IN THE SUPREME COURT OF THE STATE OF NEVADA

LESEAN TARUS COLLINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45647

FILED

AUG 0 4 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of felony stop required on the signal of a police officer (evading) and gross misdemeanor child endangerment. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court sentenced appellant Lesean Tarus Collins to serve a prison term of 28 to 72 months for the evading count and a consecutive jail term of 12 months for the child endangerment count.

Citing to Blackledge v. Perry,[1] Collins first argues that the district court erred by denying his motion to dismiss based on vindictive prosecution. Specifically, Collins argues that his right to due process was violated because there is a "realistic likelihood" that the criminal charges in this case were filed in retaliation for his rejection of a plea agreement and the exercise of his right to a jury trial in another criminal case. Collins notes that two days after he was acquitted on kidnapping and sexual assault charges the police affidavit in support of the arrest warrant

[1]417 U.S. 21 (1974) (holding that it is unconstitutional for a prosecutor to respond to a defendant's exercise of his constitutional and statutory rights by filing more serious felony charges for the same conduct), overruled on other grounds by Bordenkircher v. Hayes, 434 U.S. 357 (1977).

was filed in this case, charging him with one count each of felony evading and altering a firearm for conduct occurring on April 27, 2001; and one count each of felony evading, child endangerment, and battery with use of a deadly weapon for conduct occurring on May 5, 2001.[2] Collins claims that the following evidence gives rise to a "realistic likelihood" of prosecutorial vindictiveness: (1) the second indictment was based on information known at the time the kidnapping and sexual assault charges were filed; (2) the prosecutor, Lisa Luzaich, personally instructed the police to submit felony evading charges even though it was contrary to police department policy to file such charges when the police pursuit involved an unmarked vehicle; (3) Luzaich, a member of the Special Victims Unit, personally prosecuted the case despite the fact that it involved traffic offenses and should have been assigned to the DUI unit; and (4) Luzaich charged Collins with an offense involving a firearm found during a search following his arrest for the sexual assault. We conclude that Collins' contention lacks merit.

A claim of vindictive prosecution may arise if the government increases the severity of criminal charges after a defendant exercises a procedural right.[3] If a defendant seeks to have criminal charges dismissed based on a claim of vindictive prosecution, he must make an initial

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[2]Collins was acquitted of the count of felony evading occurring on April 27, 2001, as well as the battery with the use of a deadly weapon. Prior to trial, the prosecutor agreed to sever the charge involving the firearm, and ultimately dismissed it after Collins was convicted in this case.

[3]United States v. Burt, 619 F.2d 831, 836 (9th Cir. 1980); see also Schmidt v. State, 94 Nev. 665, 584 P.2d 695 (1978).

showing of the "appearance of vindictiveness."[4] If the defendant satisfies his initial burden, the burden then shifts to the prosecutor to prove that any increase in criminal charges did not result from a vindictive motive.[5] In resolving a claim of vindictive prosecution, "the court must determine whether the prosecutorial decision was 'justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness.'"[6] Notably, there is generally no appearance or likelihood of prosecutorial vindictiveness for a defendant's exercise of a constitutional right to trial when the second criminal case arises out of a different set of facts.[7]

In this case, we disagree that there was an appearance or likelihood of vindictive prosecution because the new felony evading charges were factually unrelated to the kidnapping and sexual assault charges on which Collins was acquitted. The felony evading charge on which Collins was convicted arose from conduct, occurring on May 5, 2001, when Collins failed to stop for police after committing a traffic offense, while the sexual assault charge arose from an attack upon a female victim occurring on April 27, 2001.

Moreover, even assuming the crimes were factually related, the district court's finding that the prosecutor was not acting vindictively is supported by substantial evidence. In particular, at the hearing on the

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[4]Burt, 619 F.2d at 836.

[5]Id.

[6]Id. (quoting United States v. Griffin, 617 F.2d 1342, 1347 (9th Cir. 1980)).

[7]See United States v. Martinez, 785 F.2d 663, 669 (9th Cir. 1986).

motion to dismiss, the prosecutor dispelled the appearance of vindictiveness by explaining the delay in filing the felony evading charges. She stated that she did not know about the May 5th incident of evading until she received a police report on the day of jury selection in the sexual assault case. The prosecutor also explained that she did not believe that she could prove the felony evading offenses until she heard evidence at the sexual assault trial, including Collins' taped police statement indicating he knew he was evading police officers. Additionally, the prosecutor noted that she had informed detectives of her decision to file charges for the two instances of evading one and one-half weeks before the not guilty verdict in the sexual assault case. Accordingly, the district court did not err in denying the motion to dismiss based on vindictive prosecution.

Second, in a related argument, Collins alleges that the prosecutor's charging decision violated his right to equal protection because it was racially-motivated. Specifically, Collins notes that he is a member of a minority race and claims the State "has repeatedly failed to prosecute other [non-minority] races for this same crime." Collins also alleges that the seven-month delay in filing the criminal charges violated his right to due process because he was not afforded finality of judgment, and, had he known about the evading charges, he would have prepared his cross-examination of the police officers in the sexual assault case differently. Collins did not raise these contentions in his motions to dismiss filed in the district court. "Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."[8] Nonetheless, even assuming the contentions

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[8]See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).

were properly raised, in light of the prosecutor's explanation for the delay in filing the evading charges and the fact that there is no indication that Collins was prejudiced by the delay, we disagree that the charging decision was racially-motivated or violated Collins' due process or equal protection rights.[9]

Third, Collins contends that there is insufficient evidence to sustain his convictions. In particular, Collins contends that his conviction for felony evading should be reversed because there was no evidence that the unmarked vehicle pursuing him was a "readily identifiable" police car. Further, Collins argues that the State failed to prove that he was the driver of the vehicle at issue or that he drove in a manner that would endanger other persons or property. Finally, Collins argues that his conviction for child endangerment should be reversed because there was no evidence that he drove in a manner endangering the children in the backseat, and no evidence of the children's ages except for an inadmissible, testimonial hearsay statement.[10] Our review of the record

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[9]See Salaiscooper v. Dist. Ct., 117 Nev. 892, 903, 34 P.3d 509, 516-17 (2001) (selective prosecution claim requires proof that a public officer enforced a law or policy in a discriminatory manner and that the enforcement was for a discriminatory purpose); State v. Gattuso, 108 Nev. 49, 52, 825 P.2d 569, 570-71 (1992) (defendant must show that pre-accusation delay prejudiced the ability to obtain a fair trial or that the prosecution was intentionally delayed for an improper purpose).

[10]In his appellate brief discussing the sufficiency of the evidence of the child endangerment conviction, Collins states, "since this a crime against a person and dependent upon age, these additional elements should have been included in the Information and the jury instructions." To the extent that Collins challenges the adequacy of the charging document and the jury instructions, we conclude that Collins failed to preserve this issue for our review by first raising the issue in district court. See McKenna, 114 Nev. at 1054, 968 P.2d at 746. Also, Collins fails

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on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[11]

In particular, Las Vegas police detective Brian Kobrys testified that, on May 5, 2001, he observed Collins driving a vehicle, with a female passenger in the front seat and two little boys in the backseat. Detective Kobrys testified that the boys appeared to be between one and three years old. According to Detective Kobrys, Collins recognized that he was a police officer and appeared nervous. As Detective Kobrys pulled behind Collins' vehicle to run the license plate, Collins sped up, cut off another driver, rammed another vehicle twice, went through a red light at an intersection and, subsequently, jumped out of the vehicle while it was moving and ran.

Another officer pursued Collins on foot and testified that he repeatedly identified himself as a police officer, but Collins refused to stop. When Collins was finally caught hiding inside a retail store's walk-in freezer, he gave police officers his brother's name. Although Collins notes that the police vehicle was unmarked, police officer testimony indicated that, during the pursuit, the vehicle's flashing red and blue lights and siren were activated. Further, Detective Kobrys was wearing a military green uniform with Metro police patches visible on each shoulder. The jury could reasonably infer from the evidence presented that Collins failed to stop on the signal of a police officer and drove in a manner that

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to cite any relevant legal authority and make further cogent argument in support of these contentions. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

[11]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

endangered the young children in the backseat of the car.[12] It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[13]

Fourth, Collins contends that the convictions for evading and child endangerment constituted double jeopardy and were impermissibly redundant. Specifically, he argues that the elements of "child endangerment fits within the elements of the felony [evading]" and both offenses arise out of the same set of facts. We disagree.

"[I]f the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses."[14] Additionally, even when separate offenses do not violate double jeopardy, this court "will reverse redundant convictions that do not comport with legislative intent."[15] "'The issue . . . is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions.'"[16]

In this case, the convictions do not violate double jeopardy because the elements of child endangerment are not entirely included

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[12]See NRS 484.348; NRS 200.508.

[13]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[14]Barton v. State, 117 Nev. 686, 692, 694, 30 P.3d 1103, 1107 (2001).

[15]Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (internal quotations omitted).

[16]Id. (quoting State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

within the elements of evading. Most notably, child endangerment contains the element of placing a child "in a situation where the child may suffer physical pain or mental suffering," while the evading offense does not.[17] Further, we disagree that the charges are redundant. The gravamen of the charged child endangerment offense is the act of placing children at risk of harm. In contrast, the gravamen of the charged evading offense is fleeing from a police officer. The evading offense is complete when the defendant fails to stop on the signal of the police officer, regardless of whether the defendant has children in his vehicle or drives in a manner that placed them at risk. Because the evading and child endangerment offenses do not contain the same elements or punish the same illegal act, they do not violate double jeopardy and are not redundant.

