refusing to do so before. Thus, the evidence of Goad's potential incompetence in the record, in the aggregate, raised a reasonable doubt as to Goad's competence on the third and fourth days of trial.

The evidence the State cites to contradict the reasonable doubt that arose during trial did not dispose of the court's duty to order a competency hearing. A reasonable doubt cannot be dispelled by resorting to conflicting evidence once there is evidence of incompetence sufficient to give rise to a reasonable doubt. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113. Therefore, the evidence that the State cites to suggest that Goad was competent, including that Goad was apparently medically cleared on the fourth day of trial by an unknown person from the jail staff and Goad's comprehension and nonverbal responsiveness during the court's canvass, did not obviate the need for a competency hearing.[14] *See* *Pate*, 383 U.S. at 385, 86 S.Ct. 836 (rejecting the argument that "the mental alertness and understanding displayed in [the defendant's] colloquies with the trial judge" dispensed with the need for a competency hearing (internal quotations omitted)).

14 Additionally, the district court's canvass did not

cover the criteria for incompetency as provided by NRS 178.400(2).

Neither Goad's expressed desire to proceed nor defense counsel's request for a canvass waived Goad's right to a competency hearing. A defendant cannot waive his right to a competency hearing. *Krause*, 82 Nev. at 463, 421 P.2d at 951 (citing *Pate*, 383 U.S. at 384, 86 S.Ct. 836). Goad did not waive his right to a competency hearing by not specifically requesting one either. *See* *Pate*, 383 U.S. at 384, 86 S.Ct. 836 (rejecting the prosecution's argument that the defendant waived his right to a competency hearing because his counsel failed to demand a hearing). Thus, the State's argument that the district court satisfied due process by obliging defense counsel's request for a canvass and by confirming that Goad desired to proceed is unpersuasive.[15]

15 The dissent cites no authority for its conclusion that, "[i]f Goad can't quite bring himself to say that he was incompetent in truth and in fact, then I would conclude that there exists no 'reasonable doubt [.]' " This is a classic "red herring" because Goad was not required at trial, or now on appeal, to assert he was incompetent. The quantum of proof for a defendant to be entitled to a competency hearing is reasonable doubt. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113. Due process required he receive a hearing when there was reasonable doubt as to his competency, and the hearing was not conditioned upon Goad or his counsel asserting that he was incompetent in fact. Thus, even if he ultimately would have been found competent at trial, he was still entitled to a hearing under NRS 178.415 to *confirm* he was competent because there was a reasonable doubt. Additionally, NRS 178.415 shows competency in fact is a question requiring medical expertise: a court may determine competency in fact only after receiving reports from experts. We cannot expect Goad to declare in good faith that he was incompetent when we would not allow a district court to reach the same conclusion without the assistance of experts.

***659** The State's analogy to *Lipsitz* overlooks that there are stronger indicia of incompetence in Goad's case. In *Lipsitz*, the Nevada Supreme Court held that a trial court did not err when it "relied on defense counsel's assurances, its own interactions with [the defendant], and his responses to the court's canvass in arriving at its determination that a competency hearing was not warranted." 135 Nev. at 135, 442 P.3d at 142. The supreme court concluded that the defendant's obstinacy was not sufficient to raise a reasonable doubt as to the defendant's competence. *Id.* at 135, 442 P.3d at 142-43.

The State is correct that, like the district court in *Lipsitz*, the district court here performed a canvass—albeit a brief one—and relied in part on assurances from counsel that Goad desired to proceed with trial. Similarly, Goad appeared to behave "obstinately" on the morning of the fourth day of trial when he refused to acknowledge his counsel. However, unlike Goad, who was deprived of medication and whose psychiatric and medical history suggested that the deprivation of the medication affected his competency, there was no reason to believe that Lipsitz had been deprived of medication that affected his competency.

Furthermore, Lipsitz's obstinacy was preceded by a pattern of attempts to obstruct trial proceedings. *Id.* at 132-34, 442 P.3d at 141-42. Comparatively, there is no indication in the record that Goad behaved inappropriately, previously refused to acknowledge defense counsel, or otherwise obstructed the proceedings prior to the fourth day of trial. On the contrary, Goad's obstinacy on the fourth day of trial weighs in favor of finding that reasonable doubt existed because, according to the district court, he was well-behaved throughout trial. Based on the record, Goad's temperament changed only after he was deprived of medication. *See* *Drope*, 420 U.S. at 181, 95 S.Ct. 896 ("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial."); *see generally* *Hawai'i v. Soares*, 81 Hawai'i 332, 916 P.2d 1233, 1250 (Ct. App. 1996), *overruled on other grounds by* *State v. Janto*, 92 Hawai'i 19, 986 P.2d 306 (1999).[16]

16 Although Nevada competency jurisprudence has not previously addressed the significance of deprivation of medication with regard to a court's reasonable doubt determination, Goad's case is very similar to *Soares*. 916 P.2d at 1250. In *Soares*, the Intermediate Court of Appeals of Hawai'i held that "a good faith doubt"—Hawaii's rendition of the "reasonable doubt" standard—arose based upon the

> defendant's assertion that he had not received his medication that morning and his trial counsel's representation that he "was acting completely differently from the first day of trial." *Id.* The court explained that it was "not clear from the record whether [d]efendant required the medication in order to be mentally competent to proceed to trial. However, in view of [d]efendant's assertion, as well as his trial counsel's representations that [d]efendant was acting completely differently from the first day of trial[,] ... a good faith doubt was clearly raised as to whether [d]efendant's failure to take his medication was directly affecting his legal competence to stand trial." *Id.*

In sum, federal due process jurisprudence and the Nevada Constitution required the district court to order a competency hearing sua sponte because reasonable doubt arose as to Goad's competency on the third day of trial in light of the nature of the charged crime, Goad's history of mental health conditions and use of psychoactive medications, Goad being deprived of medication, and Goad's abnormal behavior thereafter. The reasonable doubt that accrued on the third day of trial continued into the fourth day of trial, where Goad's competency became even more doubtful in light of his inability to speak and his refusal to acknowledge his counsel. We emphasize that the record does not suggest that Goad was feigning his behavior ***660** or attempting to manipulate the court at any time.

Although we conclude there was sufficient evidence to give rise to a reasonable doubt, our conclusion should not be interpreted as endorsing or opposing an inference that Goad was in fact incompetent during trial. We reiterate that the district court was required to "decide whether there is any evidence which, *assuming its truth*, raise[d] a reasonable doubt" about Goad's competency. *See* *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (emphasis added) (quoting *Moore*, 464 F.2d at 666). We thus do not resolve whether Goad was telling the truth when he made the statements documented in the interrogation transcript, whether the medication did in fact impact his competency, or any other matter bearing on Goad's competency except to the extent that it gave rise to a reasonable doubt necessitating a competency hearing.

Remedy

In every case where the Nevada Supreme Court has found on direct review that a trial court failed to order a competency hearing when reasonable doubt existed, it has reversed the judgment of conviction and ordered a new trial.[17] When the case entailed review of a petition for a writ of habeas corpus, the court discharged the petitioner from confinement unless the State elected to retry the petitioner within a reasonable time.[18] Despite this uniformity, the Nevada Supreme Court has not ruled that reversal and remand for a new trial is *always* required when a trial court fails to order a competency hearing. *See* *Krause*, 82 Nev. at 463, 421 P.2d at 951 (stating that the court "prefer[s]" the United States Supreme Court's remedy in *Pate* of reversal and remand due to the difficulty of holding a limited retrospective hearing). Nor has the United States Supreme Court ruled that reversal and remand is the exclusive remedy when a court violates *Pate*. *See* *Pate*, 383 U.S. at 386, 86 S.Ct. 836; *Drope*, 420 U.S. at 183, 95 S.Ct. 896.

17 *See Olivares*, 124 Nev. at 1149, 195 P.3d at 869 (reversing defendant's conviction and remanding the case to district court to conduct a new trial); *Fergusen*, 124 Nev. at 806, 192 P.3d at 720 (reversing the defendant's conviction and remanding the case for a new trial).

18 *See Williams*, 91 Nev. at 17, 530 P.2d at 761-62 (reversing a habeas petitioner's conviction because the trial court failed to order a competency hearing and "discharg[ing] [petitioner] from confinement unless the State within a reasonable time elects to retry him"); *Krause*, 82 Nev. at 463, 421 P.2d at 951 (discharging a habeas petitioner from confinement due to a trial court's failure to sua sponte order a competency hearing "unless the State, within a reasonable time, elects to retry him").

In lieu of reversal and remand, appellate courts have at times remedied trial courts' failures to order a competency hearing with a retrospective, or *nunc pro tunc*, competency hearing. *See* *Odle*, 238 F.3d at 1089-90 ("The state court can nonetheless cure its failure to hold a competency hearing at the time of trial by conducting one retroactively."). A *nunc pro tunc* hearing is a hearing that takes the place of a contemporaneous hearing, as if it had been held at an earlier time. *See* *Iouri v. Ashcroft*, 464 F.3d 172,181-82 (2d Cir. 2006),

opinion modified and superseded on denial of rehearing, 487 F.3d 76 (2d Cir. 2007).

The utility of a retrospective competency hearing is clear: "[a]n automatic full reversal with a remand for a new trial ... would impose severe costs on the justice system in remedying a violation that, while considered a miscarriage of justice in the context of competency proceedings, might not have affected the guilt and penalty verdicts." *People v. Lightsey*, 54 Cal.4th 668, 143 Cal.Rptr.3d 589, 279 P.3d 1072, 1102 (2012). "[I]f placing [the] defendant in a position comparable to the one he would have been in had the violation not occurred is possible," and the district court finds that the defendant was competent to stand trial on remand, then "we would have no reason to question the fundamental fairness and reliability of the remainder of the judgment against him." *Id.*

However, before a *nunc pro tunc* competency hearing can occur, the district court must determine on remand that a meaningful retrospective hearing to determine competency is feasible.[19] *See* ***661** *Odle*, 238 F.3d at 1089-90; *see also* *McGregor v. Gibson*, 248 F.3d 946, 962 (10th Cir. 2001) ("Retrospective competency hearings are generally disfavored but are permissible whenever a court can conduct a meaningful hearing to evaluate retrospectively the competency of the defendant." (internal quotations omitted)). A retrospective competency hearing is "feasible" if there is sufficient evidence available to reliably determine a defendant's competence at or around the time reasonable doubt arose. *Lightsey*, 143 Cal.Rptr.3d 589, 279 P.3d at 1104-05. To determine whether a retrospective competency hearing is feasible, a trial court must consider the following factors:

> (1) [t]he passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with [the] defendant before and during trial as well as any other facts the court deems relevant.

Id., 143 Cal.Rptr.3d 589, 279 P.3d at 1105 (alterations in original) (citation and internal quotations omitted). The trial court's focus in making "the feasibility determination must be on whether a retrospective competency hearing will provide [a] defendant a fair opportunity to prove incompetence, not merely whether some evidence exists by which the trier of fact might reach a decision on the subject." *Id.* (emphasis omitted). "Because of the inherent difficulties in attempting to look back at the defendant's past mental state, the burden of persuasion" is on the prosecution to convince the trial court "by a preponderance of the evidence that a retrospective competency hearing is feasible in this case."[20] *Id.* (citation omitted).

