IN THE SUPREME COURT OF THE STATE OF NEVADA

RUDDY A. RODRIGUEZ-HERRERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49139

FILED

JUL 11 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of felony driving under the influence (DUI). First Judicial District Court, Carson City; James Todd Russell, Judge. The district court sentenced appellant to serve a prison term of 24-60 months and ordered him to pay a fine of $2,000.

First, appellant contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Specifically, appellant denies ever driving a vehicle during the period in which he admits to being drunk, and points out that the arresting officer never saw him driving. Additionally, appellant claims that conflicting testimony was presented regarding his drunken behavior and that the eyewitness' testimony was unreliable and inconsistent.

Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a

rational trier of fact.[1] In particular, we note that Hostess Quintana, a maintenance man at Foothill Garden Apartments in Carson City, testified that he witnessed appellant nearly hit a large rock while driving his vehicle in reverse. Quintana also saw appellant drive over and crush brooms he was using to sweep the curb. After appellant parked the vehicle, Quintana and his manager confronted appellant, who stated, "That's my car." Appellant then got back into the vehicle and drove it out of the apartment complex parking lot. Quintana testified that appellant smelled of alcohol, his speech was impaired, and that he appeared drunk due to the manner in which he was walking and driving. Quintana wrote the license plate number of appellant's vehicle on his hand; it was later determined that the vehicle was registered in appellant's name. When appellant was seen back on the premises of the apartment complex approximately ten minutes later, the manager called law enforcement.

Deputy Glenn Fair from the Carson City Sheriff's Office testified that when he arrived at the scene, he saw an individual, identified as appellant, quickly walking away. When Deputy Fair made contact with appellant, he noticed that appellant's "eyes were extremely bloodshot. . . . He reeked of an alcoholic beverage. And he was extremely unstable on his feet." Appellant refused to take a standardized field sobriety test or a breath test and was arrested. Approximately one hour after Deputy Fair responded to the scene, a blood sample was taken from

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[1]See Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

appellant which revealed a blood alcohol level of .16. Keys to a Ford Escort were found on appellant, and several hours later, the vehicle was located, parked on the street near the apartment complex; the license plate number matched that written down by Quintana. The lone defense witness testified that, on the day in question, appellant drank two beers with him in a park.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that appellant committed the crime beyond a reasonable doubt.[2] 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.[3] Moreover, we note that circumstantial evidence alone may sustain a conviction.[4] Therefore, we conclude that the State presented sufficient evidence to support the jury's verdict

Second, appellant contends that his conviction should be reversed because the district court failed to canvass him about his constitutional right to testify, and therefore, "it cannot be determined in this appeal whether or not" he validly waived this right. We disagree with appellant's contention.

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[2]See NRS 484.3792(2)(a).

[3]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).

[4]See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

In Phillips v. State, this court stated that while "it is good practice" for a trial court to advise a defendant about his constitutional right to testify, such an advisement is not mandatory for purposes of a valid conviction.[5] In the instant case, the record reveals that, on two occasions outside the presence of the jury, once with appellant present, the district court inquired as to whether appellant would testify. On both occasions, counsel for appellant was equivocal, indicating that a strategic decision had not yet been made. On appeal, appellant does not state that he actually wanted to testify and has failed to allege, let alone demonstrate, that he was prejudiced by the lack of an advisement. We also note that appellant, similarly to the defendant in Phillips: (1) failed to demonstrate that he was coerced into waiving his right to testify; (2) had multiple prior convictions, which suggests that he may have decided not to testify in order to avoid being impeached in front of the jury with his criminal history; and (3) had an extensive criminal history, including at least three prior jury trials, and therefore, it "strains credulity" to believe that he was unaware of his right to testify.[6] Accordingly, we conclude that the district court did not err by failing to canvass appellant about his right to testify.

Third, appellant contends that the district court violated his right to due process by addressing several pretrial matters outside of his presence. Specifically, appellant notes that he was not present during the

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[5]105 Nev. 631, 633, 782 P.2d 381, 382 (1989).

