IN THE SUPREME COURT OF THE STATE OF NEVADA

CHARLES RONELL GREEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51193

FILED

MAY 05 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sale of a controlled substance and possession of a controlled substance with intent to sell. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Charles Ronell Green was sentenced to twenty-eight to seventy-two months in jail for sale of a controlled substance and nineteen to forty-eight months for possession with intent to sell, with the sentences to run concurrently. The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

On appeal, Green contends that: (1) the district court erred in refusing to give several proposed instructions on eyewitness identification, (2) the district court erred in refusing to grant him access to the criminal histories of alternative suspects, and (3) the district court violated his right to a speedy trial.

Proposed instruction on eyewitness identification

First, Green contends that the district court erred in refusing to give several proposed instructions on misidentification. We disagree.

This court reviews a district court's refusal to give jury instructions for an abuse of discretion or judicial error. Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). Generally, "the defense has

the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Margetts v. State, 107 Nev. 616, 619, 818 P.2d 392, 394 (1991); see also Geary v. State, 110 Nev. 261, 264-65, 871 P.2d 927, 929 (1994) (quoting Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990)). However, the district court may refuse instructions on the defendant's theory of the case if the proffered instructions are substantially covered by the instructions given to the jury. Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). For example, in Nevius v. State, this court concluded that appellant's proposed instruction on eyewitness identification was properly refused because the jury received "instructions on credibility of witnesses and proof beyond a reasonable doubt." 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985).

Here, the district court denied Green's proffered instructions on misidentification and in its stead submitted general instructions on the credibility of witnesses and proof beyond a reasonable doubt. Accordingly, we conclude that the district court properly refused Green's proffered instructions because they were adequately covered by the instructions given.

Criminal history

Second, Green contends that the district court erred in refusing to grant him access to the criminal histories of alternative suspects. We disagree.

At trial, Green submitted a request for the criminal histories for each of the twelve individuals that were arrested alongside Green.

Pursuant to Brady v. Maryland, the State must disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment. 373 U.S. 83 (1963). Evidence must also be

disclosed if it provides grounds for the defense to impeach the credibility of the State's witnesses or to bolster the defense case. Mazzan v. Warden, 116 Nev. 48, 67, 993 P.2d 25, 37 (2000); Kyles v. Whitley, 514 U.S. 419, 442 n.13, 445-51 (1995).

In the instant matter, the information sought by Green was neither exculpatory nor relevant to the credibility of the State's witnesses. Furthermore, "Brady does not require the State to disclose evidence which is available to the defendant from other sources, including diligent investigation by the defense." Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998). Here, the identities of the alternative suspects were readily available. Through diligent investigation, defense counsel could have obtained the criminal conviction history of these individuals. Therefore, we conclude that the district court did not err in denying Green's request for access to these records.

Right to a speedy trial

Third, Green contends that his state statutory and federal constitutional speedy trial rights were violated. See NRS 178.556. We disagree.

At a hearing on November 1, 2007, Green invoked his right to a speedy trial, and trial was scheduled for December 10, 2007. On December 3, 2007, the State moved to consolidate two pending cases. Over Green's objection, the district court granted the motion to consolidate, and reset the trial for January 14, 2008. Subsequently, the State moved to consolidate yet another pending case. The State's motion to consolidate was scheduled to be heard on December 20, 2007. Prior to the hearing, Green waived his right to a speedy trial and requested a continuance so that he could properly challenge the motion to consolidate. On January 3, 2008, the district court denied the State's second motion to

consolidate, and reset the trial for February 19, 2008. The jury trial began on that date.

To determine whether the defendant's Sixth Amendment right to a speedy trial has been violated, a court must conduct a balancing test. Barker v. Wingo, 407 U.S. 514, 530 (1972). Among the factors to be considered are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) prejudice to the defendant. Id. Unless the delay is long enough to be presumptively prejudicial, inquiry into the other factors is not necessary. Id.

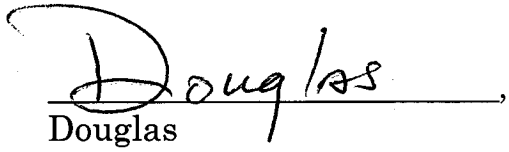
First, the length of delay in this case was from November 1, 2007, when Green invoked his right to a speedy trial, until February 19, 2008, when his trial began. The delay was less than a year and cannot be said to be presumptively prejudicial. See Cowart v. Hargett, 16 F.3d 642, 646 (5th Cir. 1994) (concluding that "[a] delay of less than one year will rarely qualify as 'presumptively prejudicial' for purposes of triggering the Barker inquiry") (citing Doggett v. U.S., 505 U.S. 647, 652 n. 1 (1992)). Because the delay was less then a year, and because Green waived his right to a speedy trial, our inquiry ends here and we conclude that Green's rights to a speedy trial were not violated.[1] Nevertheless, we have considered Green's additional arguments regarding his right to a speedy

[1]Green also contends that the State failed to comply with the notice requirements found in NRS 174.234. We note that Green properly objected to the State's late disclosure of expert witnesses. However, Green has failed to demonstrate how he could have impeached the expert witnesses' testimony even if given timely notice, and thus, has shown no prejudice.

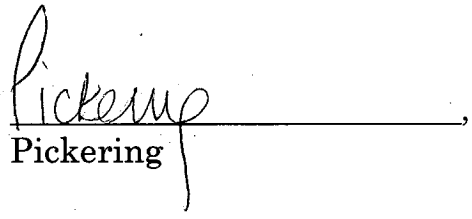
trial and conclude that he has suffered no prejudice. Therefore, his right to a speedy trial was not violated. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Parraguirre



_____, J.
Douglas



_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Susan D. Burke
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk