IN THE SUPREME COURT OF THE STATE OF NEVADA

DUSHON NICHALOS GREEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50756

FILED

JUL 3 1 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY G. Alvarado
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of ten counts of sexual assault, two counts of lewdness with a child under 14 years of age, two counts of sexual assault of a minor under 14 years of age, and four counts of sexual assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant Dushon Green was charged with multiple counts of sexual assault and lewdness against seven different victims, two of whom were minors at the time of the alleged incidents. After a four-day trial, a jury found Green guilty of eleven counts of sexual assault, two counts of lewdness with a minor under the age of fourteen, and four counts of sexual assault with the use of a deadly weapon. The district court sentenced Green as follows: as to Count 1, sexual assault, a term of life in prison with a minimum parole eligibility of ten years; as to Count 2, sexual assault, a term of life in prison with a minimum parole eligibility of ten years, to run concurrent with Count 1; as to Count 3, sexual assault, a term of life in prison with a minimum parole eligibility of ten years, to run consecutive to Counts 1 and 2; as to Count 4, sexual assault, a term of life in prison with a minimum parole eligibility of ten years, to run concurrent with Count 3; as to Count 6, sexual assault, a term of life in prison with a minimum parole eligibility of ten years, to run consecutive to Counts 3 and 4; as to Count 7, sexual assault, a term of life in prison with a minimum

parole eligibility of ten years, to run consecutive to Count 6; as to Count 8, sexual assault, a term of life in prison with a minimum parole eligibility of ten years, to run consecutive to Count 7; as to Count 9, sexual assault, a term of life in prison with a minimum parole eligibility of ten years, to run consecutive to Counts 7 and 8; as to Count 10, sexual assault, a term of life in prison with a minimum parole eligibility of ten years, to run concurrent with Count 9; as to Count 11, lewdness with a child under the age of fourteen, a term of life in prison with a minimum parole eligibility of ten years, to run consecutive to Counts 9 and 10; as to Count 12, lewdness with a child under the age of fourteen, a term of life in prison with a minimum parole eligibility of ten years, to run concurrent to Count 11; as to Count 13, sexual assault with a minor under the age of fourteen, a term of life in prison with a minimum parole eligibility of twenty years, to run consecutive to Counts 11 and 12; as to Count 14, sexual assault with a minor under the age of fourteen, a term of life in prison with a minimum parole eligibility of twenty years, to run concurrent with Count 13; as to Count 15, sexual assault with use of a deadly weapon, a term of life in prison with a minimum parole eligibility of twenty years, to run consecutive to Counts 13 and 14; as to Count 16, sexual assault with use of a deadly weapon, a term of life in prison with a minimum parole eligibility of twenty years, to run consecutive to Count 15; as to Count 17, sexual assault with use of a deadly weapon, a term of life in prison with a minimum parole eligibility of twenty years, to run concurrent with Count 16; as to Count 18, sexual assault with use of a deadly weapon, a term of life in prison with a minimum parole eligibility of twenty years, to run concurrent with Counts 16 and 17; as to Count 19, sexual assault, a term of life in prison with a minimum parole eligibility of ten years, to run consecutive to Counts 17 and 18; and as to Count 20, sexual assault, a

term of life in prison with a minimum parole eligibility of ten years, to run concurrent with Count 19.[1]

On appeal, Green argues that his convictions should be reversed because: 1) his DNA was taken in an illegal search and should have been excluded under the exclusionary rule, 2) the district court abused its discretion in admitting his palm print into evidence, 3) the district court abused its discretion in failing to sever the counts charged against him, 4) of cumulative error. [2] For the following reasons, we conclude that Green's arguments lack merit and we affirm the district court's judgment of conviction.

Collection of Green's DNA

On November 14, 2001, in a separate matter, Green pleaded guilty to attempted pandering, and received probation for the offense. Green's probation officer, Richard Ainsworth, took a sample of Green's DNA and entered it into the Combined DNA Index System (CODIS). After Green's DNA was entered into CODIS, it was matched to several unsolved cases leading to his arrest and prosecution for the crimes in the underlying case. Green filed a motion to suppress the DNA evidence that the district court denied.

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[1]The parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

[2]Green also argues that the district court erred in failing to order a full evidentiary hearing to discuss the nature and extent of the contact between the police and the Department of Parole and Probation in the investigation that ultimately led to Green's arrest. As Green cites to no authority that would require the district court to have conducted such a hearing, we conclude that Green's argument is without merit and warrants no further discussion.

Green argues that the Department of Parole and Probation had no legal authority to collect his DNA. Green contends that NRS 176.0913(4) does not apply to him, and that he was not required to give the DNA sample.[3] As such, Green contends that the DNA sample was collected as the result of an illegal search and the exclusionary rule applies. While we agree that Green's DNA was collected during an illegal search, we do not agree that this evidence needed to be excluded.

