IN THE SUPREME COURT OF THE STATE OF NEVADA

RANDY ROYAL JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 46570
RANDY ROYAL JOHNSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 46826

FILED

SEP 14 2006

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

ORDER OF AFFIRMANCE

These are consolidated appeals from judgments of conviction. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. Docket No. 46570 is an appeal from a judgment of a conviction, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon. The district court sentenced appellant Randy Royal Johnson to serve two consecutive prison terms of 40 to 180 months. Docket No. 46826 is an appeal from a judgment of conviction, pursuant to a guilty plea, of one count of being an ex-felon in possession of a firearm. The district court sentenced Johnson to serve a prison term of 12 to 30 months to run concurrently to the sentence imposed in the robbery case.

First, Johnson contends that the district court abused its discretion by denying his motion to suppress because the police officers had no reasonable suspicion to stop the vehicle in which he was riding as a passenger. Specifically, Johnson notes that the vehicle was a different

color than the vehicle involved in the robbery, and the driver's failure to swerve or stop when the police officer shone his spotlight was not sufficiently indicative of criminal activity. We conclude that Johnson's contention lacks merit.

"A stop is lawful if police reasonably suspect that the persons or vehicles stopped have been involved in criminal activity."[1] This court has held that police officers are justified in stopping a vehicle if a felony was just committed in the vicinity and the vehicle is similar to the broadcast description of the suspect vehicle.[2] The district court's factual findings in a suppression hearing will not be disturbed if supported by substantial evidence.[3]

In the instant case, the district court found that police had reasonable suspicion to stop the vehicle because it "substantially matched the description relayed by dispatch," it was "a short distance away from the scene of the crime," and "the passengers did not turn around or move" when the police officer shone his light on the vehicle. We conclude the district court's finding is supported by substantial evidence. At the grand jury proceedings, Sean Jones, a Reno Police Officer with numerous years of experience in law enforcement, testified that he stopped the vehicle, an older silver sedan, because it was in the vicinity of the robbery and

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[1]State v. Wright, 104 Nev. 521, 523, 763 P.2d 49, 50 (1988).

[2]See Franklin v. State, 96 Nev. 417, 419, 610 P.2d 732, 734 (1980).

[3]State v. Harnisch, 113 Nev. 214, 219, 931 P.2d 1359, 1363 (1997).

matched the suspect vehicle, which was described as a white older passenger vehicle. Officer Jones also explained that he was suspicious because, after he shone his spotlight on the vehicle, it did not slow down or stop like most vehicles, but instead drove several blocks with the spotlight illuminating it. Although Johnson notes that the vehicle stopped was silver instead of white, we conclude from the totality of the circumstances that the lightly-colored, older sedans were sufficiently similar to warrant an investigatory stop.[4]

Second, Johnson contends that the district court erred by denying his motion to quash the indictment for failure to dismiss a grand juror who knew the victim, the State's primary witness. Specifically, Johnson contends that a grand juror acted as a witness in the case, in violation of NRS 50.065,[5] because the grand juror had a personal relationship with the victim and, therefore, was more likely to give "great deference" to the credibility of the victim. Johnson also opines that it is "more likely that the [grand] juror's opinion will be highly regarded, given that grand juries work together for at least a year and develop a history of their own." Finally, Johnson argues that the district court should have quashed the indictment because it failed to follow the proper procedure

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[4]See Terry v. Ohio, 392 U.S. 1 (1968).

[5]NRS 50.065(1) states that, "[a] member of the jury shall not testify as a witness in the trial of the case in which he is sitting as a juror."

and question the juror to determine whether he should be excluded for cause.[6] We conclude that Johnson's contentions lack merit.

NRS 172.055 provides that a defendant may challenge a grand juror on the ground that he is not legally qualified. Grand juries are within the control of the judiciary, and the district court may excuse a juror for cause.[7] A juror may be disqualified for cause if he is unable to adjudicate the facts fairly and impartially.[8] The district court's determination that a juror is fair and impartial will be upheld if supported by substantial evidence.[9]

In this case, the district court denied the motion to dismiss, finding that there was no "showing of any prejudice or bias on the part of the grand juror." The district court's finding is supported by substantial evidence. After the victim testified, a grand juror disclosed that the victim had been his personal fitness trainer at various times, but that he did not recognize her until she finished testifying. Upon questioning from the prosecutor, the juror stated that he did not "exactly have a personal

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[6]See NRS 6.030; NRS 16.060; NRS 175.121(3) (vesting the trial court with authority to determine whether a person is qualified to serve as a juror).

