

IN THE SUPREME COURT OF THE STATE OF NEVADA

JULIO CESAR NAVAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46966

JULIO CESAR NAVAS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46967

**FILED**

DEC 12 2008

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

ORDER OF AFFIRMANCE

These are consolidated appeals from judgments of conviction entered upon jury verdicts of one count of sexual assault of a child, one count of lewdness with a child under 14, two counts of open and gross lewdness, and one count of intimidating or bribing a witness. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Navas was sentenced to a term of life in prison with the possibility of parole after 20 years for sexual assault of a child. He was sentenced to a term of life in prison with the possibility of parole after 10 years for lewdness with a minor, to run consecutively with the sentence for sexual assault of a child. He was sentenced to two terms of 12 months for two counts of open and gross lewdness, to be served concurrently with the sentence for sexual assault. Navas was also sentenced to a term of 24 to

60 months for intimidating or bribing a witness, to be served concurrently with the sentence for sexual assault.

Navas raises six issues on appeal. First, Navas argues that the district court abused its discretion by failing to conduct further hearings to determine whether he was competent to stand trial. In particular, Navas contends that the proper person motions he filed and the statements he made during sentencing indicate that he did not understand the legal process and that he did not have a meaningful relationship with counsel. In addition, Navas states that at sentencing his counsel informed the district court that Navas' mental condition had deteriorated since his previous competency hearing.

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial."<sup>1</sup> An incompetent defendant is defined under NRS 178.400(2)(a) as one who does not have the present ability to understand either "the nature of the criminal charges against him" or "the nature and purpose of the court proceedings" and is not able to "[a]id and assist his counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding."<sup>2</sup> The United States and Nevada Constitutions compel a district court to hold a formal competency hearing when there is "substantial evidence" that the

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<sup>1</sup>Medina v. California, 505 U.S. 437, 439 (1992).

<sup>2</sup>NRS 178.405(1).

defendant may not be competent to stand trial.<sup>3</sup> “In this context, evidence is ‘substantial’ if it ‘raises a reasonable doubt about the defendant’s competency to stand trial. Once there is such evidence from any source, there is a doubt that cannot be dispelled by resort to conflicting evidence.’”<sup>4</sup> A district court abuses its discretion and denies a defendant his right to due process when there is reasonable doubt regarding a defendant’s competency and the district court fails to order a competency evaluation.<sup>5</sup>

Here, Navas was found competent to stand trial on November 15, 2005, less than three months prior to trial and four months prior to sentencing. While counsel stated to the district court at sentencing that Navas’ mental condition had deteriorated, he told the district court that he believed that Navas was competent. After observing Navas during his allocution, the district court found him to be intelligent, with a good memory. The district court explained to Navas that many of the issues he raised in his allocution were not properly before the court at sentencing.<sup>6</sup>

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<sup>3</sup>Melchor-Gloria v. State, 99 Nev. 174, 180, 660 P.2d 109, 113 (1983); see U.S. Const. amend. XIV, § 1; Nev. Const. art. 1 § 8.

<sup>4</sup>Melchor-Gloria, 99 Nev. at 180, 660 P.2d at 113 (citing Moore v. United States, 464 F.2d 663, 666 (9th Cir. 1972)).

<sup>5</sup>Morales v. State, 116 Nev. 19, 22, 992 P.2d 252, 254 (2000).

<sup>6</sup>Navas argued during allocution that his ex-wife and the victims were conspiring against him by making these allegations in order to keep him from turning in the victim’s mother’s boyfriend on drug charges. The district court explained that these matters should have been presented to the jury during the guilt phase of the trial.

Navas stated that he understood and indicated that he would be raising these issues on appeal. Navas also demonstrated that he understood his right to appeal and that the information he was relating to the district court should have been presented to the jury. Further, he understood that he was allowed to call witnesses on his behalf at trial, and he understood his rights to appeal and file a post-conviction writ of habeas corpus. Navas also demonstrated awareness of the deadlines for filing an appeal and a post-conviction writ of habeas corpus. Based on the record before it, the district court was not presented with substantial evidence that raised a reasonable doubt as to Navas' competency. Therefore, we conclude that district court did not abuse its discretion by not inquiring further into Navas' competency.

Second, Navas argues that his constitutional right to a speedy trial was violated. Specifically, he argues that the nearly four year delay was excessive—that the length of the delay created a presumption of prejudice or, in the alternative, that he was prejudiced by the delay because he suffered from fairly serious health problems which diminished his ability to defend against the State's case.

No set time limit dictates when a defendant's constitutional right to a speedy trial has been violated.<sup>7</sup> Rather, "[w]hen determining whether the right to a speedy trial was violated, four factors should be

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<sup>7</sup>Furbay v. State, 116 Nev. 481, 484, 998 P.2d 553, 556 (2000); see Barker v. Wingo, 407 U.S. 514, 521 (1972), modified by Doggett v. United States, 505 U.S. 647, 655-57 (1992) (holding that, in some cases, prejudice is presumed by an excessive delay).

considered: (1) length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant."<sup>8</sup>

We conclude that Navas' claim that his speedy trial right was violated lacks merit. Navas' conviction was vacated, and he was subsequently tried and convicted of the same charges. It is not a violation of a defendant's speedy trial rights when a delay is caused by the vacation of a defendant's conviction.<sup>9</sup> In United States v. Ewell, the United States Supreme Court held that a 19-month delay was not a violation of Ewell's speedy trial rights because his original conviction had been vacated on appeal. While the overall delay, from his original arraignment to the time he was brought to trial, was lengthy, most of the delay was due to Navas' successful withdrawal of his plea of nolo contendere. Navas originally waived his speedy trial right at his arraignment on January 23, 2003. He subsequently pleaded nolo contendere and was sentenced. Navas' motion to withdraw his plea was granted, and he was arraigned again on August 2, 2005. At counsel's request, trial was set for October 17, 2005. Counsel then requested that trial be continued so that Navas' competency could be evaluated. Navas was found competent on November 15, 2005. Thereafter, trial was set for February 6, 2006, which was the earliest available date for the State, counsel, and the district court. Based on the record before us, we conclude that the length and basis for the delay were not unreasonable.

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<sup>8</sup>Furbay, 116 Nev. at 484-85, 998 P.2d at 555.

<sup>9</sup>United States v. Ewell, 383 U.S. 116, 120-21 (1966).

Additionally, Navas has failed to allege how he was prejudiced by the delay except that the length of delay requires that prejudice is presumed and that his physical health has deteriorated. First, Navas argues that the length of the delay created a presumption of prejudice.<sup>10</sup> In Doggett v. United States, the United States Supreme Court held that delay of more than a year creates a presumption that a defendant has been prejudiced.<sup>11</sup> Here, the delay was not caused by the State, rather it was due in large part to Nava's withdrawal of his plea and the subsequent competency determination. Given the reasons for the delay, we conclude that the presumption of prejudice does not apply.

Since the presumption of prejudice does not apply, Navas must allege specific instances of prejudice. "Bare allegations of impairment of memory, witness unavailability, or anxiety, unsupported by affidavits or other offers of proof, do not demonstrate a reasonable possibility that the defense will be impaired at trial or that defendants have suffered other significant prejudice."<sup>12</sup> Navas has only alleged that his defense was diminished and his deteriorating physical health affected his ability to assist his counsel. Navas has not explained exactly how his deteriorating physical health affected his ability to assist counsel, only

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<sup>10</sup>Doggett v. U.S., 505 U.S. 647, 655-56 (1992).

<sup>11</sup>Id. However, in Middleton v. State, 114 Nev. 1089, 1110, 968 P.2d 296, 311 (1998), we held that a two and a half year delay that was mostly caused by the defendant did not give rise to a presumption of prejudice.

<sup>12</sup>Sheriff v. Berman, 99 Nev. 102, 107, 659 P.2d 298, 301 (1983).

that it may have affected his mental health. Navas' vague allegations of prejudice, are insufficient to support a claim that his constitutional right to a speedy trial was violated.

Third, Navas argues that there was insufficient evidence to convict him of sexual assault. In particular, he contends that the victim's testimony that she thought Navas digitally penetrated her and that it hurt was insufficient to prove that a sexual assault had occurred because the victim "never testified that she saw Navas penetrate her or that she knew to any degree of certainty what happened." In addition, Navas argues that the testimony of the examining nurse was contradictory because some of the injuries that she found on the victim may have occurred after Navas was arrested.

Our review of the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>13</sup> We have repeatedly held that the uncorroborated testimony of a victim is sufficient to uphold a conviction for sexual assault.<sup>14</sup> With respect to the conviction for sexual assault, the victim, who was nine-years-old at the time of the incident, testified that Navas digitally penetrated her against her will and that it hurt. In addition, the nurse

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<sup>13</sup>See Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980); see also Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

<sup>14</sup>Gaxiola v. State, 121 Nev. 638, 648, 119 P.3d 1225, 1232 (2005); State v. Gomes, 112 Nev. 1473, 1481, 930 P.2d 701, 706 (1996); Washington v. State, 112 Nev. 1067, 1073, 922 P.2d 547, 551 (1996).

that examined the victim found scars and injuries that corroborated the victim's allegations. While some of the injuries the nurse testified about may have been caused after Navas was arrested, many of the injuries were old enough that they could have occurred prior to Navas' arrest. Therefore, the jury could reasonably infer from the evidence presented that Navas sexually assaulted the victim.<sup>15</sup>

Fourth, Navas contends that the State improperly commented on his post-arrest silence. During the direct examination of a police detective, the State asked what happened at the conclusion of Navas' interview. The detective responded that Navas invoked his right to have an attorney present and the interview terminated. This was the only reference made to Navas' right to remain silent and Navas did not object to the challenged testimony. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights.<sup>16</sup> Generally, an appellant must show that he was prejudiced by a particular error in order to prove that it affected his substantial rights.<sup>17</sup>

The detective's comment was error. However, Navas must demonstrate that the error affected his substantial rights. Navas has failed to show how this one reference to his right to silence prejudiced him or affected his substantial rights. Reference to a defendant's post-arrest

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<sup>15</sup>See NRS 200.366(1).

<sup>16</sup>Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

<sup>17</sup>Id.



silence is harmless beyond a reasonable doubt if “(1) at trial there was only a mere passing reference, without more, to an accused’s post-arrest silence, or (2) there is overwhelming evidence of guilt.”<sup>18</sup> The evidence in this case was overwhelming. All three victims testified consistent with their prior statements and consistent with each other’s testimony that Navas committed the acts alleged. We conclude that the brief reference to Navas’ invocation of his right to counsel did not affect his substantial rights.

Fifth, Navas complains that the phrase “more weighty affairs of life” in the reasonable doubt instruction is unconstitutional and lessens the State’s burden. The instruction given comports with NRS 175.211. We have repeatedly upheld the constitutionality of the reasonable doubt instruction and we decline to revisit the issue here.<sup>19</sup>

Finally, Navas asserts that the cumulative effect of the claimed errors denied him a fair trial, requiring reversal. “If the cumulative effect of errors committed at trial denies the appellant his right to a fair trial, this court will reverse the conviction.”<sup>20</sup> We conclude

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<sup>18</sup>Sampson v. State, 121 Nev. 820, 830, 122 P.3d 1255, 1261 (2005) (quoting Morris v. State, 112 Nev. 260, 264, 913 P.2d 1264, 1267-68 (1996)).

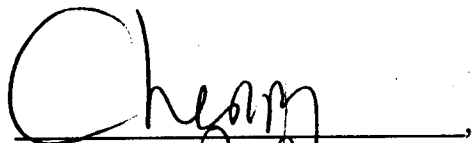
<sup>19</sup>See Garcia v. State, 121 Nev. 327, 345, 113 P.3d 836, 847 (2005); Bolin v. State, 114 Nev. 503, 530, 960 P.2d 784, 801 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002); Holmes v. State, 114 Nev. 1357, 1365-66, 972 P.2d 337, 342-43 (1998).

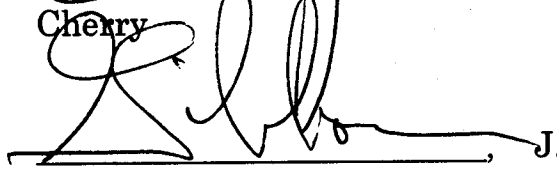
<sup>20</sup>Homick v. State, 112 Nev. 304, 316, 913 P.2d 1280, 1288 (2004).

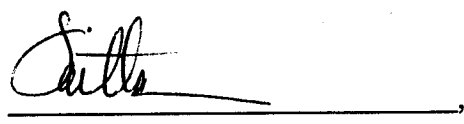
that any error, considered individually or cumulatively, does not warrant relief.

Having considered Navas' claims and concluded that they lack merit, we

ORDER the judgment of convictions AFFIRMED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Jerome Polaha, District Judge  
Thomas L. Qualls  
Attorney General Catherine Cortez Masto/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk