IN THE SUPREME COURT OF THE STATE OF NEVADA

YUN KYEONG SUNG, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 44717
AE HOE KWON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 45303

FILED

FEB 21 2008

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

These are consolidated appeals from judgments of conviction. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The district court convicted appellants Yun Kyeong Sung and Ae Hoe Kwon, pursuant to jury verdicts after separate trials, of one count each of conspiracy to commit extortion, extortion, and witness soliciting a bribe. The district court sentenced Sung and Kwon to serve various concurrent and consecutive terms in prison. These appeals followed.[1]

I. Issues raised jointly by Sung and Kwon

Truth as a defense to extortion based on a theory of libel

Sung and Kwon argue that their convictions for conspiracy to commit extortion and extortion must be reversed. Because the State relied upon a libel theory to support the extortion counts, Sung and Kwon

[1]On November 28, 2005, this court entered an order granting appellant's motion to consolidate these appeals.

contend that the district court committed reversible error when it denied them the opportunity to present truth as a defense. We agree.

A defendant has a constitutional due process right to present evidence supporting his theory of defense.[2] He is also entitled to have the jury instructed on that defense theory so long as there is evidence to support it, regardless of how weak or incredible that evidence may be.[3] We recognized in Phillips v. State that "a statement must be false to constitute libel under the extortion statute."[4] Conversely, truth is a defense to an extortion charge based upon a libel theory.

Here, libel was one of several theories the State relied upon to support the conspiracy to commit extortion and extortion counts against Sung and Kwon. Sung and Kwon were therefore entitled to present truth as a defense to the libel extortion theory, provided, of course, the evidence was otherwise admissible under evidentiary rules. If some evidence supported their defense theory, they were also entitled to have the jury accurately instructed on it.

We conclude that the district court erred when it denied Sung's and Kwon's request to present evidence supporting the truth of their allegations against Rene Angelil as a defense to the libel theory supporting the extortion counts. This error was exacerbated by the absence of an instruction accurately defining libel and the State's

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[2]See Cosio v. State, 106 Nev. 327, 330, 793 P.2d 836, 838 (1990).

[3]Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983).

[4]121 Nev. 591, 599, 119 P.3d 711, 717 (2005); see NRS 205.320 (defining extortion).

arguments to the jury that the truth or falsity of the statements attributed to Sung and Kwon supporting the extortion counts was irrelevant.

We have held that "[i]f several theories of criminal liability are presented to the jury and one is legally insufficient or unconstitutional, a general verdict cannot stand."[5] Because the libel theory of extortion was legally insufficient and the juries were only provided with a general verdict form, we are unable to determine whether they relied upon the libel theory of extortion to convict Sung and Kwon.

The State draws our attention to the fact that it proposed special verdict forms to avoid this problem and the use of the forms were objected to by Sung and Kwon and rejected by the district court. Although a defendant may not invite error at trial and then later assert that error as a basis for relief on appeal,[6] the absence of special verdict forms in these cases did not create the underlying due process errors. And the decision to reject the forms rested with the district court, not Sung and Kwon. We reject the State's argument that Sung's and Kwon's objection to the forms now precludes them from seeking relief based on these errors. Based on our reasoning in Phillips,[7] we reverse Sung's and Kwon's convictions for conspiracy to commit extortion and extortion.[8]

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[5]Phillips, 121 Nev. at 597, 119 P.3d at 716.

[6]See State v. Gomes, 112 Nev. 1473, 1480, 930 P.2d 701, 706 (1996).

[7]We recognize that Phillips was published on September 15, 2005, after Sung's and Kwon's jury trials, and the district court did not have the benefit of that opinion when making its decisions in this matter.

[8]Because we reverse Sung's and Kwon's convictions for conspiracy to commit extortion and extortion, we do not reach the issue whether these

continued on next page . . .

Admission of evidence and witness testimony

Sung and Kwon argue that the district court committed reversible error by improperly admitting evidence at trial. We disagree.

A district court's decision to admit or exclude evidence is given deference on appeal and "will not be reversed absent manifest error."[9] Sung and Kwon raise several arguments.

First, Sung and Kwon argue that the district court improperly admitted into evidence statements attributed to their former counsel, Joseph Hong and Michael Olsen. Hong and Olsen were retained by Sung and Kwon as counsel to represent them in pursing their claims against Angelil. The statements were contained in faxed documents, letters, and transcripts of telephone conversations and meetings apparently dating between March 2002 and January 2003. Sung and Kwon contend that admission of these statements at their trials violated the rule against hearsay and their Sixth Amendment right to confrontation pursuant to Crawford v. Washington.[10] We disagree.

