IN THE SUPREME COURT OF THE STATE OF NEVADA

JOEL KENNETH PARKER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50137

ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count each of burglary, robbery, and grand larceny auto. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant Joel Kenneth Parker to serve consecutive prison terms of 36 to 96 months for burglary, 72 to 180 months for robbery, and 12 to 30 months for grand larceny auto.

First, Parker contends that the district court abused its discretion by denying his pretrial motion to dismiss. Parker specifically claims that the district court had an obligation to dismiss the charges against him because the State failed to disclose a tape recording of his interrogation, the tape recording contained exculpatory evidence, and the State failed to preserve this evidence.[1]

[1]Parker cites to Brady v. Maryland, 373 U.S. 83 (1963), and Cook v. State, 114 Nev. 120, 125, 953 P.2d 712, 715 (1998) ("A conviction may be reversed when the state loses evidence if the defendant is prejudiced by the loss or the state acted in bad faith in losing it.").

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"[R]esolution of discovery issues is normally within the district court's discretion."[2] Here, the district court continued the trial after learning of the discovery problem involving the alleged tape recording. Parker subsequently filed a motion to dismiss the charges based on the State's purported violation of discovery rules and failure to preserve exculpatory evidence. The district court conducted an evidentiary hearing, heard testimony from all of the interrogation participants, found that the tape recording did not exist, ordered Special Agent Lobkowicz to provide a copy of his interrogation notes to Parker, and denied Parker's motion. Under these circumstances, Parker has not shown that the district court abused its discretion by denying his motion to dismiss.

Second, Parker contends that insufficient evidence was adduced at trial to support his convictions. Parker specifically claims that the uncontroverted evidence supported his contention that his misconduct was borne out of necessity and therefore the State's evidence was insufficient to establish the crimes of burglary, robbery, and grand larceny auto. 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.[3]

Here, Parker testified that he ran from the Henderson Department of Motor Vehicles Office after recognizing a man carrying a "rifle bag" as someone with whom he had recently had an altercation.

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[2]Floyd v. State, 118 Nev. 156, 167, 42 P.3d 249, 257 (2002), abrogated on other grounds by Grey v. State, 124 Nev. ___, 178 P.3d 154 (2008).

[3]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Parker admitted to forcibly entering the victim's home through the French doors, searching the contents of the victim's purse for car keys, threatening to kill the victim if she lied about the location of her car keys, and driving off in the victim's motor vehicle.

The victim testified that she was in the bathroom when she heard a loud noise and a voice coming from within the house. When she opened the bathroom door, Parker told her, "Ma'am, I don't want to hurt you, I just want the keys to your car." The victim informed Parker that her keys were in her car and she pointed to the garage. Parker said "just don't lie to me or I'll kill you" and walked toward the garage. The victim followed Parker and pushed the switch to open the garage door. Parker got in the car and drove off. After Parker left, the victim called 911, closed the garage door, and noticed that her French doors had been damaged and the contents of her purse had been dumped out. The victim testified that she bought her car for $20,000 and a trade-in.

Based on this evidence, we conclude that a rational juror could reasonably infer that Parker was not acting out of necessity when he committed burglary, robbery, and grand larceny auto.[4] 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, substantial evidence supports the verdict.[5]

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[4]See NRS 194.010(7); NRS 200.380(1); NRS 205.060(1); NRS 205.228(1).

[5]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

Third, Parker claims that he could not have committed grand larceny auto without committing robbery and he argues that his convictions for grand larceny and robbery violate the Double Jeopardy Clause or, alternatively, are redundant.

"The Double Jeopardy Clause of the United States Constitution protects defendants from multiple punishments for the same offense."[6] "This court utilizes the test set forth in Blockburger v. United States to determine whether multiple convictions for the same act or transaction are permissible."[7] "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not."[8] The crime of robbery requires proof that the defendant used "force or violence or fear of injury" to take "personal property from the person of another."[9] Grand larceny auto requires proof that the defendant intentionally took a motor vehicle owned by another person.[10] Because each of these crimes requires proof of an additional fact that the other does not, the Double Jeopardy Clause is not implicated under Blockburger.[11]

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[6]Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003).

[7]Id. (footnote omitted).

[8]Blockburger v. United States, 284 U.S. 299, 304 (1932).

[9]See NRS 200.380(1).

[10]See NRS 205.228(1).

