IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSEPH M. ANDERSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34620

FILED

OCT 03 2000

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault (count I) and kidnaping in the first degree (count II). The district court sentenced appellant to serve two consecutive terms of life with the possibility of parole in the Nevada State Prison, with parole eligibility after ten years for count I, and parole eligibility after five years for count II. Appellant was further ordered to pay $1,989.33 in restitution.

First, appellant contends he was prejudiced during deliberations when the jury was provided with a verdict form on an uncharged crime. Appellant argues that a juror could reasonably infer that he engaged in the uncharged criminal activity referenced by the erroneous verdict form, and that as a result, he is entitled to a retrial. Appellant also argues that the district court improperly resolved the issue outside the presence of counsel.

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During deliberations, the jury questioned the district court whether the uncharged activity on a verdict form was "part of the case or in consideration." The district court's response was, "No. These verdict forms found their way into the instructions in error. The defendant has not been charged with . . . and has not been tried for that crime. You are not to consider this in your deliberations in any way." This court has held that it is "always presumed that the jury abided by its duty to read and consider all instructions provided by the trial court." Evans v. State, 112 Nev. 1172, 1204, 926 P.2d 265, 286 (1996) (citing Lambert v. State, 94 Nev. 68, 70, 574 P.2d 586, 587 (1978)); State v. Ah Mook, 12 Nev. 369, 388 (1877). It does not appear that appellant was actually prejudiced by the erroneous verdict form or that the jurors considered the form in contravention of the district court's instruction. Moreover, appellant has not demonstrated that he was prejudiced by the district court's interaction with the jury outside the presence of counsel. See NRS 178.598; Abeyta v. State, 113 Nev. 1070, 944 P.2d 849 (1997); Varner v. State, 97 Nev. 486, 634 P.2d 1205 (1981). Therefore, we conclude that appellant's contention is without merit.

Second, appellant contends there was insufficient evidence to establish jurisdiction in the district court over the charge of sexual assault, and therefore, appellant's conviction and sentence should be vacated. Appellant argues

that there was no evidence presented by the State showing that the offense occurred in Nevada, or that appellant actually attempted or formed the intent to commit the sexual assault at the time of the kidnaping.[1]

Pursuant to NRS 171.020, the State of Nevada has jurisdiction over an offense "[w]henever a person, with intent to commit a crime, does any act within this state in execution or part execution of such intent, which culminates in the commission of a crime, either within or without this state . . . ." This court held that NRS 171.020 gives the state jurisdiction over an offense "whenever the criminal intent is formed and any act is accomplished in this state in pursuance or partial pursuance of the intent." Shannon v. State, 105 Nev. 782, 792, 783 P.2d 942, 948 (1989).

Our review of the record on appeal reveals the district court had jurisdiction over appellant and the charge of sexual assault. Appellant kidnaped the victim in Reno, and according to the trial testimony of the victim, stated that he planned to rape her. Regardless of where the eventual sexual assault occurred, appellant's act was part of an "overall continuing crime plan." Smith v. State, 101 Nev. 167, 169, 697 P.2d 113, 115 (1985). Even if the sexual assault occurred in California as appellant contends, the district court had jurisdiction pursuant to NRS 171.020 and Shannon, 105 Nev. at

[1]Appellant does not contest the jurisdiction of the district court to preside over the charge of kidnaping in the first degree.

792, 783 P.2d at 948. Moreover, the evidence adduced at trial established that the sexual assault likely occurred in Nevada.

Third, appellant contends he was tried and convicted in violation of the Interstate Agreement on Detainers (IAD).[2] More specifically, appellant contends the delay in bringing him to trial within the time limits imposed by the IAD was not based on good cause, as required by Article III(a). Appellant argues that his convictions must be vacated with prejudice.[3]

Appellant raises this issue for the first time on appeal. "Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal." McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998), cert. denied, ___ U.S. ___, 120 S. Ct. 342 (1999) (citation omitted). Nevertheless, a consideration of appellant's contention reveals that it lacks merit.

Appellant argues that his counsel's lack of preparedness and subsequent motion for a continuance was not good cause to delay his trial. The district court's granting of the motion, in open court with appellant present, caused the time limits imposed by the IAD for bringing appellant to trial to be exceeded. A review of the hearing transcript

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[2]See NRS 178.620 et seq.

[3]Article V(c) of the IAD states, "in the event that an action on the indictment . . . is not brought to trial within the period provided, . . . the appropriate court of the jurisdiction where the indictment . . . has been pending shall enter an order dismissing the same with prejudice."

reveals, however, that appellant discussed the motion with counsel, did not object to the continuance, and, in fact, tentatively agreed to an even later date. Appellant effectively waived his rights in this matter; a holding otherwise "would enable defendants to escape justice by willingly accepting treatment inconsistent with the IAD's time limits, and then recanting later on. Nothing in the IAD requires or even suggests a distinction between waiver proposed and waiver agreed to." New York v. Hill, ___ U.S. ___, 120 S. Ct. 659, 666 (2000). Moreover, in scheduling matters, counsel controls and may waive the time limits of the IAD without the consent of the defendant. See id. at 664.

Having considered appellant's contentions and concluded that they lack merit, we affirm the judgment of conviction.

It is so ORDERED.

_____, J.
Shearing

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Peter I. Breen, District Judge
Attorney General
Washoe County District Attorney
Scott W. Edwards
Washoe County Clerk