The Fourth Amendment protects citizens from unreasonable searches and seizures. U.S. Const. amend. IV. We review the lawfulness of a search de novo. McMorran v. State, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002).

We conclude that Green's DNA was collected as part of an illegal search because the crime to which Green pleaded guilty—attempted pandering, a gross misdemeanor—is not covered by NRS 176.0913(4). As such, Green's parole officer had no legal authority to collect Green's DNA. However, we further conclude that the collection of Green's DNA without legal authority does not invoke the exclusionary rule.

"The exclusionary rule operates as a judicially created remedy designed to safeguard against future violations of Fourth Amendment rights through the rule's general deterrent effect." Arizona v. Evans, 514 U.S. 1, 10 (1995) (citing United States v. Leon, 468 U.S. 897, 906 (1984)). "As with any remedial device, the rule's application has been restricted to those instances where its remedial objectives are thought most

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[3]NRS 176.0913(4) provides a list of specific levels of convictions that allow the State or its agencies to take a biological sample from the convicted person.

efficaciously served." Id. at 11. "Where 'the exclusionary rule does not result in appreciable deterrence, then, clearly, its use . . . is unwarranted.'" Id. (quoting United State v. Janis, 428 U.S. 433, 454 (1976)).

In line with Evans, we have stated that "[w]here no deterrent effect would be achieved by the exclusion of evidence seized as the result of an unlawful search, the United States Supreme Court has steadfastly rejected the application of the exclusionary rule." Taylor v. State, 92 Nev. 158, 162, 547 P.2d 674, 676 (1976). In an effort to clarify the purpose of the exclusionary rule, we have stated that

> The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim . . . . Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures . . . . In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

Id. at 161, 547 P.2d at 676. (quoting United States v. Calandra, 414 U.S. 338, 347-48 (1974)). The exclusionary rule does not apply, because there is nothing to deter, "where (1) the allegedly improper search involved a completely different crime, (2) the officers involved had no idea that the knowledge they gained would become useful in the prosecution of another offense, and (3) the violation of rights was unintentional . . . ." Cavanaugh v. State, 102 Nev. 478, 485, 729 P.2d 481, 486 (1986).

We conclude that the exclusionary rule does not apply here based on the three factors set out in Cavanaugh. First, the DNA was obtained in an improper search relating to another crime. Green had pleaded guilty to attempted pandering and his parole officer improperly took his DNA sample based on that crime. Second, there is no evidence

that Ainsworth knew that taking Green's DNA would become useful in identifying Green for the crimes he was convicted of in the underlying case. Third, while Ainsworth did not remember the exact reason why he took Green's DNA, it is reasonable to believe that because Green's guilty plea was for attempted pandering–a crime which allows for the taking of DNA if the offense is committed against a minor–Ainsworth's violation of Green's rights was an unintentional mistake. Accordingly, since the exclusionary rule does not apply here, we conclude that the district court did not abuse its discretion in admitting the DNA evidence. See Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996) (stating that we will not disturb a trial court's ruling on the admission of evidence without a showing of a clear abuse of discretion), overruled on other grounds by Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006).

Admission of Green's palm print

Green's motion to suppress also sought the suppression of a palm print that was obtained as a result of a warrant that was based on the match in CODIS of his DNA. The district court also denied Green's motion to suppress the palm print because it found that the good-faith exception to the exclusionary rule applied.

Green argues that the district court abused its discretion in finding that the good-faith exception to the exclusionary rule applied to admit the palm print. We disagree.

The good-faith exception to the exclusionary rule applies to allow the admission of evidence when an agent of the state performs a search in objectively reasonable reliance on the constitutionality of a statute that is subsequently declared unconstitutional. Arizona v. Evans, 514 U.S. 1, 14 (1995).

A magistrate's determination on whether there was probable cause to issue a warrant is afforded great deference. United States v. Leon, 468 U.S. 897, 914 (1984). Further, "suppression of evidence obtained pursuant to a warrant should be ordered . . . only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." Id. at 918. Specifically, suppression of evidence obtained pursuant to a warrant, even if later invalidated, should not be ordered unless it is shown that the police officer who obtained the warrant knew, or could be charged with knowing, that the search violated the Fourth Amendment. Id. at 919.

We conclude that the district court did not abuse its discretion in determining that the good-faith exception to the exclusionary rule applied. The deterrent effect of the exclusionary rule would not have been furthered by suppression of this evidence because the warrant application was based on the DNA which we have concluded did not invoke the exclusionary rule. Further, Green has failed to show that the police officer who obtained the warrant knew, or should have known, that Green's DNA was obtained improperly. Without actual evidence that the police officer who obtained the warrant for Green's palm print was dishonest in his warrant application the district court did not abuse its discretion in admitting this evidence.

Severing of counts

Green argues that the district court abused its discretion by failing to sever the several charges brought against him. While we agree that the district court abused its discretion in failing to sever the several counts charged against Green, we conclude that this error was harmless.

