IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD WILLIAM MARTIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47037

FILED

NOV 13 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 second-degree kidnapping and attempted murder. Second Judicial District Court, Washoe County; Steven R. Kosach, Judge. The district court sentenced appellant Richard William Martin to serve a prison term of 36 to 120 months for the kidnapping count and a concurrent prison term of 72 to 184 months for the attempted murder count.

First, Martin contends that the district court erred by finding that he was competent to stand trial. Specifically, Martin argues that "the district court did not properly consider the nature of [his] organic brain defect, nor the sporadicness of his alleged competency." We disagree.

"The test to be applied in determining competency is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational and factual understanding of the proceedings against him."[1] The

[1]Jones v. State, 107 Nev. 632, 637, 817 P.2d 1179, 1182 (1991).

district court's findings following a competency hearing will not be disturbed on appeal if they are supported by substantial evidence.[2]

Here, after conducting an evidentiary hearing, the district court found that Martin was competent to stand trial. The district court's finding is supported by substantial evidence. In particular, three mental health professionals who evaluated Martin testified that, although he sustained a significant brain injury, he understood the criminal proceedings and could assist counsel in preparing a defense. Accordingly, the district court did not abuse its discretion in its competency determination.

Second, Martin contends that the district court abused its discretion by admitting prior bad act evidence. At trial, the victim testified that, approximately two weeks before the kidnapping and attempted murder, Martin told her that he would kill her if she left him. Also, during that time period, the victim testified that Martin walked into the room with a loaded gun, held it to his head, and stated that he would kill them both. Martin argues: (1) the prejudicial effect of the testimony outweighed the probative value because there was other evidence of motive and the charged offenses did not involve a gun; (2) the alleged threats were remote in time, occurring "almost two weeks before;" and (3) it was not proven by clear and convincing evidence because the victim's testimony was uncorroborated. We disagree.

In this case, the record indicates that the district court admitted the prior bad act evidence at issue after conducting a Petrocelli

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[2]See Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

hearing[3] and considering the factors set forth in Tinch v. State[4] and NRS 48.045(2). We conclude that the district court did not abuse its discretion in admitting the evidence. It was relevant to show Martin's motive and negate his claim that he did not have the intent to kill the victim.[5] Further, the prior bad acts were proven by clear and convincing evidence, namely, through the victim's testimony. Finally, any danger of unfair prejudice was alleviated because the district court gave a limiting instruction.[6] Accordingly, the district court did not err with respect to the prior bad act evidence.

Third, citing to Cordova v. State,[7] Martin contends that reversal of his conviction his warranted because a police officer witness impermissibly testified that Martin was guilty of the charged attempted murder offense. We disagree.

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[3]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

[4]113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[5]See Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (evidence that the defendant had previously injured the victim admissible to show "ill-will as a motive for the crime").

[6]See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001) (discussing the importance of a limiting instruction).

[7]116 Nev. 664, 669, 6 P.3d 481, 485 (2000) (recognizing that it is impermissible for a law enforcement officer to give an opinion on the ultimate issue of guilt or innocence because "jurors 'may be improperly swayed by the opinion of a witness who is presented as an experienced criminal investigator.'") (quoting Sakeagak v. State, 952 P.2d 278, 282 (Alaska Ct. App. 1998)).

At trial, in response to the prosecutor's question about the functions of the Special Investigation Response Team, a Nevada highway patrol officer stated:

> We respond to any high-profile incident or accident which would include obviously vehicle collisions, shooting scenes, possibly attempted homicides as in this case, as well as any fatal accident involving state [roadways]. (Emphasis added.)

Martin failed to object at trial to the allegedly improper testimony. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights.[8] Generally, a defendant must show that he was prejudiced by a particular error in order to prove that it affected substantial rights.[9] We conclude that Martin was not prejudiced by the officer's testimony. We note that the officer did not give an opinion that Martin was guilty of attempted homicide, only that his unit responds to "possibl[e] attempted homicides." Accordingly, no plain error occurred.