[7]NRS 172.275(1).

[8]See generally Hall v. State, 89 Nev. 366, 371, 513 P.2d 1244, 1247 (1973) (trial court properly denied motion for new trial where record did not indicate actual or implied bias).

[9]See generally Walker v. State, 113 Nev. 853, 865-67, 944 P.2d 762, 770-71 (1997).

relationship" with the witness, and there was nothing about the prior relationship that would make him uncomfortable in evaluating her testimony and rendering a fair decision. Because there is no indication that the grand juror was not legally qualified to serve, we conclude that any procedural error involving the questioning of the juror was harmless, and the district court did not abuse its discretion in denying the motion to quash the indictment.

Third, Johnson contends that his constitutional and statutory rights to a speedy trial were violated when the district court granted the State's motion to continue the trial. Specifically, Johnson contends that the State did not have good cause for the delay, and Johnson was prejudiced because his appointed counsel left the public defender's office, and a public defender less familiar with the case represented him at trial. We conclude that Johnson's contention lacks merit.

This court has held that the absence of a key police officer witness is good cause for a continuance beyond the 60-day statutory period set forth in NRS 178.556.[10] Here, Johnson's trial was continued for 42 days because of the absence of a key State witness, police officer Jones. Johnson's trial began approximately 90 days after arraignment. According to the sworn testimony of the prosecutor, she had been informed that the police officer was in New Orleans assisting in Hurricane Katrina relief efforts and, although he was due back before the start of trial, "there

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[10]See Huebner v. State, 103 Nev. 29, 31-32, 731 P.2d 1330, 1332 (1987).

was surely no assurance to that matter." We conclude that the district court did not err in finding good cause for the delay and, therefore, Johnson's statutory right to a speedy trial was not violated.[11]

Similarly, we conclude that Johnson's constitutional right to a speedy trial was not violated. Although Johnson invoked his speedy trial rights, the State had good cause for the delay, the continuance of the proceedings was brief, and there is no indication that Johnson was prejudiced.[12] He does not allege that valuable evidence or witnesses were lost due to the delay in the proceedings.[13] Although Johnson notes that defense counsel was replaced, the record reveals that replacement counsel was prepared to defend the case.[14] Accordingly, the district court did not err by granting the State's motion to continue.

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[11]We decline Johnson's request that this court take judicial notice of both a press release issue by the city of Reno and a Reno Gazette Journal article that indicate that Officer Jones returned from New Orleans on the day of the hearing.

[12]See U.S. Const. amend. VI; Barker v. Wingo, 407 U.S. 514, 530-33 (1972) (setting forth four-factor analysis for speedy trial claim, including length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant).

[13]Cf. Barker, 407 U.S. at 534; State v. Fain, 105 Nev. 567, 779 P.2d 965 (1989) (holding that four and one-half year delay did not violate the appellant's right to a speedy trial because no specific witness, piece of evidence, or defense theory were lost due to the delay).

[14]See Fain, 105 Nev. at 569, 779 P.2d at 966 (in considering a speedy trial claim, "[p]rejudice to the accused is a paramount concern").

Fourth, Johnson contends that the district court abused its discretion by excluding expert testimony of Dr. Deborah Davis on eyewitness identification. Dr. Davis would have testified that the reliability of eyewitness identification depends on a variety of factors, including cross-racial identification, length of observation, effect of stressors, and use of suggestive identification procedures. Citing to Echavarria v. State,[15] Johnson argues that the district court erred by excluding the testimony because the State's case against him hinged upon the victim's identification, which was cross-racial, made under enormous stress, and the product of a suggestive show-up.

In Echavarria, this court concluded that the district court erred by refusing to allow the admission of testimony by an eyewitness identification expert because there was considerable doubt about the reliability of the State's primary identification witnesses.[16] Subsequently, however, in White v. State, this court distinguished Echavarria, concluding that expert testimony on eyewitness identification may be excluded in cases where there is no "considerable doubt" about the reliability of the witness identifications.[17]

Even assuming without deciding that the district court should have allowed the expert testimony, we conclude that error was harmless.

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[15]108 Nev. 734, 839 P.2d 589 (1992).

[16]Id.