"The decision to join or sever charges is within the discretion of the district court, and an appellant carries the heavy burden of showing

that the court abused that discretion. Error resulting from misjoinder of charges is harmless unless the improperly joined charges had a substantial and injurious effect on the jury's verdict." Weber v. State, 121 Nev. 554, 570, 119 P.3d 107, 119 (2005).

NRS 173.115, which governs whether there is a basis for joinder of criminal counts, provides in pertinent part that "[t]wo or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are: . . . [b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Even with charges that otherwise could be joined under NRS 173.115, a district court should order severance where joinder would cause unfair prejudice to the defendant. Weber at 571, 119 P.3d at 119. As such, we must determine whether there is a proper basis to join the charges here and, if so, whether unfair prejudice still mandates severance. Id.

In order for there to be a common plan or scheme in the context of NRS 173.115(2), it must be shown that there was a purposeful design. Id. at 572, n.6, 119 P.3d at 120, n.6. We have held that the test to determine whether there was a common plan or scheme is not whether the charged offenses had certain elements in common, but whether they tended to establish a preconceived plan which resulted in the commission of those crimes. Richmond v. State, 118 Nev. 924, 933, 59 P.3d 1249, 1255 (2002); Mitchell v. State, 105 Nev. 735, 738, 782 P.2d 1340, 1342 (1989). [4]

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[4]See also Weber at 572, 119 P.3d at 120 (recognizing that "purposeful design is central to a scheme or plan" but also recognizing that "a person who forms and follows a scheme or plan may have to contend with contingencies, and therefore a scheme or plan can in practice reflect some flexibility and variation . . . .").

In Richmond, we stated that sexual assaults that occurred a month apart in the same location and in the same manner did not establish a common plan or scheme. 118 Nev. at 934, 59 P.3d at 1255. In Mitchell, we held that there was no common plan or scheme for sexual assaults that occurred 45 days apart and where the same activity was used to attempt to have intercourse with the victims. 105 Nev. at 738, 782 P.2d at 1342.

However, we will not overturn a conviction for failure to sever counts unless it is shown that the district court's error had a substantial and injurious effect on the jury's outcome. Weber at 571, 119 P.3d at 119. "To establish that joinder was [unfairly] prejudicial requires more than a mere showing that severance might have made acquittal more likely." Id. at 574-75, 119 P.3d at 121 (internal quotations omitted).

We conclude that the district court abused its discretion in failing to sever the several counts charged against Green. The first indictment concerned counts of sexual assault that dated as far back as December 1996. The second indictment concerned a sexual assault that occurred in February 1998, more than a year later. Based on our precedent in Richmond and Mitchell, the sexual assault that occurred here more than a year later cannot be seen as part of a common plan or scheme. As such, the district court abused its discretion by failing to sever the two indictments for trial.

However, we conclude that the district court's abuse of discretion was harmless. Because of the overwhelming evidence of guilt that the State presented at trial, including the DNA evidence and the palm print, it is likely that Green would have been convicted on all counts even if his trial was severed.[5] As such, we conclude that a reversal of Green's convictions is not warranted on this issue.

Cumulative error

Green argues that multiple errors committed by the district court warrant a reversal of his convictions because of the cumulative effect of those errors. We disagree.

Cumulative error results when an individual error, standing alone, is not enough to reverse, but the cumulative effect prevents the defendant from receiving a fair trial. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

As we conclude that the district court did not commit error, other than harmless error on any issue presented by Green, the

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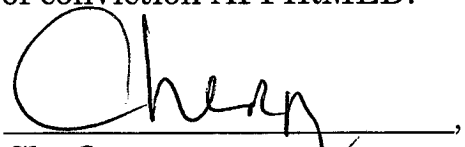
[5]Compare Tabish v. State, 119 Nev. 293, 302, 72 P.3d 584, 590 (2003) (where we concluded that, even though the counts were not part of the same scheme or plan, that combining the counts was unfairly prejudicial, and that the counts did not have to be combined to give the jury the complete story of the crimes, the district court's failure to sever the charges was harmless because "the improper joinder of the charges did not have [a] substantial and injurious influence on the jury's consideration of the charges.").

cumulative error doctrine is inapplicable. As such, we conclude that Green's convictions should not be reversed on this issue.

In light of the foregoing discussion, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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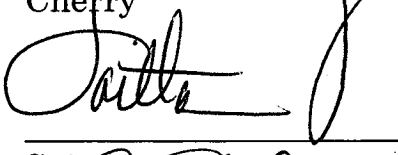

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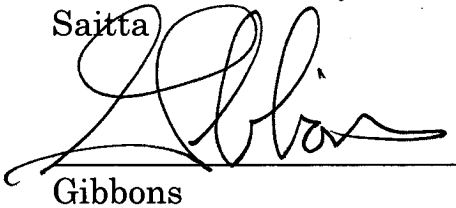

_____, J.
Gibbons

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