[6]See id.

following brief discussions about (1) the granting of the State's motion for leave to amend the criminal information; (2) defense counsel's withdrawal of a motion in limine; (3) whether appellant was planning on testifying; (4) a stipulation regarding appellant's Department of Motor Vehicles (DMV) records from California; and (5) a previously excused juror who knew about appellant's prior DUI conviction. We disagree with appellant's contention.

A defendant does not have an unlimited right to be present at every proceeding.[7] Moreover, "[v]iolations of the right to be present are reviewed for harmless error."[8] In other words, a "defendant must show that he was prejudiced by the absence."[9]

Initially, we note that counsel did not object to appellant's absence during the discussions. The State's motion to amend the information, granted with no objection from defense counsel, merely corrected the make of the vehicle appellant was driving at the time of the crime by changing the information to read "1988 Ford Escort" instead of "1988 Ford Escape." Defense counsel withdrew the motion in limine because the State informed counsel that it did not intend to call the witness that was the subject of the motion.

The district court's inquiry into whether appellant was planning on testifying was brief and concluded with the court stating,

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[7]See Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001).

[8]Rose v. State, 123 Nev. ___, ___, 163 P.3d 408, 417 (2007).

[9]Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996).

"Well, when it gets to that point in time, we'll certainly consider that." As noted above, the district court also inquired into appellant's decision to testify in his presence. Also, the State informed the district court that the parties reached an agreement regarding appellant's California DMV records and their admission, thereby precluding the need for a hearing, to which the district court replied, "I was going to allow them anyway, so that's fine." The stipulation was later read into the record in appellant's presence without objection.

Finally, the brief discussion about the juror who learned about appellant's prior DUI convictions was immaterial to the case because, as the district court informed the parties, she had already been excused due to sickness. Therefore, because appellant has failed to demonstrate, let alone even allege, that he was prejudiced by his absence, we conclude that that the district court did not violate his right to due process by addressing these pretrial matters outside of his presence.

Fourth, appellant contends that the district court committed reversible error by failing to ask the jurors if they had any questions before excusing each witness. Appellant points out that, as a result, a question submitted after a witness was excused was not asked.[10]

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[10]Prior to the start of the trial, the district court instructed the jury as follows:

> Again, we cannot ask questions of witnesses who have been excused. So if the witness has been excused and you have a question, it's too late. So think about the fact, if you do have any questions

continued on next page . . .

Appellant has not provided this court with any persuasive authority in support of his argument that the district court is required, after the testimony of each witness, to ask jurors if they have any questions before excusing the witness. In fact, appellant concedes that the district court "substantially complied with the safeguards pertaining to juror questions" established by this court.[11] Additionally, appellant did not object to the instructions given regarding juror questions. And finally, we note that defense counsel objected to the untimely submitted question by the juror, and the prosecutor agreed that it called for speculation. Therefore, we conclude that the district court did not commit reversible error.

Fifth, appellant contends that the district court committed reversible error by failing to admonish the jury, pursuant to NRS 175.401, prior to a recess on two occasions – once during the jury selection process and once during the trial. We disagree.

Here, as in Blake v. State, "the record is devoid of any evidence suggesting that [appellant] was prejudiced by the district court's

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. . . continued

> . . . when a witness is on the stand, you may, as indicated, write a question out and provide it.

[11]See Flores v. State, 114 Nev. 910, 913, 965 P.2d 901, 902-03 (1998); see also Allred v. State, 120 Nev. 410, 416-18, 92 P.3d 1246, 1251-52 (2004) (failure to comply with the safeguards established in Flores is reviewed for harmless error).

omissions in this regard."[12] Moreover, appellant has not even alleged that he was prejudiced by the district court's failure to admonish the jury on the two occasions.[13] Additionally, after the district court acknowledged on the record that it failed to admonish the jury prior to a brief recess during the trial, it sought to address the error, and stated the following to counsel:

> I don't think it's a major problem, because I've admonished them so many times in this case already. But when we bring them back in, I'm just going to ask the basic question to ensure nobody talked about this case, or any discussion, and go through that just to make sure the record is clear.