19 The dissent states, "there is nothing for the district court to aggregate on remand." The dissent again confuses reasonable doubt with determining competency in fact. The aggregating principle applies when a court is considering whether there is reasonable doubt such that a hearing is necessary, not *during* a competency hearing when a court determines if a defendant is incompetent in fact under NRS 178.415. Similarly, the dissent's comments regarding the scope of a competency hearing, which are not supported by authority, completely overlook NRS 178.415, the controlling statute.

20 During oral argument, we asked the parties if it would be feasible at this time to conduct a hearing to determine Goad's competence during his trial. Neither party conceded that it would be feasible, but neither argued that it would be impracticable or impossible. Notably, neither party suggested that there are any impediments in determining the effect of being deprived of the medication Goad was receiving, which would likely be the focus of the feasibility determination and, if feasible, the subsequent *nunc pro tunc* competency hearing.

We conclude that vacating the judgment of conviction and ordering a retrospective, or *nunc pro tunc*, competency hearing is the appropriate remedy for the district court's violation. If, on remand,[21] the district court determines that a hearing to retrospectively determine Goad's competence is not feasible in accordance with the forgoing prescripts, then the judgment of conviction remains vacated and the district court is ordered to conduct a new trial.[22] *See* *id.*, 143 Cal.Rptr.3d 589, 279

P.3d at 1120. If the district court determines that a hearing is feasible, then it shall conduct the hearing in accordance with NRS 178.415.[23] If, at the ***662** conclusion of the hearing, the district court finds that Goad was competent throughout his 2019 trial, then the court shall reinstate its judgment of conviction. *See* NRS 178.420; *Lightsey*, 143 Cal.Rptr.3d 589, 279 P.3d at 1120. Alternatively, if the court finds that Goad was incompetent, then the district court must conduct a new trial.[24] *Id.*

21 Remanding a case for the district court to make a determination on a specific issue is not a novel practice for a Nevada reviewing court. *See Harvey v. State*, 136 Nev. 61, 473 P.3d 1015 (2020) (reversing a judge's rulings on post-trial motions who sat in for the trial judge and remanding the case for the trial judge to consider the motions). *Lightsey* further explains that "a limited remand for the purpose of conducting, if feasible, a retrospective competency hearing is akin to a limited remand to remedy a sentencing error that has not affected the judgment of guilt." 143 Cal.Rptr.3d 589, 279 P.3d at 1103.

22 Pursuant to *Lightsey*, a reviewing court reverses the judgment of conviction and remands the case for a *nunc pro tunc* hearing with instructions to conduct a new trial if the hearing is not feasible or the result of the hearing is that the defendant is found to have been incompetent. *See Lightsey*, 143 Cal.Rptr.3d 589, 279 P.3d at 1120. We choose to vacate because the judgment of conviction may be reinstated depending on the outcome of the hearing.

23 In *Doggett v. Warden*, the Nevada Supreme Court, in reviewing a petition for postconviction relief, commented that the burden of proof in a retrospective hearing to determine competency is sometimes allocated to the State. 93 Nev. 591, 595, 572 P.2d 207, 210 (1977) ("It is only when the trial court has failed to follow the procedural requirements of *Pate* that the State is required to forgo its usual requirement that the defendant establish his incompetence as of the date of the original trial."). Because the *Doggett* court reviewed an order denying a petition for a writ of habeas corpus that did not allege a *Pate* violation, and because the decision predates the enactment of Nevada's current competency hearing statute, NRS 178.415, we need not decide its possible application here.

24 The dissent cites an unpublished case, *State v. Fifth Judicial Dist. Court*, to argue that the Nevada Supreme Court has ruled against the remedy we order here. Docket No. 53926, 2009 WL 3188918 (Order Granting Petition, Sept. 25, 2009) ("Nevada law does not permit a trial court to vacate prior proceedings based upon present doubt as to past competency."). Even if this decision bound us, which it does not, *see* NRAP 36(c)(3), our remedy does not vest the district court with power to "vacate prior proceedings." *This court* is vacating the district court's judgment, and the district court will reinstate the judgment of conviction if a competency hearing is feasible and the district court determines that Goad was competent during his trial after the hearing. Otherwise, the district court must conduct a new trial pursuant to *our order*.

CONCLUSION

Trial courts have a duty to ensure that criminal defendants are competent while standing trial. Thus, a trial court must order a hearing sua sponte to determine whether a defendant is competent when there is reasonable doubt about his or her competency. To fulfill its duty to order a competency hearing, a trial court must follow Nevada's statutory competency procedures and consider any evidence of incompetence in the record regardless of whether that evidence was adduced pretrial or during trial. In reaching its reasonable doubt determination, the trial court must consider evidence of incompetence in the aggregate; that is, evidence of incompetence should be considered in light of other evidence of incompetence as well as the court's own observations of the defendant. If a trial court fails to order a competency hearing when reasonable doubt arises, an appellate court may remedy the failure by remanding the case to the trial court to hold a retrospective hearing to determine whether the defendant was incompetent during trial, provided the trial court first determines on remand that it is feasible to retrospectively determine the defendant's competence.

Accordingly, we order the judgment of conviction vacated and remand this case for a retrospective competency hearing, if feasible, and any such other proceedings consistent with this opinion.

I concur:

Bulla, J.

TAO, J., concurring in part and dissenting in part:

The majority resolves this appeal by vacating a murder conviction in favor of a remedy—a retrospective competency hearing to be held more than 21 months after the original trial—that Goad himself never requested; that the Nevada Supreme Court has already announced that district courts cannot order; and that doesn't even apply to the facts of this case. The majority ends up vacating a murder conviction for the district court to "aggregate" additional evidence that Goad himself doesn't claim to exist, for the purposes of assessing the truth of something that Goad himself doesn't claim to be true. "There's no there there" to aggregate. Gertrude Stein, *Everybody's Autobiography* (1937). Respectfully, I dissent.

I.

Goad stabbed his victim a total of 250 times in one of the most brutal and bloody murders in recent memory. Goad has been diagnosed with a mental illness, and it's pretty clear that he has one of some sort; the excessive and wanton violence of the crime alone seems to suggest that. But what we don't know is whether his mental illness either did, or did not, render him incompetent on one particular day several months after the murder, day four (August 8, 2019) of his ***663** trial. As the majority notes, the record is devoid of sufficient information. For example, as the majority specifically notes (and greatly emphasizes), we don't know much about his precise diagnosis, as he was apparently never examined by a psychologist or psychiatrist during the litigation of this case, and we don't know what medications he was administered during his trial and how they may, or may not, have affected him.

This lack of information matters, because mental illness and legal incompetence are two very different things. Many people who suffer from various mental illnesses are fully competent to stand trial for the crimes they commit. The test for legal incompetence is altogether different, and considerably harder to meet, than the test for whether someone suffers from one of the many mental illnesses listed in the *DSM* (*Diagnostic and Statistical Manual of Mental Disorders*, published by the American Psychiatric Association). A court measures competence not by whether the defendant has a mental illness, but rather something very different: by the defendant's ability to understand the nature of the criminal charges, the nature and purpose of the court proceedings, and by his or her ability to aid and assist his or her counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding. *Calvin v. State*, 122 Nev. 1178, 1182-83, 147 P.3d 1097, 1100 (2006); *Dusky v. U.S.*, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960); see NRS 178.400(2Xa)-(c).

"Diagnosis of a mental illness or defect, without more, does not reasonably raise doubt about defendant's competence to stand trial." *Robinson v. State*, 301 So. 3d 577 (Miss. 2020); *see* *People v. Lara*, (Cal. Ct. App., Dec. 20, 2006, No. B186598) 2006 WL 3734924, at *2 (noting psychologist's evaluation that defendant was mentally ill but not incompetent); *Commonwealth v. Zook*, 585 Pa. 11, 887 A.2d 1218, 1225 (2005) (affirming trial judge's conclusion that defendant was "mentally ill and not incompetent to proceed"); *Bishop v. Caudill*, 118 S.W.3d 159, 167 (Ky. 2003) (Keller, J., concurring) (noting entire class of cases "where the defendant is mentally ill, but not incompetent"). The Nevada Supreme Court agrees: "[a defendant's] history of drug abuse, possible PTSD, and mental health history, without more, did not indicate that he was unable to consult with his attorney or understand the proceedings against him." *Eubanks v. Baker*, Docket No. 68628, at *1 (Order of Affirmance, May 9, 2016) (citing *Melchor-Gloria v. State*, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983), and *Dusky*, 362 U.S. at 402, 80 S.Ct. 788).

Quite the opposite can often be true: people with mental illnesses can function at such a high level that several have won Pulitzer Prizes and Nobel Prizes for their work. *See* James C. Kaufman, *Genius, Lunatics, and Poets: Mental Illness in Prize-Winning Authors*, SAGE J., Vol. 20, Issue 4, pp. 305-14 (Yale Univ. June 1, 2001); A. Rothenberg, *Creativity and Mental Illness*, Am. J. of Psychiatry, 152:5, pp. 815-16 (1995). Meeting the basic test of legal competency is many orders of magnitude less complex than the kind of sustained genius that wins those

kinds of awards. Genius aside, millions of other people diagnosed with mental illnesses are nonetheless fully competent to sign contracts, raise children, be licensed to drive, open bank accounts, write valid wills, hold important jobs, grant or refuse consent to medical treatment, make important life choices without being overruled by a court-appointed guardian, and be put on trial for the crimes they commit. *See Munsey v. State*, 2004 WL 587642 (Tenn. Crim. App. 2004) (finding that a mentally ill defendant was fully competent to waive right to counsel); *In re Yetter*, 1973 WL 15229 (Pa. Ct. Comm. Pleas 1973) (refusing to appoint a guardian to oversee medical decisions for a person who had mental illness but was fully competent to make her own medical decisions). *See generally* Claudine Walker Ausness, Note: *The Identification of Incompetent Defendants: Separating Those Unfit for Adversary Combat From Those Who Are Fit*, 66 Ky. L. J. 666, 679 (1977-78).

On the other hand, people can be incompetent for reasons entirely unrelated to mental illness. Intoxicated defendants, for example, may be incompetent (albeit temporarily). In Nevada, children under six years of age are presumptively incompetent to testify in judicial ***664** proceedings. People suffering from Alzheimer's disease or dementia, or who have suffered certain types of head injuries, may be incompetent despite having no diagnosed mental illness whatsoever. Competence can sometimes come and go; someone can be incompetent to testify at one period in time but fully competent at another. *See* *Felix v. State*, 109 Nev. 151, 173, 849 P.2d 220, 235-36 (1993), *superseded by statute on other grounds as stated in Springman v. State*, Docket No. 50325, 2009 WL 1491486 (Order of Affirmance, February 10, 2009).

Of course, it goes without saying that for many people mental illness and competency can be related. Some people suffer from mental illnesses so severe that they render that person legally incompetent, sometimes permanently. But the larger point is that the link between the two things is at best imperfect. The presence of one does not necessarily suggest the other. In fact, the link is so tenuous that mental illness cannot even be said to usually or commonly suggest legal incompetence. *See Robinson*, 301 So. 3d at 582; *Bishop*, 118 S.W.3d at 167 (noting entire class of cases "where the defendant is mentally ill, but not incompetent"). If we're going to get the analysis right, then as the saying goes, we need to make sure apples are sorted with apples and oranges with oranges.