[17]White v. State, 112 Nev. 1261, 1263, 926 P.2d 291, 292 (1996).

The evidence linking Johnson to the crime was of sufficient magnitude to render the error harmless beyond a reasonable doubt.[18] In particular, we note that the State presented evidence at trial that Johnson was a passenger in a vehicle, which was substantially similar to the suspect vehicle, and was driving in the vicinity of the robbery within minutes after it occurred. When confronted by police, Johnson was described by police as nervous and sweating profusely. A loaded gun similar to the gun used in the robbery was found in the area of the backseat of the vehicle where Johnson was sitting, and $316.00 in cash was found wadded up in his pocket.[19] At the time of his arrest, Johnson was wearing boots with a distinct Vibram shoe print that were similar to a shoeprint found at the scene of the robbery. Further, according to a police officer's testimony and the driver's written statement, the driver of the vehicle admitted that Johnson and the other passenger "had discussed mugging someone in order to get money for Johnson." In light of the substantial evidence corroborating the victim's identification testimony, we conclude that any error involving the exclusion of the expert witness testimony did not affect the reliability of the jury's verdict.

Finally, citing to Williams v. State,[20] Johnson contends that his due process rights were violated when he was convicted of being an ex-

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[18]See Echavarria, 108 Nev. at 747, 839 P.2d at 597.

[19]The victim reported that approximately $400.00 was stolen from her.

[20]121 Nev. ___, ___, 125 P.3d 627, 636-37 (2005).

felon in possession of a firearm because he was only sixteen years of age when he was convicted of the underlying felony, and there is no evidence that the underlying felony was not a juvenile adjudication.[21] We conclude that Johnson's contention lacks merit.

Preliminarily, we note that Williams is inapposite because, in that case, the prior juvenile felony conviction was used for impeachment purposes in violation of NRS 50.095(4).[22] Here, the prior underlying felony for attempted murder with the use of a deadly weapon was not used to impeach a witness; instead, it was an element of the crime of ex-felon in possession of a firearm, as described in NRS 202.360. Notably, NRS 202.360(1) makes no exception for juvenile adjudications.[23] Moreover, the record does not indicate that the attempted murder offense was a juvenile adjudication. In the California case, Johnson pleaded guilty in superior court and was sentenced to serve ten years in prison.[24] Although Johnson was incarcerated at the California Youth Authority, under California law, all adult felons under 21 years old may be committed to the youth

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[21]We note that, in pleading guilty, Johnson expressly preserved in writing the right to raise this issue on appeal. See NRS 174.035(3).

[22]NRS 50.095(4) states, "[e]vidence of juvenile adjudications is inadmissible" to impeach a witness.

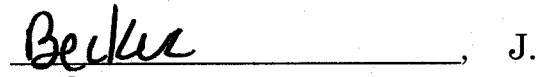
[23]See NRS 202.360(1) (A person shall not possess a firearm if he "[h]as been convicted of a felony in this or any other state . . . unless he has received a pardon and the pardon does not restrict his right to bear arms.").

[24]See Cal. Welf. & Inst. Code § 707 (West 2006).

authority in lieu of adult prison under certain circumstances.[25] Accordingly, we conclude that the district court did not err by convicting Johnson of being an ex-felon in possession of a firearm.

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

ORDER the judgment of conviction AFFIRMED.[26]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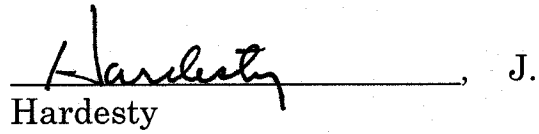
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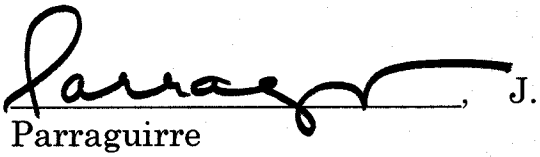
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[25]See Cal. Welf. & Inst. Code § 1731.5 (West 2006).

[26]On July 29, 2006, counsel for Johnson filed a motion for leave to file "a statement of clarification regarding State's allegation of dishonesty in fast track statement." Cause appearing, we grant the motion. The clerk of this court shall file the affidavit and statement of clarification received on July 29, 2006.

cc: Hon. Steven P. Elliott, District Judge
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe County Public Defender
Washoe District Court Clerk