When the jury returned, none of the jurors admitted to talking about the case during the recess, and when asked if they understood the prior admonishments not to talk, a lone juror answered in the affirmative while none responded negatively. Finally, we note that defense counsel did not object or seek any other remedy. Therefore, we conclude that appellant has failed to demonstrate that the district court committed reversible error in this regard.

Sixth, appellant contends that the district court erred by allowing testimony from one of the investigating officers that concerned

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[12]121 Nev. 779, 798, 121 P.3d 567, 579 (2005), cert. denied, 547 U.S. 1134 (2006).

[13]See Bollinger v. State, 111 Nev. 1110, 1114, 901 P.2d 671, 674 (1995).

the ultimate issue in the case and, therefore, usurped the function of the jury. Specifically, appellant challenges the following exchange:

> Q Did this vehicle here in 4 and 5 that you found on Rand Avenue correspond with the description as provided by Mr. Quintana?
>
> [Defense counsel]: Objection, Your Honor. I believe that's up to the jury.
>
> The Court: I'm going to go ahead and overrule you. Go ahead and answer, [Deputy] Fair.
>
> Q If you have personal knowledge of that.
>
> A It's – it is as described by Hostess [Quintana], and the license plate's the same one that I read off his hand.

We disagree with appellant's contention.

In Cordova v. State, this court recognized 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.'"[14] In this case, however, Deputy Fair's testimony did not amount to an opinion on the ultimate issue of guilt or innocence, but rather was his observation that the vehicle described by the eyewitness, Quintana, matched the vehicle later found by the investigating officers. Deputy Fair did not provide an opinion as to whether appellant was guilty of driving under the influence of an

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[14]116 Nev. 664, 669, 6 P.3d 481, 485 (2000) (quoting Sakeagak v. State, 952 P.2d 278, 282 (Alaska Ct. App. 1998)).

intoxicating liquor. Therefore, we conclude that the district court did not err by allowing the testimony.

Seventh, appellant contends that the district court erred by allowing a line of questioning on cross-examination that elicited the fact that the defense witness, Sergio Guerrero, was serving time in jail when he learned that appellant had been arrested. Appellant challenges the following exchange:

> Q When did you learn that Mr. – well, you've learned, have you not, that Mr. Rodriguez-Herrera has been arrested; correct?
>
> THE INTERPRETER: Are you asking when he found out?
>
> BY MR. YOUNG:
>
> Q Sure.
>
> THE INTERPRETER: When I was here, in here, for 30 days.
>
> BY MR. YOUNG:
>
> Q Okay. Was this – was this recently, or was it back in August when you found out?
>
> THE INTERPRETER: When I got the 30 days, he was already here in jail.
>
> BY MR. YOUNG:
>
> Q Okay. So my question is, because I'm still not getting it, did you find out that Mr. Rodriguez-Herrera was arrested back in August?
>
> THE INTERPRETER: The interpreter requests clarification. Did he find out in August, or did he know that he was arrested back in August?
>
> MS. FLYGARE: Objection, Your Honor –
>
> MR. YOUNG: When did you –

MS. FLYGARE: – relevance.

The district court sustained defense counsel's objection and encouraged the prosecutor to ask a different question in an attempt to clarify what information he was seeking. Appellant now claims that the exchange above amounted to an improper attack on Guerrero's credibility through the admission of a prior bad act. We disagree with appellant's contention.