II.

The answer to our lack of knowledge isn't to vacate the conviction and remand for a retrospective hearing, because that approach turns such a hearing into something it isn't supposed to be: rather than a focused judicial weighing of existing evidence, it becomes a tool of open-ended investigation and discovery requiring the district court to conduct a free-floating fishing expedition for new information totally outside of the record and beyond the evidence that the parties decided to present on their behalf, regardless of whether the parties want the new evidence or think it helps them or not. Worse, it directs the district court to do this even though Goad did not request such an investigation either before or during trial.

Fundamentally, it reverses not because the district court committed any legal error in evaluating what the parties actually presented, but rather because the majority imagines that there might be some evidence outside the record that the parties overlooked that the court was never asked to consider but that someone ought to now go look for, 21 months after the fact. Mind you, the majority tacitly admits that we don't know what that evidence might be, because it isn't enough for this court to actually conclude that Goad was so clearly incompetent that the district court must conduct a new trial. Rather, the majority expressly leaves open the possibility that the district court is free on remand to conclude that any additional evidence it finds might not be enough to warrant a full competency adjudication, much less demand the conclusion that Goad was incompetent to stand trial on day four. So whatever additional evidence might be out there (whatever it is) could go either way. But let's vacate Goad's murder conviction and require the district court to look anyway.

This isn't how such hearings are supposed to work. They're not supposed to be open-ended discovery searches. Rather,

> [t]his court "disfavor[s] retrospective determinations of incompetence," *see* *Williams v. Woodford*, 384 F.3d 567, 608 (9th Cir. 2004), and they are reserved for those cases where it is possible to "conduct a meaningful hearing to evaluate retrospectively the competency of the defendant." *Moran v. Godinez*, 57 F.3d 690, 696 (9th Cir. 1995), *overruled on other grounds by* *Lockyer v. Andrade*, 538 U.S. 63, 75-76, 123 S.Ct. 1166, 155 L.Ed.2d 144 ... (2003); *see* *Drope* [*v. Missouri*], 420 U.S. [162] 183, 95 S.Ct. 896, 43 L.Ed.2d 103 ... [(1975)] (holding that "[g]iven

> the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances," a retrospective competency hearing six years after the trial was not possible). In determining whether such a hearing is warranted, we evaluate such factors as the passage of time and the availability of contemporaneous medical reports. *Moran*, 57 F.3d at 696; *see also* *McMurtrey* [*v. Ryan*], 539 F.3d [1112,] 1131-32 [(2008).

Maxwell v. Roe, 606 F.3d 561, 576 (9th Cir. 2010). Requiring one when we have no idea if ***665** any concrete evidence even exists risks morphing Goad's trial from an adversarial proceeding into something more like an inquisitorial one (familiar to Europeans) in which the judge, not the parties, directs the investigation, decides where to look, and decides what should matter to the parties whether they like it or not. That might be how things work in Europe, but it's not how we're supposed to handle things. In our adversarial system of justice, when the record lacks information necessary to warrant reversal, the solution is to conclude that the appellant failed to meet his or her burden of demonstrating that he or she is entitled to relief. In Nevada, the burden falls on the appellant trying to overturn a jury verdict to provide us with a complete enough record to make a case for reversal, and if he or she fails to do so we "necessarily presume that the missing portion supports the district court's decision." *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). This premise is sometimes phrased in an alternative: we "cannot properly consider matters not appearing in th[e] record." *Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997).

Here, the record contains ample evidence of mental illness, but none whatsoever that Goad has ever been legally incompetent at any time in his long 74-year life. Indeed, he never claimed to be incompetent at any time during the litigation of his murder case: he did not assert a defense of insanity or diminished capacity in response to the charges, and his trial counsel never argued to the district court that he believed his client was incompetent to stand trial or assist in his defense. Goad and his counsel presented no evidence at all that he has ever been legally incompetent for even a single minute of his life, and Nevada law holds that lack of information against the party bearing the burden of proof on appeal, which is Goad. Yet by reversing anyway, the majority assumes something it doesn't want to say: that by failing to challenge competency more vigorously, Goad's counsel was basically ineffective and two judges of this court are going to give him a second chance to come up with more evidence than he presented the first time. But unlike my colleagues, I'm not willing to jump to the conclusion that counsel failed at his job. Rather, I would think that if anyone knows Goad's mental competence, it would be counsel in close contact with him during the litigation of a murder trial over the course of several months, rather than appellate judges viewing nothing but a written transcript almost two years later.

Quite to the contrary, one fact stands out: Goad doesn't even claim himself that he was incompetent during his trial. In determining whether a full competency hearing is required, courts focus on three factors: the defendant's history of irrational behavior, the defendant's demeanor at trial, and prior medical opinion of the defendant's competence to stand trial. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (citing *Drope*, 420 U.S. at 180, 95 S.Ct. 896). Two of the three are nonexistent by Goad's own admission, and the third supports the district court.

As a starting point, Goad admits that he goes long periods of his life without taking any medication for his mental illness; in fact, he told the police during a recorded and transcribed interrogation that he was medication-free for seven years before his arrest, and he never disavows the truth of that statement, not even now. *See* Transcript of March 2019 Police Interview, 1 JA 124: "Q: When was the last time you took, you took your medications? A: 7 years ago .... So 7 years I went without medicine." Yet he never claimed to be legally incompetent. In district court, Goad never argued that he was incompetent either before or during trial, and indeed while the district court conducted the canvass that gives rise to this appeal, neither Goad nor his counsel suggested that there existed any past history of incompetency. On appeal, his counsel expressly admitted that there is no evidence that Goad has ever been diagnosed or adjudicated incompetent by any physician or court at any time during his 74-year life, not even during the years when he was medication-free.

> [Court:] [B]ut mental illness and incompetence are two different things, so my question to you is, has he ever in his seventy-four years been adjudicated incompetent by any other court, because it doesn't appear anywhere during the lifespan ***666** of this case before trial that anyone raised any questions of his competency despite the fact that he clearly has a mental illness. Has anyone ever, other than this one day in time, had questions about his competency as opposed to his overall mental health?
>
> [Goad:] ... In the record, before the district court or anything that was currently in the appellant record there is no other indication that Mr. Goad has been formally adjudicated incompetent by a court.

Notably, the question asked during argument wasn't just whether he's ever been formally adjudicated legally incompetent, but whether anyone has ever "had questions" about his competency, to which the answer was negative. If any such evidence existed, this was certainly the prime moment for counsel to mention it.

Conclusion: there is simply is no evidence that Goad was ever legally incompetent to stand trial for murder, either with or without medication.

Indeed, if you look closely and carefully at both the record and Goad's briefing, Goad himself never actually asserted that he was ever incompetent, either to the district court or, notably, even in his briefing on appeal to this court even after having had almost two years to think about it. The best argument that Goad makes is the cleverly worded one that "due process clearly required that Mr. Goad be evaluated for his competence to stand trial." (Appellant's Opening Brief, page 15.) His "Summary of Argument" elaborates:

> In this case, Mr. Goad was found to be seriously ill on the afternoon of August 7. When he returned to court on August 8, he refused to engage with or acknowledge counsel, and appeared unable to assist counsel in his own defense. Given these circumstances, the district court abused its discretion in failing to initiate formal competency proceedings.

(Appellant's Opening Brief, p. 10.) We all know that Goad was mentally "ill," but notice what's cleverly missing from even Goad's own carefully parsed argument: the factual assertion that he has ever been incompetent, either before August 8, on August 8, or at any time after August 8 through today. His argument is all about day four of the trial, August 8. He concedes (and the majority accepts) that he was fully competent on days one and two of the trial, and then fully competent on every day after day four. But even as to day four itself, nowhere does he go so far as to allege that he actually was, as a medical truth, incompetent. So it appears to me that Goad just wants a reversal of his murder conviction for the purely rhetorical reason that the evidence might suggest victory based upon grounds that he himself does not personally say were factually true. Unlike the majority, I don't assume that counsel must have done a bad job. Rather, I see this as good and clever lawyering, the kind of quality representation that every defendant facing murder charges deserves to have but relatively few ever get. But good lawyering by itself doesn't mean that reversal is warranted. If Goad can't quite bring himself to say that he was incompetent in truth and in fact, then I would conclude that there exists no "reasonable doubt" about it: it's just not true. At the very least, we must conclude that the existing record supports no other conclusion.

The majority thus remands this matter back to the district court for supposedly failing to "aggregate" evidence that Goad's trial and appellate counsel do not claim to actually exist anywhere in the world. The district court can hardly be faulted for failing to "aggregate" evidence that Goad did not bother to present to the district court when given the opportunity, and even now does not quite say actually exists. If any hearing would be meaningless, this one will be, and during oral argument Goad's counsel quite sensibly agreed:

> [Court:] Is it possible in this situation to send this case back for a competency hearing at this point in time as opposed to a new trial?
>
> [Goad:] Your honor, I don't believe a competency examination at this point in time could establish whether Mr. Goad was competent during that morning of trial, though it may provide more information if we knew what the medication was.
>
> [Court:] Couldn't a hearing determine the answer to the questions [the court] posed?
>
> ***667** [Goad:] A hearing could determine the answer to those questions, though it would be difficult to determine Mr. Goad's mental state on that morning.
>
> [Court:] It would be difficult, but would it be impossible?
>
> [Goad:] I think it would be next to impossible.

There is nothing for the district court to aggregate on remand. The aggregate of zero is zero, and we should affirm.

III.

The scope and purpose of a retrospective hearing is considerably more limited and narrow than the majority opinion suggests. Its purpose is to answer the narrow question of legal competence, not to conduct a free-wheeling investigation into a defendant's overall mental health just to see what might be lurking there. Thus, the remedy is far from sweeping; to the contrary, it is actually quite narrow. First, it triggers only when there exists "reasonable doubt" regarding competency; it is not supposed to be held for every defendant who happens to suffer from some kind of mental illness unrelated to competency.

Second, the remedy is only an appellate remedy, not one that can be granted by a district court in connection with a post-verdict motion for new trial no matter how much doubt exists regarding competence. The Nevada Supreme Court has already announced that "Nevada law does not permit a trial court to vacate prior proceedings based upon present doubt as to past competency" and a district court that vacates a jury verdict and grants a new trial on this basis "exceeds its authority." *State v. Fifth Judicial Dist. Court*, Docket No. 53926, (Order Granting Petition, Sept. 25, 2009). In that case, the defendant was convicted at trial but behaved erratically during sentencing. The district court ordered and conducted its own retrospective hearing and determined that the defendant had been incompetent during trial, and vacated the conviction. The State filed a petition for writ of mandamus, and the Nevada Supreme Court intervened and ordered the district court to restore the guilty verdict, concluding:

> The State challenges the district court's order setting aside the verdict on two grounds: (1) the district court exceeded its authority under NRS 175.381(2) when it set aside the verdict on a ground other than sufficiency of the evidence, and (2) the district court exceeded its authority and abused its discretion when it made a determination as to Yowell's past competency that was not supported by substantial evidence. We agree.
>
> First, a trial court may set aside the verdict and enter a judgment of acquittal if the evidence is insufficient to sustain a conviction. NRS 175.381(2). In the instant case, the district court set aside the verdict because it believed that Yowell was not competent during his trial. There was no allegation, let alone a finding by the district court, that the evidence presented by the State was insufficient to sustain a conviction. Therefore, we conclude that the district court exceeded its authority under NRS 175.381(2) by setting aside the verdict.
>
> NRS 176.515(1) provides that "the court may grant a new trial to a defendant if required as a matter of law on the ground of newly discovered evidence." However, Nevada law does not permit a trial court to vacate prior proceedings based upon present doubt as to past competency.

Id. at *2. Thus, a district court's power to vacate a jury verdict and grant a new trial in a criminal case is governed by statute, and the statutes do not authorize courts to grant new trials on grounds other than insufficiency of the evidence. *Id.* Consequently, district courts may not vacate jury verdicts and order such hearings themselves after trial. Only appellate courts may order such hearings; district courts have no authority to do so.

Accordingly, the scope of what the majority does today is extremely limited: it applies only to the judges of this court, not to any district courts and not to the Nevada Supreme Court either, which remains free to ignore opinions from lower courts. It is precedent only to us, not any other court either above or below. Because this is only an appellate remedy not available to the district ***668** court, the inquiry must be filtered through the appellate standard of review. Whether there exists "reasonable doubt" regarding competency is a question of fact "within the discretion of the trial court" to answer. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113. Appellate courts are required to defer to the district court on questions of fact.

> An appellate court is not particularly well-suited to make factual determinations in the first instance. *Zugel* [*by Zugel v. Miller*], 99 Nev. [100,] 101, 659 P.2d [296,] 297 [(1983)]; 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3937.1 (2d ed. 1996) ("Appellate procedure is not geared to factfinding."); *see also Anderson v. Bessemer City*, 470 U.S. 564, 575 [105 S.Ct. 1504, 84 L.Ed.2d 518] (1985) (explaining that a trial court is better suited as an original finder of fact because of the trial judge's superior position to make determinations of credibility and experience in making determinations of fact); *Alburquerque v. Bara*, 628 F.2d 767, 775 (2d Cir. 1980) (remanding habeas petition to district court for additional fact findings because Court of Appeals was not well-suited to make factual findings). An appellate court's ability to make factual determinations is hampered by the rules of appellate procedure, the limited ability to take oral testimony, and its panel or en banc nature.

Ryan's Express v. Amador Stage Lines, 128 Nev. 289, 299, 279 P.3d 166, 172-73 (2012).

So, properly framed, the issue before us isn't whether we

think there existed "reasonable doubt" regarding Goad's competency; we have no ability to engage in fact-finding when we can't see Goad and all we have before us is a typed transcript of events that happened over 21 months ago. Rather, the issue is whether there exists "substantial evidence" in the record to support the district court's conclusion that no such doubt existed based upon its firsthand personal interaction with Goad at the precise moment in time when his competency was supposedly under suspicion.

IV.

This court reviews the district court's decision to hold or not to hold a more in-depth competency proceeding for an abuse of discretion. *Olivares v. State*, 124 Nev. 1142, 1149, 195 P.3d 864, 869 (2008). Here, Goad is mentally ill, but that tells us little about whether he was incompetent on any particular day of his trial. Even at the ripe old age of 74, Goad admits that there exists precisely zero evidence that he has ever been previously suspected, diagnosed, or adjudicated as legally incompetent at any time in his life by any physician or any court, despite suffering from a mental illness continuously. *See Eubanks v. Baker*, Docket No. 68628, 2016 WL 2742376, at *1 (Order of Affirmance, May 9, 2016) (a defendant's "history of drug abuse, possible PTSD, and mental health history, without more, did not indicate that he was unable to consult with his attorney or understand the proceedings against him"). Did the district court "abuse its discretion" in finding that a formal competency hearing was unnecessary? Here's what the trial record says.

During six months of pretrial litigation between Goad's arrest and trial (from March to August 2019), neither he nor his counsel ever placed his competency into question. I would think that counsel in close quarters with Goad while preparing for a murder trial would know plenty that we do not, and would raise the matter on even the slightest sniff of a problem. Nothing. The district court was asked to resolve a series of pretrial motions, none of which raised any question about Goad's competency (motion to admit/exclude evidence of Goad's eviction/financial issues, motion to exclude prior bad acts, motion to exclude prejudicial photos and videos).

If anything, the pretrial record cuts the opposite way. The only pretrial motion relating in any way to Goad's mental health was a motion to admit/exclude a recording/transcript of police interrogation in which Goad describes his mental health history in some detail but never claimed any prior diagnosis of incompetency. During it, Goad claimed (all unverified) that he spent time in various mental health facilities (at UC Davis, in Glendale, and in Galletti) and suffers from what he described as "depression" and at one time took the medications Amitriptyline to help him sleep and Ativan for "shakes." However, ***669** he asserted that the last time he took those medications was seven years before the interrogation. Therefore, by his own admission, he does not need medication to be legally incompetent. Perhaps the medication reduces the severity of the symptoms of his mental illness. But when he admits that he has not received medication for seven years, and then counsel adds that he has never been diagnosed or adjudicated incompetent, the last step of the syllogism becomes obvious: the district court correctly concluded that there is simply no evidence that Goad needs medication to be legally competent to stand trial for the crime of murder.

So Goad's competency was never questioned before trial and has apparently not been questioned in the 21 months that have elapsed since trial until now. What about the trial itself? In evaluating whether a full competency hearing is required, trial courts must consider their own observations of the defendant's behavior. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113; *Drope*, 420 U.S. at 180, 95 S.Ct. 896. Goad concedes that he was fully competent on days one and two of the trial, and then fully competent on every day of the trial that took place after day four. Even on day four, he concedes (as will soon become apparent) that he was competent by the early afternoon.

The only issue is what happened during part of the morning of day four, as he was fully competent after lunch. Here's what the trial transcript says about Goad's behavior during the events of that day.

On day three of Goad's trial, the district court stated shortly after the lunch break:

> I've observed a difference in Mr. Goad's physical appearance today. And during the lunch hour, just in the last five minutes, Deputy Cross came to me and said that there had been some inquires about Mr. Goad's health. I asked him if Mr. Goad's attorneys were aware of it, and he said that they had been here

for the entire break.

A deputy court marshal then stated on the record that he was "advised of the change of behavior" and was in contact with medical staff, which revealed that Goad did not receive a medicine that day. The deputy further noted the medication was the "type that cannot wait until the end of our normal business day." The deputy recommended stopping proceedings for the day and taking care of Goad.

The district court then asked defense counsel for his impressions, to which counsel responded that Goad was "worse than he was this morning" and was degrading physically. Notably, counsel did not question Goad's ability to communicate with him or assist in defending the trial, despite the judge's express invitation. The district court then said, "I think it's appropriate that we recess for the day. And if that means that it pushes the trial back, that's what it means. Mr. Goad is entitled to be present and well as he both observes trial and participates with his attorneys privately " The district court then sent the jury home, after which Goad received his medication.

Trial reconvened the next day at 9 a.m. Defense counsel started by notifying the district court that Goad was unresponsive and failed to acknowledge his attorneys. The record indicates, however, that Goad was responsive with the marshals and courtroom deputies. Defense counsel next said, "So what I would be interested in this morning is just the Court to ask Mr. Goad if he understands why we're here and what we're doing. And if he could acknowledge that to the Court I would feel comfortable going forward." Notably, counsel did not express the belief that Goad was incompetent, and did not request the full competency hearing that the majority now says was necessary. The district court responded:

> I'm not going to conduct some form of informal mini mental examination from the bench. This trial is going to proceed with or without Mr. Goad's presence or participation. I want Mr. Goad to be present. But if Mr. Goad, for example, chose not to accept the transport I'd quickly do some legal research but I—I have a sense that without any competent jury this trial proceeds.
>
> So I'm going to ask Mr. Goad about being here, I'm going to acknowledge him, express my gratitude that he's here, my hope ***670** that he remains, but I'm not going to make findings about his cog nature.

The following is the interaction the district court had with Goad.

> [Court:] Mr. Goad, good morning. And you've just raised your hand to say hello to me in gesture. Are you having a hard time speaking?
>
> [Goad:] (Nods head.)
>
> [Court:] Yes, you're nodding your head yes. The record will reflect that I'm looking directly at Mr. Goad and he is looking at me as I speak to him. Our eyes are communicating with each other, and he's nodding his head yes. But you're not able to speak this morning; is that correct?
>
> [Goad:] (No audible response.)
>
> [Court:] So Mr. Goad has attempted to make noise with his throat and he's held his hand up to his throat indicating there may be some problem with his ability to use words this morning.
>
> Mr. Goad, do you know who I am? Not my name, but do you know what I do? Yeah, you're nodding your head yes. And these are your two attorneys. And you're nodding your head and saying yes and waving to them.
>
> Are you able to write at all? Yes? So what I'll do is at defense counsel's request, if at any time you want to communicate with your attorneys, just let Ms. Mayhew know, she'll stand and let me know, and ... we'll let you write a note to them. I'm not sure what's going on.
>
> Has Mr. Goad been medically cleared from the infirmary? The deputies are answering yes, he has, and he is nodding his head yes.
>
> Mr. Goad, is it—will you just raise your hand if you want this trial to proceed? Yes. He's raising his hand immediately.
>
> All right. That's enough of a canvass for me.

The district court then called the jury in and the trial proceeded. By early that afternoon, Goad's counsel entered the following observation into the record:

> What I want to let the court know is it's as if the medication that he was given yesterday has a time frame in which it actually has its effect. Because I have noticed a marked difference now with respect to Mr. Goad and his ability to communicate with me.... It's as if the medication took a while to have

> its effect, this morning it hadn't fully activated.

Thus, any issue that Goad had during the morning of day four was resolved by that afternoon.

V.

Notably, at no point during this lengthy exchange did defense counsel argue that Goad was incompetent or suggest that there existed some additional evidence bearing on competency that the court should consider. Counsel's concern was not that Goad was incapable of understanding enough to proceed, but only that he was being difficult and obstinate toward his attorneys (as he was simultaneously responsive to the courtroom marshals and the judge's canvass). Obstinacy is an entirely different problem than competency. Being difficult, even to the extent of being overtly rude and dismissive to counsel, is not the same thing as being incapable of understanding the nature of the proceedings.

Even to the extent that this exchange suggests something about competency rather than mere stubbornness, on appeal the question isn't whether we agree with the district court's observations. We can't see them, so we have no basis to either agree or disagree. The only question is whether the record indicates that the district court did what it was supposed to do, which is personally evaluate Goad's demeanor, and it did. The only other question is whether the record contains "substantial evidence" supporting the district court's conclusion that it did not need to probe further into Goad's competency, and without being able to see Goad ourselves, we must say that it does.

What this exchange tells us is this. Of the three things courts must weigh to determine whether a full competency hearing is required—the defendant's history of irrational behavior, his demeanor at trial, and prior medical opinion of his competence to stand trial—two of the three are nonexistent by Goad's own admission (no evidence of any ***671** prior history of behavior suggesting incompetency, no prior medical diagnosis of incompetency), and the third (Goad's demeanor at trial) is something the district court saw, made an extensive record about, and we cannot see ourselves on appeal. *See* *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (citing *Drope*, 420 U.S. at 180, 95 S.Ct. 896). Then on top of that, Goad doesn't even quite assert that he was incompetent at the moment in question on day four, nor did his attorneys suggest that there existed some other evidence the court should consider when given an opportunity to do so. When all three of the factors, plus Goad's own argument, come out in favor of the district court, our inquiry ought to end there.