[11]See Barrett v. State, 105 Nev. 361, 364, 775 P.2d 1276, 1278 (1989) ("Grand larceny auto is a separate and distinct offense from robbery.").

However, even if multiple convictions for the same act are permitted under Blockburger, we "will reverse redundant convictions that do not comport with legislative intent."[12] "'[R]edundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act.' The question is whether the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant."[13] Parker was charged with committing robbery by taking car keys from the person of the victim, or in her presence, by force or violence or fear of injury, and he was charged with committing grand larceny auto by intentionally driving away a car owned by the victim. In view of the fact that the victim's keys were located inside the victim's car, we conclude that the robbery and the larceny charges arise from acts that occurred close in time and made up one course of criminal conduct: the unlawful taking of the victim's car. Accordingly, these charges punish the same illegal act, they are redundant, and the grand larceny auto conviction must be reversed.

Fourth, Parker contends that the district court abused its discretion by denying his motion for a mistrial, which was made after a prosecution witness testified that Parker was under the influence of cocaine.

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[12]Salazar at 119 Nev. at 227, 70 P.2d at 751 (citation and internal quotation marks omitted).

[13]State of Nevada v. Dist. Ct., 116 Nev. 127, 136, 994 P.2d 692, 698 (2000) (internal citation omitted) (alteration in original).

We have previously held that the decision to grant or deny a motion for a mistrial is well within the district court's sound discretion and will not be disturbed absent a clear showing of an abuse of that discretion.[14] And, that "[a] witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement."[15]

When asked "did the defendant ever tell you that he needed help, or that anyone was chasing him," the witness responded that Parker did not say "that somebody was chasing him, but something to the effect that he was – did cocaine or something." Parker objected to this testimony, approached the bench, and moved for a mistrial. The district court denied the motion and asked Parker whether he wanted the jury admonished to disregard the statement or if he preferred to do nothing and avoid reemphasizing the statement. Parker decided against admonishing the jury. Under these circumstances, Parker has not shown that the district court abused its discretion by denying his motion for a mistrial.

Fifth, Parker contends that the district court improperly instructed the jury that

> Instruction No. 12
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> The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his

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[14]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

[15]Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005).

> guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.
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> . . .
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> Instruction No. 18
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> You are here to determine the guilt or innocence of the Defendant from the evidence in this case. You are not called upon to return a verdict as to the guilt or innocence of any other person. So, if the evidence in the case convinces you beyond a reasonable doubt of the guilt of the Defendant, you should so find, even though you may believe one or more persons are also guilty.

Parker claims that the "guilt or innocence" language in these instructions "improperly undercut the presumption of innocence and the prosecutor's proof burden,"[16] and that instruction number 18 should have incorporated language tailored to the particular facts of this case -- his necessity defense.[17]

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[16]Parker cites to U.S. v. Mendoza-Acevedo, 950 F.2d 1, 4 (1st Cir. 1991) (observing that "[w]hen a court repeatedly tells jurors that the question is one of guilt or innocence, it risks undercutting the government's burden by suggesting that they should find the defendant guilty if they think he is not innocent," and holding that "district judges should be wary of the risks of misunderstanding in a 'guilt or innocence' comparison").

[17]Parker cites to Crawford v. State, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005) (observing that jurors "should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case").

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error."[18] "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason."[19]

Here, only two instructions addressed the question of "guilt or innocence," any confusion that these instructions may have caused was offset by the district court's instructions on the presumption of innocence and the State's burden of proof,[20] both instructions accurately reflect Nevada law,[21] and the jury received a separate instruction on Parker's necessity defense. Under these circumstances, Parker has not demonstrated that the district court abused its discretion or committed judicial error while settling instructions or instructing the jury.

Sixth, Parker contends that the district court erred by refusing to instruct the jury that it "may consider flight evidence for the

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[18]Id. at 748, 121 P.3d at 585.

[19]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

[20]See Mendoza-Acevedo, 950 F.2d at 4 (observing "that any confusion engendered by the inappropriate references to 'guilt or innocence' was offset by the court's careful and clear discussion of the presumption of innocence and the government's burden of proof").