Fourth, Martin contends that the district court erred by denying his request for a jury instruction on reckless driving. Specifically, Martin argues that the jury instruction should have been given because the defense is entitled to have the jurors instructed on its theory of the case. We conclude that Martin's contention lacks merit.

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[8]See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

[9]Id.

This court has recognized that a defendant is not entitled to a jury instruction on a particular criminal offense unless it is a lesser-included offense of the crime charged.[10] An offense is lesser-included only if the elements of the lesser crime are entirely included within the elements of the charged crime.[11] Here, Martin was charged with second-degree kidnapping and attempted murder. The elements of reckless driving[12] are not entirely included within the offenses of kidnapping[13] or attempted murder[14] because neither offense contains the element of driving a vehicle. Accordingly, Martin was not entitled to a jury instruction on reckless driving.

Fifth, citing to Estelle v. Smith,[15] Martin contends that the district court erred by allowing the prosecution to use at trial statements

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[10]Peck v. State, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000).

[11]Barton v. State, 116 Nev. 686, 692, 30 P.3d 1103, 1107 (2001).

[12]See NRS 484.377(1) (reckless driving is defined as driving "a vehicle in willful or wanton disregard of the safety of persons").

[13]NRS 200.310(2) (second-degree kidnapping is defined in part as willfully taking a person without their consent).

[14]NRS 200.010 (murder is defined as "the unlawful killing of a human being . . . [w]ith malice aforethought"); NRS 193.330 (defining attempt).

[15]451 U.S. 454, 462-64 (1981) (holding that a defendant's statement made during a court-ordered psychiatric examination could not be used against him in a subsequent criminal proceeding because the defendant had not waived his Fifth Amendment right against self-incrimination); Brown v. State, 113 Nev. 275, 934 P.2d 235 (1997).

that Martin made during a court-ordered competency interview. We disagree.

This court has recognized that a defendant's constitutional right against self-incrimination may be violated if the defendant's inculpatory statements made during the course of a court-ordered psychiatric examination are admitted into evidence at trial.[16]

In this case, during cross-examination, the prosecutor showed Martin his competency evaluation solely to refresh his recollection about whether he previously held a gun to his head. Notably, Martin's statement and subsequent testimony about the gun was not inculpatory because the criminal charges arose from a vehicle collision and did not involve a firearm. Further, we note that the competency report was not admitted into evidence, and the jury was not shown the document or informed that the document used to refresh Martin's recollection was a competency evaluation. Under the circumstances, we conclude that Martin's right against self-incrimination was not violated.

Sixth, Martin contends that district court erred by denying his requests for alternate defense counsel. Martin notes that he made a pretrial request for a new attorney, alleging defense counsel failed to communicate. Martin made a second request for a new attorney at sentencing, alleging that "he had an extreme conflict of interest" because he had filed a lawsuit naming the sentencing judge and defense counsel as

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[16]Sechrest v. State, 108 Nev. 158, 160, 826 P.2d 564, 565 (1992).

defendants.[17] Martin argues that "it seems axiomatic that an attorney cannot represent a client who is in the process of suing the attorney." We conclude that Martin's contention lacks merit.

The right to counsel of one's choice is not absolute, and a defendant is not entitled to reject his court-appointed counsel and request substitute counsel at public expense without first showing adequate cause.[18] Whether friction between a defendant and his attorney justifies appointment of new counsel is entrusted to the sound discretion of the trial court.[19]

In this case, we conclude the district court did not abuse its discretion by denying Martin's motions for alternate counsel. With respect to his pretrial request, the record indicates that district court found that new counsel was not warranted because defense counsel Kevin Van Ry had adequately communicated with Martin. That finding is supported by the record. At a hearing to confirm trial, defense counsel informed the district court that he discussed the case with Martin, they were unable to negotiate the case and were ready to proceed to trial. Although Martin notes that the district court's inquiry into the nature of the conflict was

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[17]According to Martin, the basis for the lawsuit was the district court's refusal to allow him to fire defense counsel.

[18]Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978).

[19]Id. at 607-08, 584 P.2d at 676.

limited, it was sufficient to determine whether there was adequate cause to justify the appointment of alternate counsel.[20]

We likewise conclude that the district court did not err by denying Martin's second request for alternate counsel made at sentencing. Martin failed to show a significant breakdown in the attorney-client relationship that adversely affected counsel's performance.[21] The transcript of the sentencing hearing indicates that defense counsel had reviewed the presentence investigation report with Martin, argued for concurrent minimum sentences, and pointed out the mitigating circumstances in the case. Additionally, there is no indication in the record that a lawsuit was actually filed or that defense counsel was aware of the pending lawsuit. Because there was an insufficient showing of adequate cause to justify the appointment of alternate counsel, the district court acted within its discretion by denying Martin's requests.

Seventh, Martin contends that this court should order a new trial because the evidence presented at trial was conflicting. Specifically, Martin alleges that: (1) the victim's testimony that Martin locked her inside the vehicle conflicts with other evidence showing that she exited the vehicle after the accident; and (2) the victim's testimony about which

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[20]See Garcia v. State, 121 Nev. 327, 339, 113 P.3d 836, 843-44 (2005) (noting that an in camera hearing was not required where defense attorney addressed the issues raised in the motion on the record).

[21]Cf. Young v. State, 120 Nev. 963, 969-70, 102 P.3d 572, 576 (2004) (concluding that there was a significant breakdown in the attorney-client relationship where attorney failed to investigate the case, prepare a defense, and violated court order requiring that he communicate with client).

vehicle she drove to work that day was inconsistent. Martin relies on State v. Purcell,[22] which is a case addressing the district court's authority to order a new trial pursuant to NRS 176.515.

In this case, however, Martin did not file a motion for a new trial in district court pursuant to NRS 176.515(4). The district court was in the best position to independently evaluate any conflicting evidence in this case in the first instance, but Martin failed to seek the available remedy below. To the extent that Martin argues the evidence was insufficient to sustain the conviction, we disagree. At trial, the victim testified that Martin abducted her from her work, forced her into her vehicle, told her she was going to die, and then crashed the car while driving at speeds in excess of one hundred miles per hour. Additionally, a surveillance video tape was admitted into evidence corroborating the victim's testimony that Martin abducted her. 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, sufficient evidence supports the verdict.[23] Accordingly, we conclude Martin has not demonstrated that he is entitled to a new trial based on conflicting evidence.

Eighth, Martin contends that cumulative error denied him the ability to obtain a fair trial. Because we have rejected Martin's

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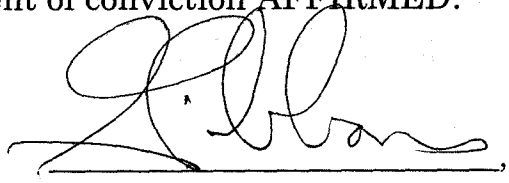
[22]110 Nev. 1389, 887 P.2d 276 (1994).

[23]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).

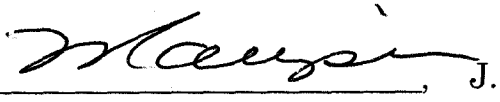
assignments of error, we conclude that his allegation of cumulative error lacks merit and that he received a fair trial.[24]

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

ORDER the judgment of conviction AFFIRMED.[25]



_____, J.
Gibbons



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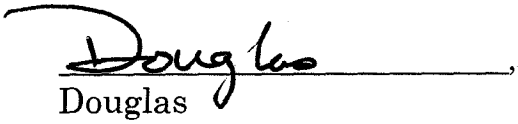

_____, J.
Douglas

cc: Hon. Steven R. Kosach, District Judge
Richard William Martin
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk
Thomas L. Qualls

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[24]See Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998); see also U.S. 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").

[25]Because Martin is represented by counsel in this matter, we decline to grant Martin permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, this court shall take no action and shall not consider the proper person documents Martin has submitted to this court in this matter.