VI.

The majority nonetheless remands for the district court to review such things "in the aggregate" as medical records pre-dating the trial, Goad's medication and dosage during the trial, and even the gruesome facts of the crime itself six months earlier, in the apparent belief that, if the district court looks, maybe something about competency might come up. But that's not how the legal test works. The district court isn't supposed to conduct a full-blown hearing and investigation (and we're not supposed to reverse if it doesn't) until there first exists some threshold reason to believe that there's something worth finding. When Goad himself doesn't say there's anything at all to uncover—when he fails to mention any evidence of incompetence to the district court and then admits on appeal that there is no evidence that he has ever been adjudicated incompetent—then the district court was well within its bounds to conclude that the threshold was not met and a hearing would be meaningless. *See* *Maxwell*, 606 F.3d at 576.

Perhaps one could take the position that there's no harm in trying to get more information, especially when the stakes involve a brutal murder and are at their highest. But I'm of a mind that courts must deal with the real rather than the conjectural, limiting ourselves to evidence for which a strong case has been made to actually exist, not merely hypothetical evidence that might exist in theory but not anywhere in the record we have. Courts aren't supposed to tolerate "fishing expeditions" in civil discovery, and we're certainly not supposed to order district courts to engage in them ourselves. *See* *Groom v. Standard Ins. Co.*, 492 F. Supp. 2d 1202, 1205 (C.D. Cal. 2007) ("[D]iscovery must be narrowly tailored and cannot be a fishing expedition."). Similarly, we're not supposed to vacate murder convictions on appeal just because the district court failed to conduct its own sua

sponte search for something that Goad never claimed to exist. The idea of a retrospective hearing assumes a reason to believe that there actually was some concrete evidence that the district court failed to consider. When there is no reason to believe that such evidence exists, a retrospective hearing will accomplish nothing except waste time and resources in the pursuit of nothing useful to add to the existing record.

Could additional evidence nonetheless still be found if the district court looks further on remand, even though Goad himself doesn't assert that any such evidence exists? I suppose it's conceivable. As noted astronomer Carl Sagan used to say, absence of evidence is not necessarily evidence of absence. Carl Sagan, *The Demon-Haunted World: Science as a Candle in the Dark* 213 (Ballantine, 1st ed. 1997). Lots of things that seem implausible today might turn out to be true tomorrow. *See* 2019 Chapman University Survey of American Fears (CSAF) (reporting that 57% of Americans believe in the existence of the lost continent of Atlantis and more than 1 in 5 believe that Bigfoot exists), published in Christopher D. Bader et ah, *Fear Itself: The Causes and Consequences of Fear in America* (NYU Press 2019), available at https://www.chapman.edu/wilkinson/research-centers/babbie-center/survey-american-fears.aspx. Likewise, it's theoretically possible that some additional evidence of incompetence might exist somewhere in the universe even though Goad's own counsel never mentioned any, either to the district court or on appeal. Even completely random discovery "fishing expeditions" occasionally do uncover meaningful evidence.

But when the overall standard of appellate review is "abuse of discretion" and the district ***672** court decides as a factual matter that no additional hearing is warranted, the standard we apply—the standard that Nevada appellate courts have applied in literally thousands of cases—is whether the court's decision is supported by "substantial evidence." *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). In the thousands of cases we've handled over the past six years, we have never assessed "substantial evidence" by speculating about hypothetical evidence that appeared nowhere in the record and was never presented to the trial court. "Substantial evidence" is assessed by looking at the evidence actually in the record before the court and asking whether it was enough to justify the finding. Once we enter into the realm of speculation, there can always be hypothetical countervailing evidence that might go the other way, whether it's a criminal case, workers' compensation case, or family law case. But we don't engage in that kind of speculation; at least, we never have before. If we did, no verdict could ever stand up on appeal because someone could always imagine the possibility of something more to find if someone else just looks a little harder.

Legality aside, consider as a practical matter how unlikely it really is that there could be something to find anyway. Goad admits on appeal that there is no evidence of past incompetence. Beyond that admission, can someone be legally competent every day for the entirety of a 74-year life, but yet incompetent for only a couple of hours one morning before becoming fully competent again by the early afternoon? Sure, it's possible. Just not in any way that matters to this case. One could be drunk or high on drugs that quickly wear off. Maybe one could suffer the effects a concussion that impairs cognitive ability for a few hours. People suffering from Alzheimer's or dementia can sometimes float in and out of competency. But Goad wasn't suffering from any of this. Looking to mental health records from some other time well before trial might make sense if a defendant had a long history of floating in and out of legal competency over time. If someone was legally incompetent in the past, that suggests at least the possibility of being legally incompetent again later. But here, there's no evidence whatsoever that Goad was incompetent at any other time of his life, including even later during the afternoon of the same day, so evidence of Goad's mere mental illness months, weeks, or days before trial tells us nothing about whether he was legally competent for part of the morning of the fourth day of trial. As the majority notes, even assuming as true that there was incompetence for part of the morning of day four, that was only because the triggering event was Goad not being given medication that morning. So what, exactly, is the relevance of his mental health months or weeks earlier before trial when things were very different and Goad himself states that he was medication-free for seven years before trial yet was never suspected of being legally incompetent, much less adjudicated so?

The bottom line is that the question at hand—whether someone who's been competent their entire life suddenly became incompetent for only a couple of hours one morning or not—is a fundamentally factual one which, in this case, the district court answered in the record in detail and at length based upon its personal interactions with Goad and its observations of his behavior. The district court is expressly required to consider its own observations about the defendant's demeanor, which we cannot see and can never second-guess. *Melchor-Gloria*, 99 Nev. at 180, 660 P.2d at 113 (citing *Drope*, 420 U.S. at 180, 95 S.Ct. 896). The district court personally canvassed the defendant, made remarks and observations about the defendant's nonverbal

conduct and in-court behavior, and then immediately found that there was no need to go further. It clearly gave a lot of weight to its personal observations. We must give deference to those observations which we cannot see in a typewritten transcript and therefore ought not second-guess. And deference on a purely factual matter means that, whenever the district court's factual findings are supported by any substantial evidence at all, we must affirm.

The district court was confronted with a factual inquiry that it answered based upon ***673** personal observations that we cannot see. Instead of speculating that there may be more evidence out there somewhere in the ether that the district court should investigate now, more than 21 months later, I would affirm.

All Citations

488 P.3d 646, 137 Nev. Adv. Op. 17

VII.

483 P.3d 526
Supreme Court of Nevada.

Roman HILDT, Petitioner,
v.
The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR the COUNTY OF CLARK; And the Honorable Richard Scotti, District Judge, Respondents,
and
City of Henderson, Real Party in Interest.

No. 79605
|
FILED MARCH 25, 2021

Synopsis

Background: Petitioner sought a writ of mandamus ordering that his conviction for misdemeanor battery constituting domestic violence, entered without a jury trial, be vacated, and that he receive a jury trial.

Holdings: As matters of first impression, the Supreme Court, en banc, Hardesty, C.J., held that:

constitutional rule providing that right to a jury trial attached to first-offense domestic battery was new, as would support retroactive application of rule, and

conviction was not final when new rule was announced, and thus new rule applied retroactively to petitioner.

Petition granted.

Procedural Posture(s): Petition for Writ of Mandamus.

***527** Original petition for a writ of mandamus or, alternatively, a writ of habeas corpus in a criminal matter concerning the right to a jury trial.

Attorneys and Law Firms

Kimberly A. Nelson, Las Vegas; Aisen Gill & Associates LLP and Michael N. Aisen and Adam L. Gill, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; Nicholas Vaskov, City Attorney, Marc M. Schifalacqua, Senior Assistant City Attorney, and Elaine F. Mather, Assistant City Attorney, Henderson, for Real Party in Interest.

Steven B. Wolfson, District Attorney, and Alexander G. Chen, Chief Deputy District Attorney, Clark County, for Amicus Curiae Clark County District Attorney.

Bradford R. Jerbic, City Attorney, and Carlene M. Helbert, Deputy City Attorney, Las Vegas, for Amicus Curiae City of Las Vegas.

Micaela C. Moore, City Attorney, and Deep Goswami, Chief Deputy City Attorney, North Las Vegas, for Amicus Curiae City of North Las Vegas.

BEFORE THE COURT EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

***528** Petitioner Roman Hildt maintains that both the municipal court and the district court erred by denying him the right to a jury trial for his misdemeanor battery constituting domestic violence charge. Approximately three weeks after the district court affirmed his conviction on appeal, and the day before Hildt filed the instant writ petition, we decided the same issue in *Andersen v. Eighth Judicial District Court*, therein announcing a new constitutional rule of criminal procedure: persons charged with a misdemeanor domestic battery offense are entitled to a jury trial. 135 Nev. 321, 324, 448 P.3d 1120, 1124 (2019). In light of this new rule, Hildt seeks a writ of mandamus ordering that his conviction be vacated and that he receive a jury trial. Thus, this original writ petition requires us to determine whether Hildt's misdemeanor conviction became final, such that the rule announced in *Andersen* cannot be retroactively applied to him.

Pursuant to our retroactivity framework in *Colwell v. State*, 118 Nev. 807, 820-21, 59 P.3d 463, 472 (2002), we apply new constitutional rules of criminal procedure to all cases in which the conviction of the individual seeking application of the rule is not yet final. Because we decided *Andersen* before Hildt's time for filing a petition for a writ of certiorari to the United States Supreme Court expired, Hildt's misdemeanor conviction

was not final, and thus the new rule in *Andersen* applies to his case. Accordingly, we grant Hildt's petition for a writ of mandamus.[1]

[1] Hildt alternatively seeks a writ of habeas corpus. In light of this opinion, the request for habeas relief is denied.

FACTS AND PROCEDURAL HISTORY

Real party in interest the City of Henderson filed a criminal complaint against Hildt, alleging one count of first-offense battery constituting domestic violence—a misdemeanor pursuant to NRS 200.485(1)(a). Hildt filed a motion requesting a jury trial in the Henderson municipal court. Hildt acknowledged that Nevada law did not recognize the right to a jury trial in misdemeanor domestic battery cases, but he requested that the municipal court stay his case pending the outcome of *Andersen*, which was being considered by this court. The municipal court denied the motion. The matter proceeded to a bench trial, where the municipal court found Hildt guilty of the charged offense. Thereafter, the municipal court sentenced Hildt but stayed the execution of his sentence pending the outcome of Hildt's appeal to the district court.

On appeal to the district court, Hildt claimed that the municipal court erred by denying his jury trial request. The district court denied Hildt's appeal and affirmed his conviction on August 21, 2019. Remittitur issued on September 5, 2019. One week later, on September 12, 2019, this court decided *Andersen*. Hildt filed this original writ petition the following day.