Initially, we note that Sung and Kwon only provide this court with general references to exhibits in their joint appendix and broadly

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. . . *continued*

counts are redundant with their convictions for witness soliciting a bribe and violate the Double Jeopardy Clause of the United States Constitution.

[9]Baltazar-Monterrosa v. State, 122 Nev. 606, 613-14, 137 P.3d 1137, 1142 (2006).

[10]541 U.S. 36 (2004).

assert this error. Nevertheless, we have reviewed the statements at issue and conclude that they were properly admitted as non-hearsay.

NRS 51.035(3)(d) provides that a statement is not hearsay if it is offered against a party and it is made by "his agent or servant concerning a matter within the scope of his agency or employment . . . before the termination of the relationship." And NRS 51.035(c) provides that statements are also not hearsay if they are made "by a person authorized by him to make a statement concerning the subject."

Here, there is conflicting evidence as to when Kwon and Sung terminated the attorney-client relationship with Hong and Olsen. Some documents show that Kwon and Sung believed that they terminated their relationship with Hong and Olsen in October 2002. Other documents show that Hong and Olsen believed their relationship was only briefly terminated in December 2002. We are unable to resolve this factual conflict, but note that statements made by Hong and Olsen during the attorney-client relationship were admissible as non-hearsay under NRS 51.035(3)(d) and NRS 51.035(c).

Nevertheless, the statements made by Hong and Olsen were admissible as non-hearsay because they were made in the course and in furtherance of a conspiracy pursuant to NRS 51.035(3)(e). To be admissible under this rule, "the existence of a conspiracy must be established by independent evidence, and the statement must have been made during the course of and in furtherance of the conspiracy."[11] According to the State, Hong and Olsen remain "unindicted co-

[11]Wood v. State, 115 Nev. 344, 349, 990 P.2d 786, 789 (1999).

conspirators." Evidence in the form of recorded audio and videotape of a January 2003 meeting where Sung and Kwon were present established the existence of the conspiracy independently of the statements attributed to Hong and Olsen. We conclude that Sung and Kwon have failed to demonstrate that the district court committed manifest error by admitting Hong's and Olsen's statements. Because the statements were non-testimonial in nature,[12] we conclude further that Crawford does not apply,[13] and Sung and Kwon were not denied their right to confrontation.[14]

Second, Sung and Kwon argue that the district court erroneously denied their request to call UNLV Boyd School of Law Professor Jeffrey Stempel to testify as an expert witness about whether Hong and Olsen acted as ethical attorneys in their representation of Sung and Kwon. We disagree. NRS 50.295 provides that "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Yet, NRS 50.275 limits the scope of expert testimony to matters that will assist the trier of fact in understanding the evidence and determining an ultimate issue of fact. Here, the scope of Professor Stempel's proposed testimony improperly involved legal conclusions about Hong and Olsen's

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[12]See Flores v. State, 121 Nev. 706, 714, 120 P.3d 1170, 1177 (2005); Crawford, 541 U.S. at 68.

[13]We also reject Sung and Kwon's argument that NRS 51.035 is unconstitutional pursuant to Crawford.

[14]Hong and Olsen invoked their Fifth Amendment right against self-incrimination and did not testify. Sung and Kwon have not cited to any authority supporting their assertion that it was error for Hong and Olsen to invoke this right outside the jury's presence.

behavior, not merely factual issues.[15] We conclude that Sung and Kwon have failed to demonstrate that the district court committed manifest error by excluding this testimony.

Third, Sung and Kwon argue that the district court erroneously limited their cross-examination of witness Martin Singer, who was the attorney for Angelil. Specifically, Sung and Kwon contend that the district court improperly prevented them from questioning Singer about references in an article published on his web site that described Singer as an "attack dog" and claimed that he was willing to get "down in the gutter" for his clients. The district court concluded that this line of questioning was irrelevant. These references, Sung and Kwon maintain, showed that Singer was a biased witness. We disagree.

Although district courts have limited discretion in excluding extrinsic evidence showing a witness's bias, we have also recognized that that discretion is properly exercised when the inquiry is "'repetitive, irrelevant, vague, speculative, or designed merely to harass, annoy or humiliate the witness.'"[16] Sung and Kwon have failed to explain the relevance of the article on Singer's website and how prejudice resulted from the limitations placed upon the cross-examination of Singer. The jury was informed that Singer was Angelil's attorney and could reasonably

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[15]See Hart-Anderson v. Hauck, 748 P.2d 937, 942 (Mont. 1988) ("It is for the jury to evaluate the facts in light of the applicable rules of law, and it is therefore erroneous for a witness to state his opinion on the law of the forum.").

[16]Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004) (quoting Bushnell v. State, 95 Nev. 570, 573, 599 P.2d 1038, 1040 (1979)).

infer the nature of Singer's relationship with Angelil and how that might, if at all, impact his testimony. Moreover, the jury was instructed that it was to evaluate a witness's credibility or believability by examining "his relationship to the parties, his fears, his motives, interests or feelings." We conclude that Sung and Kwon have failed to demonstrate that the district court committed manifest error by excluding this evidence.

Fourth, Sung and Kwon argue that the district court improperly allowed Singer to interpret a settlement agreement as an expert lawyer witness, instead of a lay witness. We disagree. NRS 50.265(2) provides that a lay witness may testify to opinions and inferences which are "[h]elpful to a clear understanding of his testimony or the determination of a fact in issue." Singer's interpretation of the settlement agreement was helpful to understanding the context in which Sung's and Kwon's conspiracy to commit extortion and extortion arose against Singer's client, Angelil. We conclude that the district court did not commit manifest error by permitting this testimony. Even if it was error for the district court to permit Singer to testify in this regard, the document was admitted into evidence and the jury had an opportunity to read it. Sung and Kwon have failed to demonstrate how they were prejudiced by the district court's decision on this matter.

Finally, Sung and Kwon argue that the district court improperly admitted a tape recording Singer made of a telephone conversation between Singer and Sung's and Kwon's counsel, Hong. Sung and Kwon contend that the recording of the conversation was not authorized under Nevada law and is inadmissible. We disagree.

Irrespective of whether the recording was authorized under Nevada law, NRS 179.465(2) provides that "[a]ny person who has received,

by any means authorized . . . by a statute of another state, any information concerning a wire or oral communication . . . may disclose the contents of that communication or the derivative evidence while giving testimony under oath . . . in any criminal proceeding." Here, the recording was made in California, where it was authorized.[17] Thus, the recording was admissible in Nevada pursuant to NRS 179.465(2), and we conclude that the district court did not commit manifest error by admitting the telephone recording into evidence.

Alleged Brady violation

Sung and Kwon argue that the district court's refusal to order Singer to give them a copy of his client file on Angelil violated Brady v. Maryland.[18] We disagree. The proscriptions of Brady apply only to evidence withheld by the State.[19] Brady does not apply to evidence in possession of a private witness, such as Singer. Although Sung and Kwon assert that Singer was a governmental actor to which Brady should apply, they have failed to provide any cogent argument supporting this assertion. We conclude that Sung and Kwon have failed to demonstrate that the district court improperly denied their request and violated Brady.

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[17]See Cal. Penal Code § 633.5 (West 1999) (providing that it is permissible for a party to record a telephone conversation "for the purpose of obtaining evidence reasonably believed to relate to the commission by another party to the communication of the crime of extortion").

[18]373 U.S. 83 (1963).

[19]See State v. Bennett, 119 Nev. 589, 599, 81 P.3d 1, 8 (2003) (citing Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000)).

Severance of the trials

Sung and Kwon argue that the district court erroneously granted their motion to sever their trials. We disagree. The record reveals that Kwon moved to sever his trial from Sung and the district court granted the motion. Although Kwon later unsuccessfully sought to re-join the trials after obtaining new counsel, we have held that an "appellant may [not] consciously invite district court action perceived as favorable to him, and then claim it as error on appeal."[20] Because Kwon moved the district court to sever his trial from Sung's trial, we conclude that he is estopped from now asserting that action as error on appeal. Moreover, "[t]he decision to join or sever charges is within the discretion of the district court, and an appellant caries the heavy burden of showing that the court abused that discretion."[21] Here, Sung's and Kwon's assertions that they were prejudiced by the severance because "it lent the appearance of division" and that Kwon could not testify at Sung's trial are speculative. We conclude that Sung and Kwon have failed to demonstrate that the district court abused its discretion by severing their trials.

II. Issues raised by Sung

Sung argues that the district court erroneously rejected her proposed jury instruction regarding Singer's testimony. Specifically, she contends that the district court should have instructed the jury as follows:

> You heard testimony from a witness who instructed you as to the legal rights of the various parties. The testimony of any witness, including

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[20]Sidote v. State, 94 Nev. 762, 762-63, 587 P.2d 1317, 1318 (1978).

[21]Weber v. State, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005).

> an attorney, is not an instruction or conclusion reached by the court in this case. You are to consider only the instructions provided by the judge in this case and you shall not consider any instructions on issues of law presented by any witness.