As appellant concedes, the district court sustained defense counsel's objection to the line of questioning. Defense counsel, however, did not ask the district court to admonish the jury or move to either strike the testimony from the record or for a mistrial. Further, the district court instructed the jury, prior to deliberations, to "disregard any evidence to which an objection was sustained by the court."[15]

To the extent that appellant claims that the prosecutor committed reversible misconduct by improperly eliciting testimony from Guerrero about having spent time in jail, we disagree. Guerrero testified that, on the day in question, appellant drank two beers with him in a park. On cross-examination, the prosecutor was challenging Guerrero's specific memory and attempting to find out "when" he learned about appellant's arrest, not "where" he was at the time; therefore, Guerrero's response was not intentionally solicited. Additionally, the prosecutor did not ask any further questions about Guerrero's jail time or criminal history. In light of the convincing nature of the evidence of appellant's

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[15]See Allred, 120 Nev. at 415, 92 P.3d at 1250 (stating that this court presumes that a jury follows the orders and instructions of the district court).

guilt, we conclude that he has failed to demonstrate that the challenged testimony had a prejudicial impact on the verdict.[16]

Eighth, appellant contends that the district court erred by allowing the prosecution to offer the eyewitness, Hostess Quintana, copies of the police report with his written statement and a transcript of his preliminary hearing testimony in order to refresh his recollection.[17] Appellant claims that Quintana had independent recollection of the specific time the incident took place and how long it took for officers to respond, and therefore his memory did not need refreshing with the hearsay documents.[18] We disagree.

When Quintana was first asked what time the incident at the apartment complex took place, he stated, "I don't remember. It was around, I would say, 4:30." Quintana then quickly corrected himself and stated, "No. 3:30 or 4." Quintana answered in the affirmative when the prosecutor asked if reviewing his statement would refresh his memory. In his statement, Quintana wrote that the incident occurred at 3:00 p.m. and,

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[16]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); see also King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) ("where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error").

[17]See NRS 51.125(1) ("recorded recollection exception" to the hearsay rule); see also NRS 50.125(1).

[18]See Sipsas v. State, 102 Nev. 119, 123, 716 P.2d 231, 233 (1986) ("Before refreshing a witness's memory it must appear that the witness has no recollection of the evidence to be refreshed.").

without objection from defense counsel, testified that 3:00 p.m. was accurate. On cross-examination, defense counsel revisited the issue and Quintana told her that he was not clear about the "timing" of the day's events. We conclude that Quintana's recollection was insufficient and that the district court did not err by allowing the State to refresh his memory with the use of the police report containing his written statement.

Quintana testified at trial that it took 30 minutes for police officers to respond to the scene after they were initially contacted. The prosecutor then produced the transcript of Quintana's preliminary hearing testimony where he stated it took only 3-5 minutes for the officers to respond. Defense counsel neither contemporaneously objected nor questioned Quintana about this discrepancy on cross-examination. On appeal, appellant has failed to demonstrate, let alone allege, that he was prejudiced by the use of the preliminary hearing transcript to refresh Quintana's recollection. Therefore, we conclude that the district court did not commit reversible plain error.

Finally, appellant contends that the district court erred by failing to voir dire the prospective jurors to determine whether they were influenced by the way he was treated by a guard. Appellant's argument is based on unsupported speculation. Appellant refers to an "incident," without providing any detail, that resulted in the district court having a discussion on the record with a guard about his handling of appellant. The discussion was brief and took place outside the presence of the jury. There was no objection from counsel. In fact, on appeal, appellant concedes that "counsel indicated that the admonition to the guard was satisfactory." There is no indication in the record that any prospective

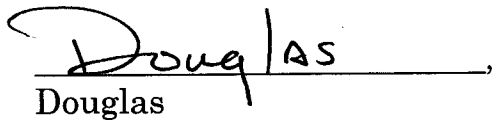
jurors witnessed any alleged mistreatment of appellant by a guard. Further, appellant has not alleged any prejudice. Therefore, we conclude that appellant has failed to demonstrate that the district court committed reversible plain error in this regard.

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.[19]

_____, J.
Hardesty

_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. James Todd Russell, District Judge
State Public Defender/Carson City
Attorney General Catherine Cortez Masto/Carson City
Carson City District Attorney
Carson City Clerk

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[19]We also reject appellant's claim that cumulative error denied him his right to a fair trial. See Pascua v. State, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006).