***529** *DISCUSSION*

Pursuant to the Nevada Constitution, we have the "power to issue writs of *mandamus* ...." Nev. Const. art. 6, § 4. "The power to issue such writs is part of this court's original jurisdiction; it is not merely auxiliary to our appellate jurisdiction." *State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 133, 994 P.2d 692, 696 (2000). A writ of mandamus may issue "to compel the performance of an act which the law requires as a duty resulting from an office or where the discretion has been manifestly abused or exercised arbitrarily or capriciously." *Andersen*, 135 Nev. at 322, 448 P.3d at 1122 (internal quotation marks omitted); *see also* NRS 34.160. "A writ will not be issued when the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170.

Generally, we decline to consider writ petitions that request review of a district court decision rendered while acting in its appellate capacity, in recognition that doing so "would undermine the finality of the district court's appellate jurisdiction." *Hedland*, 116 Nev. at 134, 994 P.2d at 696; *see also* Nev. Const. art. 6, § 6 (granting district courts "final appellate jurisdiction in cases arising in Justices Courts and such other inferior tribunals as may be established by law"). Nevertheless, we will entertain such petitions where "the district court has improperly refused to exercise its jurisdiction, has exceeded its jurisdiction, or has exercised its discretion in an arbitrary or capricious manner." *Hedland*, 116 Nev. at 134, 994 P.2d at 696. We will also exercise our discretion "where the petition present[s] a significant issue of statewide concern that would otherwise escape our review." *Amezcua v. Eighth Judicial Dist. Court*, 130 Nev. 45, 48, 319 P.3d 602, 603-04 (2014), *overruled in part by* *Andersen*, 135 Nev. at 323-24, 448 P.3d at 1123-24.

Our decision in *Andersen* overruled this court's prior precedent and requires municipal courts to provide a jury trial to any defendant charged with misdemeanor battery constituting domestic violence. 135 Nev. at 324, 448 P.3d at 1124; *see Walker v. Second Judicial Dist. Court*, 136 Nev. ——, 476 P.3d 1194, 1197 (2020) (stating that "mandamus is available ... where the law is overridden"). Hildt argues that *Andersen* applies retroactively to his case, and, as a result, he was erroneously denied the right to a jury trial on his misdemeanor battery constituting domestic violence charge. The retroactive effect of *Andersen* to Hildt's case implicates an issue of first impression concerning the finality of misdemeanor convictions with respect to our retroactivity jurisprudence—an issue of statewide concern that if not addressed in the context of a writ petition would escape this court's review. Further, Hildt has no other remedy to enforce his right to a jury trial because a litigant may only challenge a district court's appellate decision by way of a writ petition invoking our original jurisdiction. *See* *Sellers v. Fourth Judicial Dist. Court*, 119 Nev. 256, 257, 71 P.3d 495, 496 (2003) (explaining that the district court's "final appellate jurisdiction over cases arising in" lower tribunals restricts a party's request for relief from this court to writ petitions). For these reasons, we exercise

our discretion to consider this petition for a writ of mandamus.

Retroactive application of Andersen

Hildt argues that the municipal court and district court erred by denying him a jury trial because, as this court recognized in *Andersen*, the penalties for first-offense domestic battery make it a serious offense, such that the constitutional right to a jury trial attaches. He contends that the rule announced in *Andersen* applies to his case because his conviction was not final at the time *Andersen* was issued. In response, the City claims that Hildt's conviction was final at the time we issued the opinion.

We apply new constitutional rules of criminal procedure retroactively to all cases where the conviction of the individual seeking application of the rule is not yet final when the rule is announced. *Colwell*, 118 Nev. at 820-21, 59 P.3d at 472. A constitutional rule is new if "the decision announcing it overrules precedent" or rejects either an arguably sanctioned practice by this court or one consistently utilized by lower courts. ***530** *Id.* at 819-20, 59 P.3d at 472. Although our prior caselaw concluded that first-offense domestic battery was not a serious offense to which the right to a jury trial attached, in *Andersen* we recognized that intervening legislative changes to the offense now render it serious and subject to the jury-trial right. *See Amezcua*, 130 Nev. at 51, 319 P.3d at 606; *Andersen*, 135 Nev. at 323, 448 P.3d at 1123; NRS 202.360(1)(a). Therefore, *Andersen* announced a new constitutional rule of criminal procedure.

Having concluded that *Andersen* announced a new rule, we consider whether Hildt's conviction was final at the time *Andersen* was decided. *Colwell*, 118 Nev. at 820, 59 P.3d at 472. For purposes of the retroactivity analysis, we have said that a conviction is "final" when "judgment has been entered, the availability of appeal has been exhausted, and a petition for certiorari to the Supreme Court has been denied or the time for such a petition has expired." *Id.* Hildt argues that his conviction was not final because he still had time to file a petition for writ of certiorari with the United States Supreme Court at the time *Andersen* was issued. The City counters that Hildt did not have a right to file that petition and thus his conviction was final after the district court denied his appeal, before *Andersen* was decided.

However, the City provides no explanation or authority outside of United States Supreme Court Rule 13.1 to support its position that misdemeanants may not file certiorari petitions to challenge their misdemeanor convictions. United States Supreme Court Rule 13.1, which sets forth a 90-day time period for filing a "petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort," does not preclude a misdemeanant from filing a petition for review of his judgment of conviction. *See also Talley v. California*, 362 U.S. 60, 61-62, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) (granting a misdemeanant's petition for a writ of certiorari to review a superior court judgment affirming his misdemeanor conviction, where the misdemeanant raised constitutional contentions and the superior court was "the highest state court available" to him). Furthermore, although *Colwell* concerned a felony conviction, 118 Nev. at 811, 59 P.3d at 466, neither it nor *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), upon which we relied in *Colwell*, *see* 118 Nev. at 818-19, 59 P.3d at 471-72, indicated that misdemeanor convictions should be treated differently with respect to finality. Thus, we conclude that, like felony convictions, a misdemeanor conviction becomes final once the availability of direct appeal to the state courts has been exhausted and a timely filed petition for a writ of certiorari to the Supreme Court has been denied or the time for filing the petition has elapsed.

Hildt timely appealed his misdemeanor conviction to the district court, which affirmed the conviction and denied his appeal by order on August 21, 2019. Because district courts have final appellate jurisdiction over all cases arising in municipal court, *see* Nev. Const. art. 6, § 6; *Sparks v. Bare*, 132 Nev. 426, 430, 373 P.3d 864, 866-67 (2016), no further appeal was available to Hildt. Thus, Hildt had 90 days from entry of the district court's order to file a petition for writ of certiorari to the Supreme Court. As *Andersen* was decided before that time period expired, Hildt's conviction was not final and the rule in *Andersen* applies to his conviction. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Hildt's appeal and to proceed in a manner consistent with this opinion.[2]

[2] In its answer, the City requests that, if this court determines that *Andersen* retroactively applies

to Hildt's case, we also address whether it may legally conduct jury trials in domestic battery matters. We decline to reach this issue, as it seeks advisory relief not properly before us in this matter. *See* NRAP 21(a) (detailing this court's requirements for writ petitions); *see also Archon Corp. v. Eighth Judicial Dist. Court*, 133 Nev. 816, 822, 407 P.3d 702, 708 (2017) (explaining that "in the context of extraordinary writ relief, consideration of legal arguments not properly presented to and resolved by the district court will almost never be appropriate").

We concur:

Parraguirre, J.

Cadish, J.

Pickering, J.

Stiglich, J.

Silver, J.

Herndon, J.

All Citations

483 P.3d 526, 137 Nev. Adv. Op. 12

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481 P.3d 1249
Supreme Court of Nevada.

Arthur Lee SEWALL, Jr., Petitioner,
v.
The EIGHTH JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR the COUNTY OF CLARK; and the Honorable David Barker, Respondents,
and
The State of Nevada, Real Party in Interest.

No. 81309
|
FILED MARCH 04, 2021

Synopsis

Background: Following suppression of his confession, 2020 WL 1903199, defendant charged with first-degree murder filed motion for setting of reasonable bail. The District Court, Clark County, David Barker, Senior District Judge, and Valerie Adair, J., denied the motion. Defendant petitioned for writ of mandamus.

The Supreme Court, Cadish, J., held that evidence was insufficient to defeat defendant's right to reasonable bail.

Petition granted; writ issued.

Procedural Posture(s): Appellate Review; Bail or Custody Motion.

***1250** Original petition for a writ of mandamus challenging a district court order denying a motion for release on reasonable bail.

Attorneys and Law Firms

Law Office of Christopher R. Oram and Christopher R. Oram, Las Vegas; Joel M. Mann, Chtd., and Joel M. Mann, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, and Jonathan E. VanBoskerck and Alexander G. Chen, Chief Deputy District Attorneys, Clark County, for Real Party in Interest.

BEFORE HARDESTY, C.J., PARRAGUIRRE and CADISH, JJ.

OPINION

By the Court, CADISH, J.:

The State charged petitioner Arthur Sewall, Jr., by indictment with first-degree murder with the use of a deadly weapon. Sewall successfully moved to suppress his confession and later sought release on reasonable bail. The district court denied bail, finding "that the proof [was] evident and the presumption great" that Sewall committed the charged crime. Sewall argues that the district court was required to grant his release on bail under Article 1, Section 7 of the Nevada Constitution, because the State, in opposing bail, failed to meet its burden to show with admissible evidence that he committed the elements of first-degree murder with the use of a deadly weapon.

We conclude that the evidence the State presented, which was essentially limited to Sewall's semen being found on the victim and his previous ownership of a firearm that *could* have fired the round detectives found at the crime scene, is insufficient to defeat Sewall's right to reasonable bail. This evidence does not tend to demonstrate that Sewall committed the elements of first-degree murder. District courts may not rely on conjecture and inferences in denying bail. We therefore grant the petition for a writ of mandamus.

FACTS AND PROCEDURAL HISTORY

In 1997, Las Vegas Metropolitan Police Department (LVMPD) detectives responded to the scene of an apparent murder. There, they found the victim lying in a pool of blood with a gunshot wound in the back of her head and abrasions on her forehead and nose. The detectives recovered a spent round on the floor, though they did not find a cartridge for the round. The medical examiner that performed the autopsy concluded that the cause of death was homicide. A crime scene analyst administered a sexual assault kit, finding semen in the victim's vagina and ***1251** rectum and on the inside of her jeans. However, LVMPD was unable to solve the

homicide, and the case went cold.

In 2017, LVMPD detectives received a notification that Sewall's DNA matched the DNA that the crime scene analyst found during the victim's autopsy. A ballistics examination determined that the spent round found at the scene was consistent with a .357, a .38, or a 9mm revolver. The ballistics examination also concluded that the round's rifling characteristics were consistent with, but not limited to, an INA, a Ruger, a Smith & Wesson, and a Taurus. LVMPD detectives interviewed Sewall, wherein he confessed to paying the victim for sex and related that his gun went off during the encounter and that he fled the scene afterwards. The State charged Sewall by indictment with first-degree murder with the use of a deadly weapon.