[21]See Rosky v. State, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005) (observing that "a district court may properly give a flight instruction if the State presents evidence of flight and the record supports the conclusion that the defendant fled with consciousness of guilt and to evade arrest"); Guy v. State, 108 Nev. 770, 778, 839 P.2d 578, 583 (1992) (upholding an identical instruction on the jury's role in determining guilt or innocence).

purpose of deciding whether defendant was under a legal necessity during the alleged acts of February 6, 2006." Parker claims that this proposed instruction "bore directly at the heart of the defense case theory -- that [he] fled out of dire necessity." And Parker argues that the district court's refusal to give this instruction was especially prejudicial because the jury received the prosecutor's flight instruction, which allowed the jury to consider Parker's flight as evidence of consciousness of guilt.

The district court is ultimately responsible for ensuring that the jury is fully and correctly instructed.[22] If requested, the district court must provide instructions on the significance of findings that are relative to the defense's theory of the case.[23] "'If [a] proposed [defense] instruction is poorly drafted, a district court has an affirmative obligation to cooperate with the defendant to correct the proposed instruction or to incorporate the substance of such an instruction in one drafted by the court.'"[24] The defense is not entitled to instructions that are "misleading, inaccurate, or duplicitous."[25]

Here, Parker requested an instruction on the significance of flight findings relative to his theory of defense. The district court erred by not giving the proposed instruction or ensuring that the substance of the

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[22]Crawford, 121 Nev. at 754-55, 121 P.3d at 589.

[23]Carter v. State, 121 Nev. 759, 767, 121 P.3d 592, 597 (2005); Crawford, 121 Nev. at 753-54, 121 P.3d at 588-89.

[24]Carter, 121 Nev. at 765, 121 P.3d at 596 (quoting Honeycutt v. State, 118 Nev. 660, 677-78, 56 P.3d 362, 373-74 (2002) (Rose, J., dissenting)) (alternation in original).

[25]Id.; Crawford, 121 Nev. at 754, 121 P.3d at 589.

instruction was adequately incorporated into the jury instructions. However, "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of this case."[26]

Seventh, Parker contends that cumulative error deprived him of a fair trial. Parker claims that this was an extremely close case. And Parker argues that "the nature and magnitude of the error in this case compels a cumulative error reversal."

"The cumulative effect of multiple errors may violate a defendant's constitutional right to a fair trial even though errors are harmless individually."[27] We evaluate a claim of cumulative error by considering "whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged."[28]

Here, the record on appeal does not support a conclusion that the issue of innocence or guilt was close. The district court erred by refusing to give Parker's proposed significance instruction and failing to dismiss a redundant criminal charge. However, we have determined that the jury's verdict was not attributable to the absence of Parker's significance instruction and we conclude that the district court's failure to dismiss the redundant charge did not affect the trial because it was an action the district court should have taken after the verdict was

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[26]Crawford, 121 Nev. at 756, 121 P.3d at 590.

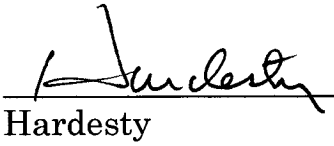
[27]Evans v. State, 117 Nev. 609, 647, 28 P.3d 498, 524 (2001).

[28]Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (internal quotation marks and citations omitted).

rendered.[29] Parker stands convicted of committing three serious felonies, one of which involves the threat of force. We conclude that the district court's errors taken together were harmless beyond a reasonable doubt and did not contribute the verdict.[30]

Having considered Parker's contentions and for the reasons discussed above, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court with instructions to vacate the grand larceny auto conviction and enter a corrected judgment of conviction.



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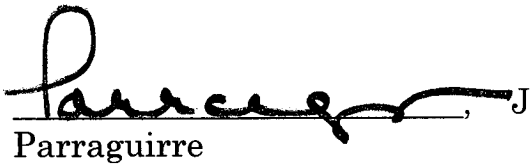

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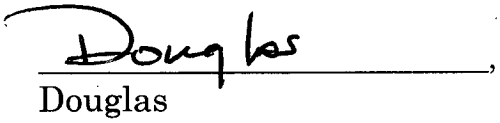

_____, J.
Douglas

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[29]See Jenkins v. District Court, 109 Nev. 337, 341, 849 P.2d 1055, 1057 (1993) (providing that the district court is precluded from entering redundant convictions against a defendant).

[30]See Chapman v. California, 386 U.S. 18, 24 (1967) (providing that federal constitutional errors are harmless beyond a reasonable doubt if they do not contribute to the verdicts obtained).

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk