IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYSHAWN CAGER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50200

FILED

DEC 16 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, entered pursuant to a jury verdict, of one count each of conspiracy to commit robbery, burglary, and robbery. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Rayshawn Cager to serve three concurrent prison terms totaling 48 to 150 months.

First, Cager contends that the combination of three delays violated his constitutional right to a speedy trial: (1) the six-month delay between the date that he notified the State of his desire to be extradited from California and the date that he was booked into the Clark County Detention Center, (2) the four-month delay between his return on a bench warrant and the trial, and (3) a seven-day delay that he incurred when the justice court granted the State's motion to continue the preliminary hearing. Cager acknowledges our determination that the State did not violate the Interstate Agreement on Detainer Act, but he asserts that we

08-31895

did not explicitly rule on whether the delay violated his right to a speedy trial.[1] Cager also admits to requesting a continuance; however, he claims that the rest of the delay was caused by the State and he argues that "[b]ecause the State's inaction and the Court's docket resulted in ten months of pretrial incarceration, this Court should find Sixth Amendment violations."

"The Sixth Amendment guarantee of a speedy trial attaches once a putative defendant is 'accused' by arrest, indictment, or the filing of a criminal complaint."[2] Four factors are weighed to determine whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant.[3] The four factors must be considered together and no single factor is either necessary or sufficient.[4] However, the length of the delay must be at least presumptively prejudicial before further inquiry into the other factors is warranted.[5] There is no established time period that automatically constitutes undue delay; each case must be analyzed on an ad hoc basis.[6]

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[1]See State v. Cager, Docket No. 46301 (Order of Reversal and Remand, May 19, 2006).

[2]Sheriff v. Berman, 99 Nev. 102, 106, 659 P.2d 298, 301 (1983) (citing Dillingham v. United States, 423 U.S. 64 (1975)).

[3]Barker v. Wingo, 407 U.S. 514, 530 (1972).

[4]Id. at 533.

[5]Id. at 530.

[6]Id. at 530-31.

Here, the combined delay was about ten months. The bulk of this delay was the result of Cager's failure to comply with the requirements of the Interstate Agreement on Detainer Act.[7] Upon his return to Nevada, Cager invoked his speedy trial rights, but then delayed the trial by filing a pretrial motion to dismiss the criminal charges, failing to appear at scheduled pretrial proceedings, and seeking a continuance to retain private counsel. A seven-day delay also occurred when the justice court continued the preliminary hearing so that the State could present additional witnesses. Cager claims that the combination of these delays was prejudicial because he was incarcerated. Our evaluation of these factors leads us to conclude that Cager was not deprived of a speedy trial.[8]

Second, Cager contends that insufficient evidence was adduced at trial to support his convictions for conspiracy, burglary, and robbery. Cager specifically claims that the victim failed to adequately identify him as the perpetrator, the police did not find inculpatory evidence on his person, and the surveillance video footage of the perpetrator exiting and entering a car driven by another person is not evidence of an agreement to commit robbery.

The State responds that "[t]he victim had no difficulty in positively identifying [Cager]" and that "the [evidentiary] support for the conspiracy conviction does not rest solely on [Cager] returning to a vehicle

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[7]See NRS 178.620 (codifying Nevada's agreement on detainers).

[8]See Bates v. State, 84 Nev. 43, 46 436 P.2d 27, 29 (1968) (where procedural delays are either ordered for good cause or the result of the defendant's actions, the defendant's right to a speedy trial is not violated).

driven by another person . . . Rather, the evidence of conspiracy lies on the multitude of facts leading up to the actual attack. The surveillance videos show [Cager] and his cohorts casing the premises for several minutes and changing parking spots multiple times." Our review of the record on appeal reveals sufficient evidence to establish Cager's guilt beyond a reasonable doubt as determined by a rational trier of fact.[9]

The jury heard testimony that the victim entered an elevator in a casino parking garage during the early morning hours. A very large black man also entered the elevator. Initially, the man did not have anything on his head or covering his face. The victim got a look at the man's face before he covered it with pantyhose, punched her, and took her purse. The jury also heard testimony regarding the casino's surveillance video system and was shown a composite video depicting the suspect vehicle entering the parking garage; the vehicle moving about the garage and parking in several different parking spaces for short periods of time; the vehicle's license plate number; and a man getting out of the vehicle, entering the elevator, and robbing the victim. The jury heard further testimony that Cager was found driving the suspect vehicle in California and that the victim identified Cager from a photographic line-up as the man who robbed her.