We disagree. District courts have broad discretion to settle jury instructions, and we review a district court's decision to give or reject proposed instructions for an abuse of discretion or judicial error.[22] Here, Sung provides no authority supporting her assertion that the district court erred in rejecting their proposed instruction.[23] Moreover, the substance of the proposed instruction was duplicitous of another instruction—the jury had already been instructed to only follow the instructions given by the district court.[24] We conclude that the district court did not abuse its discretion by rejecting Sung's proposed instruction.

Refusal to allow Sung to wear jail clothing at trial

Sung argues the district court committed reversible error when it refused her request to wear her jail clothing during the first day of trial. We disagree. Although a defendant may elect to wear jail clothing as a strategy to invoke juror sympathy,[25] the record reveals that Sung did not make her request to change from civilian clothing back into her jail clothing until minutes before the first day of her trial was scheduled to

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[22]Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

[23]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (it is appellant's responsibility to provide this court with relevant authority).

[24]See Crawford, 121 Nev. at 754, 121 P.3d at 589.

[25]See Estelle v. Williams, 425 U.S. 501, 507-08 (1976).

begin. Sung cites to no authority supporting the proposition that she had a constitutional right to wear jail clothing at trial,[26] and she fails to demonstrate that she was prejudiced by the civilian clothes she wore during trial. We conclude that the district court did not commit reversible error by denying Sung's request.

Evidence supporting witness soliciting a bribe conviction

Sung argues that insufficient evidence supports her conviction of witness soliciting a bribe. We disagree. NRS 199.250 provides in part that it is a crime for "[a] person who is or may be a witness upon a trial, hearing, investigation . . . who asks or receives, directly or indirectly, any compensation . . . upon an agreement or understanding that his testimony will be influenced thereby, or that he will absent himself from the trial, hearing, or other proceeding." The standard for reviewing a conviction is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[27]

Regardless of Singer's inability to recall a witness ever soliciting a bribe from him, Hong's and Olsen's statements and Singer's other testimony established that Sung communicated to Angelil that if Angelil paid her money she would not give authorities evidence that was necessary to continue their criminal investigation of Angelil based upon

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[26]Cf. Duckett v. State, 104 Nev. 6, 10, 752 P.2d 752, 754 (1988) (citing to Estelle, 425 U.S. at 512, for the rule that a defendant cannot be compelled to stand trial wearing identifiable prison clothes).

[27]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Sung's allegations. If charges were ever filed against Angelil, Sung would have been a key witness. Viewing this evidence in a light most favorable to the State, we conclude that it was sufficient to support Sung's conviction for witness soliciting a bribe.

Credit for time served

Sung argues that the district court erroneously applied her credit for time served in custody. She maintains that she should have been given credit for 664 days in custody, as opposed to the 260 days that the district court credited her at sentencing. We disagree. This court held in Nieto v. State that "a defendant is entitled to credit for time served in presentence confinement from another jurisdiction when that confinement was solely pursuant to the charges for which he was ultimately convicted."[28] Here, Sung was detained in custody after she posted bail because of a hold placed on her release by the United States Immigration and Naturalization Service (INS) due to federal immigration violations. Sung does not contend that the INS hold was solely related to her instant charges and conviction. Sung provides no authority on appeal supporting her argument. We conclude that she has failed to demonstrate the district court erroneously calculated her credit for time served.

III. Kwon's claim that he was improperly prohibited from calling Angelil as a witness

Kwon argues that the district court erroneously prohibited him from calling Angelil as a witness. We disagree. The record reveals that the district court quashed Kwon's subpoena to call Angelil to testify partially on the basis that it was not timely and properly served. We

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[28]119 Nev. 229, 232, 70 P.3d 747, 748 (2003).

conclude that Kwon has failed to demonstrate that the district court abused its discretion by quashing his subpoena of Angelil on this basis.[29]

IV. Conclusion

We affirm Sung's and Kwon's convictions for witness soliciting a bribe. Because the district court prevented Sung and Kwon from raising truth as a defense to a libel theory of extortion, we conclude that their convictions for extortion and conspiracy to commit extortion must be reversed.[30] Accordingly, we

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

_____, C.J.
Gibbons

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Cherry

_____, J.
Saitta

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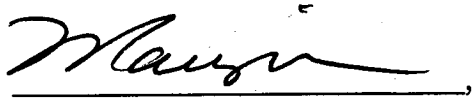
[29]We note, however, that the district court may have erroneously concluded that Angelil's testimony was not relevant.

[30]Sung and Kwon argue they are entitled to relief because of cumulative error that occurred during their trials. For reasons discussed above, we deny them relief on this basis. See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1110, 1115 (2002).

MAUPIN, J., concurring:

I concur in the result reached by the majority.

 , J.

Maupin

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