Fifth, Collins contends that he was denied his constitutional right to a fair trial by an impartial jury because the district court failed to adequately inquire whether the jurors had observed him in "leg irons and belly chains" or overheard court staff stating that Collins was being taken back to jail. Citing to a case from the Indiana Supreme Court,[18] Collins argues that, in questioning the jurors, the district court should have specifically asked whether they saw or heard anything affecting their ability to give Collins a fair and impartial trial. We conclude that Collins' contention lacks merit.

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[17]Compare NRS 200.508(2), with NRS 484.348.

[18]Hackett v. State, 716 N.E.2d 1273 (Ind. 1999) (concluding that where a juror may have observed something affecting the presumption of innocence, the trial court must inquire whether the jurors heard or saw something that would affect their ability to give the defendant a fair trial).

A defendant has the right to appear before the jury in the clothing of an innocent person because "[t]he presumption of innocence is incompatible with the garb of guilt."[19] When an error occurs potentially affecting the presumption of innocence, such as the jurors observing the defendant in prison clothing, reversal is not warranted unless it is clear that the defendant was prejudiced.

Here, after each instance alleged to affect the presumption of innocence, the district court questioned the jurors about whether they overheard any comments from court staff or observed Collins in the hallway outside the courtroom. Notably, none of the jurors stated they overheard court staff discussions. After two jurors said they observed Collins outside the courtroom, the district court individually questioned each juror about what they saw. Neither juror indicated seeing Collins, who was in civilian clothing, restrained with handcuffs or chains. After hearing the jurors' responses, defense counsel advised the district court that he was satisfied with the inquiry and declined to move for a mistrial. In light of the circumstances, we conclude that the district court's inquiry on the issue was adequate. Moreover, because there is no evidence that the jurors either heard staff comments about Collins being in custody or observed him in restraints, Collins' right to a trial by an impartial jury was not violated.

Sixth, Collins contends that reversal of his convictions is warranted because the district court erred in the manner it responded to a juror question. Specifically, the jurors asked in relevant part, "Do we need to be unanimous for a not guilty verdict," and the district court referred them to the jury instruction setting forth the unanimity requirement.

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[19]Grooms v. State, 96 Nev. 142, 144, 605 P.2d 1145, 1146 (1980).

Collins contends that the district court's "failure to properly instruct the jurors on the unanimity requirement is plain error." We disagree. "The trial judge has wide discretion in the manner and extent [s]he answers a jury's questions during deliberation."[20] The jury instruction the district court directed the jurors to read expressly stated, "Your verdict must be unanimous." Accordingly, the district court's response was adequate.

In a related argument, Collins contends that the district court erred in failing to inquire about the meaning of a juror note, which stated, "[Another juror] has told me that I am Prejudiced and will not move -- I want out of this, is going no [sic] well." Collins notes that he is "a black defendant" and argues that it was possible that the juror note could be construed to mean that a member of the jury was prejudiced against Collins because of his race and the juror should have been removed. We conclude that Collins' contention lack merit.

In the presence of counsel, the district judge read the note and stated that she was not going to excuse the juror explaining, "I think this is part of the [deliberation] process." The district judge advised counsel that she would bring the jurors in and admonish them to be courteous to one another. Defense counsel failed to object to the district judge's response to the juror question, and at no time, requested that the juror be questioned about whether he was racially biased. To the contrary, defense counsel responded, "Judge, I concur wholeheartedly in that." Generally, the failure to object below precludes appellate review absent plain or constitutional error.[21] We conclude that any error involving the juror note

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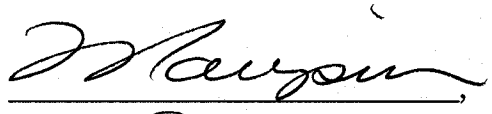
[20]Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968).

[21]Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

did not rise to the level of plain error warranting reversal of Collins' conviction.

Having considered Collins' contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.



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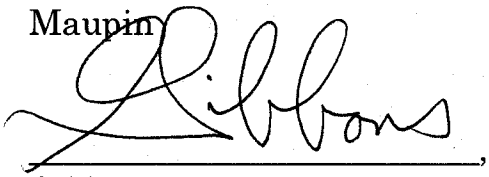

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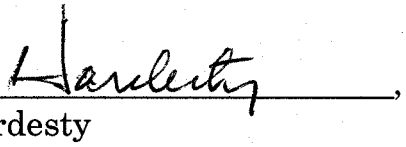

_____, J.
Hardesty

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk