

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUGENE WILFRED VARNER A/K/A
EUGENE WILFORD VARNER A/K/A
GENE VARNER A/K/A EUGENE
VARNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47716

FILED

NOV 29 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of burglary (counts I-II, V), two counts of attempted grand larceny (counts III and VI), and one count of felony possession of a controlled substance (count VIII). Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge. The district court sentenced appellant Eugene Wilfred Varner to serve two ^{consecutive} ~~concurrent~~ prison terms of 48 to 120 months for counts I and II, two concurrent prison terms of 12 to 36 months for counts III and VI, one concurrent prison term of 12 to 36 months for count V, and a suspended sentence for count VIII.

Varner's sole contention is that the district court abused its discretion by denying his motion for a mistrial. Varner argues that his "outburst in court and apparent threats to two attorneys indicated that his was not a fair trial." Varner also contends that "[h]is further disruption after the Court ruled he was only seeking another mistrial highlights the unfairness of the trial."

01-08-06
JCR

"Denial of a mistrial is within the sound discretion of the district court, and that ruling will not be reversed unless it was an abuse of discretion."¹ A mistrial is not generally granted unless an error occurs that is so patently prejudicial that it cannot be neutralized by an admonition to the jury.² Moreover, a trial court's finding that a juror is fair and impartial will be upheld if supported by substantial evidence.³

We conclude that the district court did not abuse its discretion by denying the motion for a mistrial. During voir dire, Varner made repeated comments, expressing his dissatisfaction with defense counsel.⁴ Varner also commented that he had been incarcerated for fourteen months. The prospective jurors' were questioned with respect to Varner's outbursts. Prospective jurors who advised the district that they were unsure whether they could overlook his comments were excused from the panel, either by stipulation or for cause. As a result, the jury was comprised of only individuals who had advised the district court that they could base their decision of guilt or innocence solely on the evidence

¹Lisle v. State, 113 Nev. 679, 700, 941 P.2d 459, 473 (1997), modified on other grounds by Middleton v. State, 114 Nev. 1089, 968 P.2d 296 (1998).

²See Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996).

³See Walker v. State, 113 Nev. 853, 866-67, 944 P.2d 762, 770-71 (1997).

⁴The jurors were not aware that Varner had threatened to kill his defense attorneys, and any reference to threats made by Varner occurred outside of the presence of the jury.

presented at trial. Accordingly, Varner has failed to show that his repeated outbursts resulted in deprivation of his right to a fair trial.

Having considered Varner's contention and concluded that it lacks merit, we

ORDER the judgment of conviction AFFIRMED.

Becker, J.
Becker

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. J. Michael Memeo, District Judge
Elko County Public Defender
Attorney General George Chanos/Carson City
Elko County District Attorney
Elko County Clerk