From this evidence, we conclude that a rational juror could reasonably infer that Cager committed the offenses of conspiracy to

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[9]See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

commit robbery, burglary, and robbery.[10] 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.[11]

Third, Cager contends that the district court abused its discretion by admitting other bad act evidence without conducting a Petrocelli[12] hearing, failing to instruct the jury on the use of this evidence as is required by Tavares v. State,[13] and allowing the State to refer to the other bad act in its closing argument. Cager specifically claims that testimony regarding his use of a false name when he was pulled over and questioned by a California patrol officer was evidence of an uncharged bad act.

Before admitting prior bad acts evidence, the district court must conduct a hearing outside the presence of the jury and determine whether "'(1) the incident is relevant to the crime charged; (2) the act is

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[10]See NRS 199.480; NRS 200.380(1); NRS 205.060(1); Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000) (defining conspiracy and noting that it "is usually established by inference from the parties' conduct"), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

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

[12]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

[13]117 Nev. 725, 30 P.3d 1128 (2001), modified on other grounds by Mclellan v. State, 124 Nev. ___, 182 P.3d 106 (2008).

proven by clear and convincing evidence; and (3) the probative value of the [other act] is not substantially outweighed by the danger of unfair prejudice.'"[14] Failure to conduct this hearing is a reversible error, unless "'(1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of bad acts evidence . . .; or (2) where the result would have been the same if the trial court had not admitted the evidence.'"[15] If prior bad acts evidence is to be admitted into evidence, "the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of trial."[16] "[W]e consider the failure to give such a limiting instruction to be harmless if the error did not have a substantial and injurious effect or influence the jury's verdict."[17]

Prior to trial, Cager, the State, and the district court discussed the admissibility of evidence pertaining to the traffic stop. Because the State had not filed a motion to admit evidence of other bad acts, the district court ruled that evidence regarding the condition of the car was admissible to show the patrol officer's reason for initiating the traffic stop, and evidence that Cager attempted to evade the officer was not

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[14]Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005) (quoting Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65).

[15]Id. at 22, 107 P.3d at 1281 (quoting Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998)).

[16]Tavares, 117 Nev. at 733, 30 P.3d at 1133.

[17]Rhymes, 121 Nev. at 24, 107 P.3d at 1282.

admissible. There was no discussion regarding evidence that Cager used a false name. During the trial, the following colloquy occurred:

> MR. STAUDAHER [Prosecutor]: And what kinds of questions did you ask [Cager] based on your recollection after reviewing the report?
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> [Patrol Officer]: I asked him who the car belonged to and he gave me a name but could not give me – he gave me – of Whitey Jay.
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> MR. GILES [Defense Counsel]: Objection, Your Honor.
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> MR. FELICIANO [Defense Counsel]: Can we approach, Judge?

The district court instructed the parties to approach and they conferred at the bench. No record was made of the bench conference and when the trial resumed the prosecutor began a new line of questioning.

Because Cager failed to make the bench conference part of the record, we do not know the nature of Cager's objection, how the district court ruled on the objection, or even if the district court found that the testimony constituted evidence of other bad acts. To the extent that Cager also claims that the victim's testimony constituted evidence of other bad acts,[18] we note that this testimony was elicited by defense counsel during cross-examination, defense counsel requested a bench conference, and no record was made of the bench conference. Under these circumstances, we

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[18]On cross-examination, defense counsel asked the victim if Cager was sitting at the defense table during the preliminary hearing. The victim responded "I thought he was in the – he was with other inmates actually. I don't know what they were, I guess other inmates."

conclude that Cager has failed to demonstrate that the district court abused its discretion.[19]

Fourth, Cager contends that the district court abused its discretion by admitting improper hearsay evidence. Cager argues that because Security Officer John Mason did not record the original video, did not monitor the recording process, and learned about the incident through conversations with the employees who wrote the incident reports, he had no firsthand knowledge regarding the incident captured on video and, therefore, his testimony did not provide an adequate foundation for the admission of the composite video into evidence.

The district court has considerable discretion in determining whether an adequate foundation has been laid for the admission of evidence under the business records exception to the hearsay rule.[20] NRS 51.135 provides:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian <u>or other qualified person</u>, is not inadmissible under the hearsay rule unless the source of information or

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[19]<u>See</u> <u>Johnson v. State</u>, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) ("It is appellant's responsibility to make an adequate appellate record. We cannot properly consider matters not appearing in that record.") (internal citation omitted).

[20]<u>Thomas v. State</u>, 114 Nev. 1127, 1147-48, 967 P.2d 1111, 1124-25 (1998).

> the method or circumstances of preparation indicate lack of trustworthiness.

(Emphasis added.) The term "qualified person" is broadly interpreted to include anyone who knows that the documents were kept in the ordinary course of business and understands the record-keeping system that was involved.[21] "The government need only make a prima facie showing of authenticity so that a reasonable juror could find that the document is what it purports to be."[22]

Here, Security Officer Mason testified that he was the lead monitor room officer, he supervised a crew of three, and he was responsible for producing video for the security department. When an incident occurs, the shift that is staffing the monitor room talks to the author of the incident report or on-scene investigator, determines where the incident occurred, identifies which video recorder the video coverage of the incident was recorded on, and pulls the initial video coverage of the incident. When he arrives at work, Mason reviews the incident reports and the initial video pull, searches for additional video if necessary, and constructs a composite video of the incident. A composite video is composed from pieces of original video that were recorded during the day and depicts the reported incident in a manner that allows it to be viewed as a movie. Mason further testified that he constructed the composite video of the incident in this case and that he reviewed the video before providing it to the State. We conclude that this testimony provided an

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[21]Id. at 1148, 967 P.2d at 1124.

[22]Id.

adequate foundation for the admission of the composite video under the business records hearsay exception and, accordingly, the district court did not abuse its discretion by admitting the video or still photographs captured from it into evidence.

Fifth, Cager contends that the district court improperly instructed the jury. Cager specifically claims that the district court erred by refusing his three proposed negatively-phrased instructions and by overruling his objection to Instruction No. 21. Cager argues that his proposed instructions were necessary because no other instruction contained "duty to acquit" language and that Instruction No. 21 improperly shifted the burden of proof by suggesting that he must prove that he is innocent.[23]

The district court is ultimately responsible for ensuring that the jury is fully and correctly instructed.[24] If requested, the district court must provide instructions on the significance of findings that are relative to the defense's theory of the case.[25] "'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

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[23]Instruction No. 21 provided that, "In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of guilt or innocence of the Defendant."

[24]Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005).

[25]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.

the substance of such an instruction in one drafted by the court.'"[26] The defense is not entitled to instructions that are "misleading, inaccurate or duplicitous."[27]

Here, even assuming that the district court erred by not giving Cager's proposed instructions, "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."[28] We note that the jury was instructed that "the State [had] the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense" and that if the jury had "a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty." We presume that the jury followed the district court's instructions.[29]

Sixth, Cager contends that he was denied his constitutional right to a fair trial due to prosecutorial misconduct. Cager specifically claims that during closing argument the prosecutor improperly vouched for the credibility of the State's witnesses, inflamed the jurors' passions

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[26]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)).

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

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

[29]See Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) ("There is a presumption that jurors follow jury instructions."), clarified on rehearing on other grounds, 114 Nev. 221, 954 P.2d 744 (1998).

and sympathies, implied that other victims existed, characterized him as a "predator," disparaged his defense, and minimized the standard of reasonable doubt. Cager objected to some, but not all of the comments that he alleges constitute prosecutorial misconduct.

The test for determining whether prosecutorial misconduct deprived a defendant of a fair trial is "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process."[30] To implement this test, we review the prosecutor's statements in context and, if we conclude that they were improper, we determine whether they were harmless beyond a reasonable doubt.[31] An improper statement is harmless beyond a reasonable doubt if it did not contribute to the verdict obtained.[32] As a general rule, the failure to object to prosecutorial misconduct precludes appellate review absent plain error.[33] We have considered the prosecutor's statements in context and we conclude that they did not deprive Cager of a fair trial.

Seventh, Cager contends that he was denied his constitutional right to a fair trial as a result of judicial misconduct. Cager claims that the district court overruled his objections to the prosecutor's closing

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[30]Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997), overruled in part on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000).

[31]Rudin v. State, 120 Nev. 121, 136-37, 86 P.3d 572, 582 (2004).

[32]See Witherow v. State, 104 Nev. 721, 724, 765 P.2d 1153, 1155 (1988); see also Chapman v. California, 386 U.S. 18, 24 (1967).

[33]Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987).

comments with "curt, dismissive instructions to sit down" and inappropriately commented, "So we have two of you now objecting?" when his second defense counsel lodged an objection. Cager argues that the district court's comments were prejudicial because they were made in the presence of the jury and implied that defense counsel had unnecessarily prolonged the trial. Cager did not object to the district court's rulings or comments.

A district court's conduct may deprive a defendant of his right to a fair trial.[34] The district court is responsible for protecting the defendant's right to a fair trial, providing order and decorum in trial proceedings, concerning itself with the flow of the trial, and protecting the witnesses.[35] In executing these responsibilities, the district court must be mindful of the influence it wields.[36] "The words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby."[37] As a general rule, the failure to object to judicial misconduct precludes appellate review.[38] However, we may review unpreserved allegations of

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[34]See Oade v. State, 114 Nev. 619, 624, 960 P.2d 336, 339-40 (1998).

[35]Rudin, 120 Nev. at 140, 86 P.3d at 584.

[36]Randolph v. State, 117 Nev. 970, 984-85, 36 P.3d 424, 433 (2001).

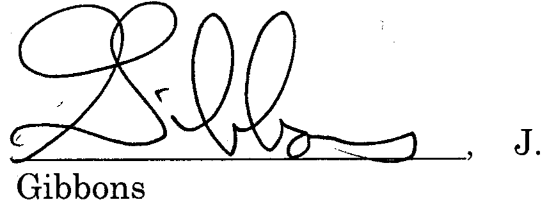
[37]Oade, 114 Nev. at 623, 960 P.2d at 339 (internal quotation marks and citation omitted).

[38]Id. at 621-22, 960 P.2d at 338.

judicial misconduct for plain error.[39] We have considered the district court's remarks in their entirety and we conclude that they do not constitute plain error.

Having considered Cager's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.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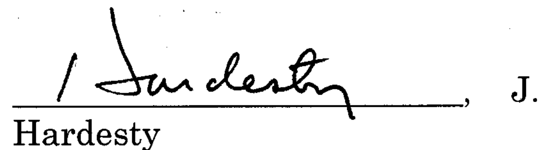
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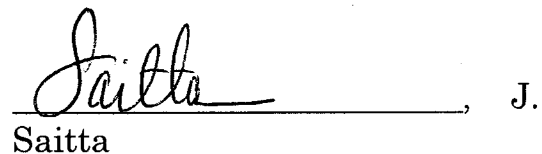
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cc: Hon. Jackie Glass, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[39] Id. at 622, 960 P.2d at 338.