Sewall moved to suppress his confession based on a violation of his *Miranda* rights, which the district court granted and we affirmed. *State v. Sewall*, Docket No. 79437, 2020 WL 1903199, at *1 (Order of Affirmance, Apr. 16, 2020). Thereafter, Sewall moved for a setting of reasonable bail on the basis that the State's proof was not evident, nor the presumption great, that he committed first-degree murder with the use of a deadly weapon. The State opposed, relying upon evidence that (1) Sewall claimed he did not know the victim; (2) LVMPD found Sewall's DNA in the victim's vagina, rectum, and on the inside of her jeans; (3) the victim was likely shot with a revolver because LVMPD did not find a cartridge casing at the murder scene; (4) the round that LVMPD found at the murder scene was consistent with a .357, a .38, or a 9mm revolver; and (5) Sewall owned a Ruger .357 revolver at the time of the alleged murder. After a hearing, the district court denied bail, finding that the proof was evident and the presumption great that Sewall committed murder.[1] Sewall now petitions this court for a writ of mandamus, challenging the constitutionality of the district court's bail order.[2]

[1] The Honorable David Barker, Senior District Judge, presided over Sewall's bail hearing, but the Honorable Valerie Adair, District Judge, signed the order.

[2] We previously granted this writ petition in an unpublished order. *Sewall v. Eighth Judicial Dist. Court*, Docket No. 81309, —— Nev. ——, 481 P.3d 1249, (2021) (Order Granting Petition for Writ of Mandamus, Dec. 4, 2020). Sewall filed a motion to reissue the order as an opinion, which we grant. We issue this opinion in place of our previous order. NRAP 36(f).

DISCUSSION

We elect to entertain Sewall's petition because he lacks an adequate legal remedy to challenge the district court's denial of bail and because Sewall's liberty interest is a fundamental right. *See* *Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 160-62, 460 P.3d 976, 983-84 (2020) (exercising discretion to entertain a petition for a writ of mandamus challenging, among other things, a district court's bail decisions).

The presumption in favor of bail

Article 1, Section 7 of the Nevada Constitution provides that criminal defendants have the right to bail prior to conviction. However, this right is limited for defendants accused of "[c]apital [o]ffenses or murders punishable by life imprisonment without [the] possibility of parole when the proof is evident or the presumption great" that the defendant committed the charged crime. Nev. Const. art. 1, § 7; *see also* NRS 178.484(4) (providing that "[a] person arrested for murder of the first degree may be admitted to bail unless the proof is evident or the presumption great" that the defendant committed first-degree murder). "The burden rests with the state to supply that proof" by competent evidence. *Howard v. Sheriff*, 83 Nev. 48, 50, 422 P.2d 538, 539 (1967); *see* *In re Wheeler*, 81 Nev. 495, 500, 406 P.2d 713, 716 (1965) (observing that the State must offer "competent evidence tending to prove the commission of [the] offense ... before the accused's right to bail may be limited"). "The quantum of proof necessary to establish the presumption of guilt" for purposes of defeating a bail request "is considerably greater than that required to establish the probable cause necessary to hold a person answerable for an offense," ***1252** *Hanley v. State*, 85 Nev. 154, 161, 451 P.2d 852, 857 (1969), but less than what is required at trial to prove guilt beyond a reasonable doubt, *Wheeler*, 81 Nev. at 500, 406 P.2d at 716. A district court abuses its discretion when it arrives at the conclusion to deny bail "by stacking inference upon inference" and where the connection between the evidence and charged crime is conjectural. *Howard*, 83 Nev. at 51-52, 422 P.2d at 539-40.

The State's evidence is insufficient to defeat the presumption in favor of bail

We previously observed that it is not possible to formulate a bright-line rule for what constitutes sufficient evidence to defeat bail. *Wheeler*, 81 Nev. at 500, 406 P.2d at 716. Nevertheless, existing caselaw on bail determinations informs our analysis on this fact-specific inquiry, which must be reviewed on a case-by-case basis. *Id.*

In *In re Wheeler*, the State charged the defendant with murder. *Id.* at 497-98, 406 P.2d at 715. The defendant requested release on bail, which the district court denied. *Id.* at 498, 406 P.2d at 715. On appeal, we reviewed the State's evidence, which consisted of a dying declaration by the murder victim who told a responding police officer that the defendant shot him. *Id.* at 501, 406 P.2d at 716-17. Because there was an appropriate foundation to admit the dying declaration, and because the declaration, if true, could support "a finding of the essential components of first degree murder," we held that the State presented sufficient evidence to defeat bail. *Id.* at 501-03, 406 P.2d at 717.

In *Howard v. Sheriff*, the State charged the defendant and her husband with murder. 83 Nev. at 50, 422 P.2d at 538. The defendant requested release on bail, which the district court denied. *Id.* at 50, 422 P.2d at 538-39. On appeal, we noted that the State offered only transcripts of the testimony given during the preliminary hearing, *id.* at 50, 422 P.2d at 539, the contents of which were as follows. A pathologist testified that the murder victim, a police officer, died from three gunshot wounds, which were not self-inflicted. *Id.* at 50-51, 422 P.2d at 539. The responding officer testified that he found the defendant's husband's driver's license on the hood of the police car. *Id.* at 51, 422 P.2d at 539. A taxi driver testified that he saw the defendant's husband speaking with the victim while the defendant was seated in a car stopped in front of the victim's police car. *Id.* A church organist testified that he saw a woman "scuffling with the" victim by two stopped cars on the same road and around the same time as the taxi driver, while a man ran up to grab either the victim or the woman, after which, the victim shoved the man. *Id.* However, the church organist did not identify the woman as the defendant or the man as the defendant's husband. *Id.* We held that the district court improperly denied bail because the evidence did not tend to show the elements of first-degree murder but instead showed only that the defendant scuffled with the victim around the time the victim was fatally shot. *Id.* Therefore, any "connection between [the scuffle] and the shooting [was] left wholly to conjecture." *Id.*

In *Hanley v. State*, the State charged the defendant with murder. 85 Nev. at 155, 451 P.2d at 853. The defendant moved for bail, which the district court denied. *Id.* at 161, 451 P.2d at 857. The State proffered the following evidence during the preliminary hearing. A deputy sheriff testified that he found footprints from a single person going from the victim's home to a truck parked in the victim's yard and that the footprints around the truck suggested the person waited at that location for some time. *Id.* at 157, 451 P.2d at 854. Additionally, the deputy sheriff testified that he followed the footprints into the desert, where he found shotgun parts. *Id.* A witness who knew the defendant for several years testified that the shotgun parts belonged to the defendant. *Id.* The witness also testified that the defendant discussed hiring somebody to murder the victim with him. *Id.* at 157-59, 451 P.2d at 854-55. Recognizing that the State must offer more than a mere inference of guilt of some crime, we held that the State's proffered evidence was insufficient to defeat the defendant's motion for bail. *Id.* at 162, 451 P.2d at 857.

The presumption was not great, nor was the proof evident, that Sewall committed first-degree murder

Applying the analysis from those cases, we hold that the evidence the State ***1253** presented here—that Sewall's semen was found on the victim and that a firearm owned by Sewall was one of several models that *could* have fired the round that LVMPD detectives found at the crime scene—is insufficient to defeat Sewall's right to reasonable bail under Article 1, Section 7 of the Nevada Constitution because it does not tend to demonstrate that Sewall committed the elements of first-degree murder.

The evidence clearly demonstrates that Sewall had sexual intercourse with the victim prior to her apparent murder. However, the State failed to present convincing evidence that tends to prove that a .357 Ruger revolver *was* the murder weapon, much less that it was Sewall's .357 Ruger revolver. Furthermore, the State's proffered evidence does not tend to prove the elements of first-degree murder under a "willful, deliberate and premeditated killing" theory, NRS 200.030(l)(a), or under a felony-murder theory, NRS 200.030(1)(b). Therefore, we conclude that the district court's finding

"that the proof [was] evident and the presumption great" that Sewall committed first-degree murder relies upon inference or conjecture rather than convincing evidence.

Sewall is awaiting trial and presumed to be innocent until found guilty. *Wheeler*, 81 Nev. at 499, 406 P.2d at 715. In our criminal justice system, "punishment should follow conviction, not precede it." *Id.* Accordingly, we hold that the district court's denial of Sewall's request for release on reasonable bail is contrary to the law, given the State's failure to rebut the presumption in favor of bail under Article 1, Section 7 of the Nevada Constitution.[3] *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (observing that a district court's decision constitutes an arbitrary or capricious exercise of discretion warranting mandamus relief where it is "contrary to the evidence or established rules of law") (internal quotation marks omitted). Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to grant Sewall's motion for release on reasonable bail in an amount and under conditions that the district court determines, after an adversarial hearing in accordance with *Valdez-Jimenez v. Eighth Judicial District Court*, 136 Nev. 155, 460 P.3d 976 (2020), are necessary to ensure Sewall's presence at trial and the safety of the community.[4]

[3] Because we are resolving Sewall's petition on these grounds, we decline to address his remaining arguments.

[4] Because the clerk of this court issued the writ of mandamus upon entry of the original order granting the petition, the clerk of this court shall not reissue the writ.

We concur:

Hardesty, C.J.

Parraguirre, J.

All Citations

481 P.3d 1249, 137 Nev. Adv. Op. 9

481 P.3d 848
Supreme Court of Nevada.

The STATE of Nevada, Petitioner,
v.
The FOURTH JUDICIAL DISTRICT COURT of the State of Nevada, IN AND FOR the COUNTY OF ELKO; and the Honorable Nancy L. Porter, District Judge, Respondents,
and
Anthony Chris Robert Martinez, Real Party in Interest.

No. 80093
|
FILED FEBRUARY 25, 2021

Synopsis

Background: In prosecution for felon in possession of firearm, the District Court, Elko County, Nancy L. Porter, J., granted defendant's motion to consolidate multiple counts. State then brought petition for writ of mandamus.

Holdings: The Supreme Court, Pickering, J., held that:

State's petition qualified for extraordinary writ review, but

as a matter of apparent first impression, State properly charges a defendant with only a single violation of the felon-in-possession statute when State alleges, without more, that the defendant is a felon who possessed any firearm, that is, one or more firearms, at one time and place.

Petition denied.

Procedural Posture(s): Appellate Review; Pre-Trial Hearing Motion.

***849** Original petition for a writ of mandamus or prohibition challenging a district court order granting a motion to consolidate counts.

Attorneys and Law Firms

Aaron D. Ford, Attorney General, Carson City; Tyler J. Ingram, District Attorney, and Daniel M. Roche, Deputy District Attorney, Elko County, for Petitioner.

Matthew Pennell, Public Defender, Elko County, for Real Party in Interest.

BEFORE THE COURT EN BANC.

OPINION

By the Court, PICKERING, J.:

NRS 202.360(1)(b) makes it illegal for a convicted felon to possess "any firearm." This raises the question whether a felon who possesses five firearms at one time and place commits a single violation of NRS 202.360(1)(b) or five separate violations. The rule of lenity resolves such unit-of-prosecution questions in favor of the defendant where, as here, the statute's text is ambiguous and conventional tools of statutory construction leave the matter in doubt. Consistent with the rule of lenity and the cases construing the similarly ambiguous federal felon-in-possession statute, 18 U.S.C. § 922(g)(1) (2018), we hold that the State properly charges a defendant with only a single violation of NRS 202.360(1)(b) when it alleges, without more, that the defendant is a felon who possessed "any firearm"—that is, one or more firearms—at one time and place.

I.

The police arrested real party in interest Anthony Martinez after he shot at two individuals in West Wendover, Nevada. They recovered five firearms at the scene, four from Martinez's car and the fifth—the gun Martinez allegedly used to fire the shots—from beside the car. The State charged Martinez with 15 felonies, including two counts of attempted murder. Among the 15 counts the State charged Martinez with were five counts of violating NRS 202.360(1)(b)—possession of a firearm by a person previously convicted of a felony offense—one count per firearm possessed.

Martinez filed a motion to consolidate the five

felon-in-possession counts into a single count. Martinez argued that, because the State alleged that he possessed these five firearms at one time and place, he committed, at most, a single violation of NRS 202.360(1)(b). The district court agreed and granted Martinez's motion to consolidate.

II.

The State brings the dispute to this court on a pretrial petition for extraordinary writ relief.[1] A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *Walker v. Second Judicial Dist. Court*, 136 Nev. ——, 476 P.3d 1194, 1196 (2020). A district court manifestly abuses its discretion if it bases its ruling on a clearly erroneous application of law. *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 932, 267 P.3d 777, 780 (2011). But writ relief does not lie when the petitioner has "a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170.

[1] The State styles its petition as one seeking a writ of prohibition or mandamus. "A writ of prohibition arrests the proceedings of a tribunal when such proceedings are without or in excess of the tribunal's jurisdiction." *State v. Justice Court of Las Vegas Twp.*, 112 Nev. 803, 806, 919 P.2d 401, 403 (1996). No such jurisdictional excess appears, so we deny the alternative petition for a writ of prohibition.

The State's petition qualifies for extraordinary writ review. It challenges as clear legal error the district court's interpretation and application of NRS 202.360(1)(b). While NRS 177.015 gives the State certain rights of appeal ***850** in criminal cases, those rights are limited and do not reach a pretrial order consolidating counts. And the unit of prosecution that NRS 202.360(1)(b) allows in felon-in-possession cases presents an unsettled legal issue of statewide significance. For these reasons, although we ultimately deny the petition, we undertake merits-based writ review.

III.

A.

Deciding NRS 202.360(1)(b)'s "unit of prosecution presents an issue of statutory interpretation and substantive law." *Jackson v. State*, 128 Nev. 598, 612, 291 P.3d 1274, 1283 (2012) (internal quotations omitted). "As with other questions of statutory interpretation," unit-of-prosecution analysis "begins with the statute's text." *Castaneda v. State*, 132 Nev. 434, 437, 373 P.3d 108, 110 (2016). When the text leaves the statute's unit of prosecution ambiguous, other interpretive resources come into play, "including related statutes, relevant legislative history, and prior judicial interpretations of related or comparable statutes." *Id.* at 439, 373 P.3d at 111. If, "after all the legitimate tools of interpretation have been applied, a reasonable doubt persists" as to the statute's unit of prosecution, the rule of lenity calls the tie for the defendant. *Id.* (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 299 (2012) (internal quotations omitted)). Under the rule of lenity, "[a]mbiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor." Scalia & Garner, *Reading Law*, *supra*, at 296.

B.

Nevada's felon-in-possession statute, NRS 202.360(1)(b), reads as follows:

> *A person shall not* own or *have in his or her possession* or under his or her custody or control *any firearm* if the person: ...
>
> (b) Has been convicted of a felony in this State or any other state ....
>
> A person who violates the provisions of this subsection is guilty of a category B felony and shall be punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000.

(emphasis added); *see* NRS 202.360(3)(b) ("As used in this section: ... '[f]irearm' includes any firearm that is loaded or unloaded and operable or inoperable.").

By its terms, NRS 202.360(1)(b) states three main elements: (1) a status element (the defendant is a person "convicted of a felony"); (2) a possession element (who

"shall not ... have in his or her possession"); and (3) a firearm element ("any firearm"). *See Hager v. State*, 135 Nev. 246, 249, 447 P.3d 1063, 1066 (2019). So, a defendant who is a convicted felon and possesses one firearm—loaded or working or not—can be charged with and convicted of one count of violating NRS 202.360(1)(b). From this it does not follow, though, that a felon who possesses five such firearms at one time and place can be charged with and convicted of five counts of violating NRS 202.360(1)(b).

The problem stems from NRS 202.360(1)'s use of the word "any" to modify "firearm." A number of criminal statutes use "any" as NRS 202.360(1) does: to help define the prohibition the statute states. *See Castaneda*, 132 Nev. at 438, 373 P.3d at 111. But unless otherwise clarified, this creates ambiguity as to the statute's unit of prosecution. *E.g.*, *Bell v. United States*, 349 U.S. 81, 75 S.Ct. 620, 99 L.Ed. 905 (1955) (holding that the simultaneous transportation of two women across state lines constituted one, not two, violations of the Mann Act, which made it a crime to knowingly transport "any woman or girl" across state lines for immoral purposes; "any" left the unit of prosecution ambiguous, so the rule of lenity applied). The ambiguity arises because "[t]he word 'any' has multiple, conflicting definitions, including (1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all." *Castaneda*, 132 Nev. at 438, 373 P.3d at 111 (internal quotations omitted). Depending on the meaning assigned "any," NRS 202.360(1)(b) can support prosecution either on a per-firearm basis or on the basis of a felon simultaneously ***851** possessing one or more firearms at one time and place. Since both readings are reasonable, the statute is ambiguous on its face. *See id.* (noting that "the word 'any' has typically been found ambiguous in connection with the allowable unit of prosecution, for it contemplates the plural, rather than specifying the singular") (internal quotations omitted); *accord Figueroa-Beltran v. United States*, 136 Nev. ——, 467 P.3d 615, 621 (2020); *Andrews v. State*, 134 Nev. 95, 98, 412 P.3d 37, 39 (2018).

C.

Legitimate statutory interpretation tools can resolve textual ambiguities, *see Castaneda*, 132 Nev. at 439, 373 P.3d at 111; Scalia & Garner, *Reading Law*, *supra*, at 299, but none appears to do so here. Citing *Washington v. State*, 132 Nev. 655, 376 P.3d 802 (2016), the State argues that, since NRS 202.360(1) uses the singular "firearm" instead of the plural "firearms," the Legislature must have meant to create a per-firearm unit of prosecution. "Firearms" instead of "firearm" would have made Nevada's felon-in-possession statute clearer, but this does not change the fact that, as written, NRS 202.360(1)(b) can reasonably be read in two different ways. And, while *Washington* held that NRS 202.285(1) authorizes a per-discharge unit of prosecution where a defendant "discharges a firearm at or into any house, room, [or] apartment." 132 Nev. at 657, 376 P.3d at 805, the statute's operative words were the verb "discharges" and its object "a firearm," which made a per-discharge unit of prosecution appropriate.

The State also makes a public policy argument: The Legislature takes possession of firearms by felons very seriously or it would not have passed NRS 202.360(1)(b) criminalizing such possession, and interpreting NRS 202.360(1)(b) to authorize per-firearm prosecutions furthers the Legislature's intent to prevent felons from possessing firearms by making each firearm possessed a separate crime. As support, the State cites *Andrews*, 134 Nev. at 101, 412 P.3d at 41-42, arguing "that everything about the analysis and ruling in *Andrews* is applicable to this case." In fact, the opposite is true. *Andrews* and this case share one similarity: Both concern a criminal statute made ambiguous by the word "any." *See id.* at 98, 412 P.3d at 39-40 (discussing *Castaneda*, 132 Nev. at 438, 373 P.3d at 111, and the unit-of-prosecution ambiguity "any" creates).

At issue in *Andrews* was NRS 453.3385 (2013), criminalizing possession of "any controlled substance which is listed in Schedule 1, except marijuana." In *Andrews*, a divided panel of this court concluded that, despite the textual ambiguity "any" created, other legitimate tools of statutory interpretation supported prosecuting as separate offenses a defendant's simultaneous possession of several different controlled substances. Those tools included that NRS 453.3385 is part of Nevada's Uniform Controlled Substances Act (UCSA), *Andrews*, 134 Nev. at 99, 412 P.3d at 40; that other statutes within the UCSA supported the per-controlled-substance interpretation, *id.*; that case law interpreting UCSA provisions also supported this

interpretation, *id.* at 101, 412 P.3d at 41; and that the legislative history supported the majority's reading of NRS 453.3385, *id.* at 99-100, 412 P.3d at 40-41. In this case, by contrast, the State does not identify or apply any interpretive tools beyond its textual analysis and assertion respecting what it perceives the Legislature intended when it enacted NRS 202.360(1)(b).

"The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514, 128 S.Ct. 2020, 170 L.Ed.2d 912 (2008); *accord Castaneda*, 132 Nev. at 443, 373 P.3d at 114. The rule is an ancient one, "founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (per Marshall, C.J.).

The text of NRS 202.360(1)(b) leaves its unit of prosecution ambiguous, and the State has not identified any legitimate statutory interpretation tools to clarify it. To ***852** credit the State's argument that the Legislature must have intended to authorize a per-firearm-possessed unit of prosecution or it would not have made possession of any firearm by a felon a crime would turn the venerable "rule of lenity upside down." *Santos*, 553 U.S. at 519, 128 S.Ct. 2020. Courts "interpret ambiguous criminal statutes in favor of defendants, not prosecutors." *Id.* We therefore hold that the State properly charges a defendant with only a single violation of NRS 202.360(1)(b) when it alleges, without more, that the defendant is a felon who possessed "any firearm"—that is, one or more firearms—at one time and place.

D.

Our holding comports with the cases construing the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1) (2018). Although the statutes are not identical, section 922(g)(1) is similar to NRS 202.360(1)(b). It has a status element, a possession element, and a firearm element, and it uses "any" to express the prohibition it states:

> (g) It shall be unlawful for any person—
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; ...
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, *any firearm* or ammunition; or to receive *any firearm* or ammunition which has been shipped or transported in interstate or foreign commerce.

(Emphasis added.) These similarities make it appropriate to look to federal case law in deciding the unit of prosecution question presented by this petition.

The federal courts have achieved rare unanimity on the unit of prosecution 18 U.S.C. § 922(g)(1) authorizes in felon-in-possession cases. Every United States circuit court of appeals has deemed section 922(g)(1) ambiguous as to its unit of prosecution, applied the rule of lenity as stated in *Bell*, 349 U.S. at 83, 75 S.Ct. 620, and held that "when a defendant's possession of multiple firearms is simultaneous and undifferentiated, the government may only charge that defendant with one violation of § 922(g)(1) ... regardless of the actual quantity of firearms involved." *United States v. Buchmeier*, 255 F.3d 415, 422 (7th Cir. 2001) (citing cases from every United States circuit court of appeals). "[I]t does not matter if [the defendant] has one, two, three, or more firearms"; so long as the defendant possesses the firearms simultaneously, at one time and place, he or she commits a single offense. *United States v. Robinson*, 855 F.3d 265, 270 (4th Cir. 2017). This body of case law supports our holding that a defendant violates NRS 202.360(1)(b) once when he or she possesses at one time and place any firearm. The federal cases follow a different rule when the defendant acquires or stores multiple firearms at different times and places, *see United States v. Cunningham*, 145 F.3d 1385, 1398 (D.C. Cir. 1998), but we leave that issue for another day, since the State does not allege or argue that Martinez did not possess the weapons at one time and place.

The district court was correct and thus did not commit the clear legal error required for writ relief. We therefore deny the petition.

We concur:

Hardesty, C.J.

Parraguirre, J.

Stiglich, J.

Cadish, J.

Silver, J.

Herndon, J.

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