IN THE SUPREME COURT OF THE STATE OF NEVADA

CORNELIUS EUGENE ROGERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51514

FILED

MAY 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S.Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary, first-degree kidnapping with substantial bodily harm, first-degree murder, robbery, possession of stolen property and, pursuant to a guilty plea, of one count of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Jennifer Togliatti, Judge.

Rogers was sentenced to two consecutive life terms without the possibility of parole, with the rest of his sentence to run concurrently.

On appeal, Rogers argues: (1) the district court erred when it failed to grant his motions for a mistrial after improper testimony regarding drugs found in Rogers' apartment; (2) the district court erred when it denied his pretrial motion to suppress the eyewitness identification made at the preliminary hearing; (3) the district court erred when it denied his motion to suppress his statements to the police; (4) the district court erred by providing misleading and prejudicial jury instructions, and; (5) the death penalty is cruel and unusual punishment in all circumstances, prohibited in all circumstances, and prohibited by the

Eighth Amendment. For the reasons set forth below, we conclude that these arguments lack merit.[1]

First, the district court did not abuse its discretion in denying Rogers' repeated motions for a mistrial. The district court's decision denying a motion for mistrial is reviewed for an abuse of discretion. Rose v. State, 123 Nev. 194, 206-07, 163 P.3d 408, 417 (2007). When the police searched Rogers' apartment, they found drugs and drug paraphernalia. Because this was irrelevant to the charges at trial, the State admonished witnesses with knowledge of the drugs to avoid mentioning this fact. In spite of this, three witnesses briefly mentioned the drugs. Following each reference, Rogers made a motion for a mistrial. The district court denied all three motions for mistrial but each time offered to give a curative instruction, which Rogers refused.

"""[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.""" Id. at 207, 163 P.3d at 417 (quoting Ledbetter v. State, 122 Nev. 252, 264-65, 129 P.3d 671, 680 (2006) (quoting Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005))). The district court repeatedly offered to give an admonishment to the jury, but Rogers refused. The references were made

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[1]Rogers also argues on appeal that: (1) the district court erred by refusing to admit a letter that suggested another possible suspect for the crimes charged, (2) his convictions for first-degree kidnapping with substantial bodily harm and for murder in the death of Julie Holt violated double jeopardy and redundancy principles, and (3) cumulative error warrants reversal. After considering these issues, we conclude that these arguments are also without merit.

in passing and were not emphasized by the State. A defendant "is not entitled to a perfect trial," merely a fair one. Ennis v. State, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). The passing references did not prevent Rogers from getting a fair trial; the district court did not abuse its discretion in denying Rogers' motions for a mistrial.

Second, the district court did not err in denying Rogers' motion to suppress the eyewitness identification. "The applicable test is whether, in light of the totality of the circumstances, the identification was so unnecessarily suggestive and conducive to irreparable mistaken identification that the defendant was denied due process of law." Bolin v. State, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998), abrogated on other grounds by Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002). The eyewitness testified at the preliminary hearing that she saw a tan station wagon parked between her house and the Holt residence around 10:30 a.m. on the morning of March 13, 2001. At around 12:30 p.m. she saw an individual backing into the Holts' garage. She testified that she got a good enough look at this person to recognize him if she saw him again. She then first identified Rogers at the preliminary hearing as the person she saw backing into the Holts' garage.

Considering the totality of the circumstances, the identification was not so unnecessarily suggestive and conducive to irreparable mistaken identification that Rogers was denied due process of law. Furthermore, the eyewitness was cross-examined at the preliminary hearing and at trial. The issue of the eyewitness identification procedure went to weight, not admissibility. The issue of weight and credibility of identifying eyewitness testimony at trial is solely within the province of the jury. Steese v. State, 114 Nev. 479, 498, 960 P.2d 321, 333 (1998).

Third, the district court did not err in denying Rogers' motion to suppress his statements to the police. Under Miranda v. Arizona, 384 U.S. 436, 444 (1966), a valid waiver of rights must be voluntary, knowing, and intelligent. Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006). A Miranda waiver is voluntary "'if, under the totality of the circumstances, the confession was the product of a free and deliberate choice rather than coercion or improper inducement.'" Mendoza, 122 Nev. at 276, 130 P.3d at 181-82 (quoting U. S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998)). A waiver is knowing and intelligent if it is made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986).

The record supports the district court's findings that Rogers' free will was not overborne by police coercion, nor were there any extrinsic falsehoods that could be deemed coercive per se, or which were likely to produce untrue statements. Silva v. State, 113 Nev. 1365, 1369-70, 951 P.2d 591, 594 (1997); Sheriff v. Bessey, 112 Nev. 322, 325, 914 P.2d 618, 620 (1996)). As the district court noted, Rogers was in his midthirties, experienced with the criminal justice system, and repeatedly advised of his Miranda rights. In fact, he specifically exercised his right to stop speaking to police temporarily until he could speak to family members. He was interviewed over a period of days, was given breaks, and was not physically mistreated in any way. See Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987). The totality of the circumstances demonstrates that Rogers waived his Miranda rights with a full awareness of both the nature of the rights being abandoned and the

consequences of his decision to abandon them and that his waiver was the product of free and deliberate choice.

Fourth, the district court did not abuse its discretion when it gave jury instruction 20.[2] The instruction was not clearly erroneous, and when read together with the other jury instructions, it was clear that robbery and kidnapping were two separate offenses. "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." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Rogers argues that instruction 20 undermined the presumption of innocence by instructing the jurors that if they found him guilty of one of the crimes, they must find him guilty of both. We disagree; the plain language of the instruction does not indicate that if the jury found Rogers guilty of one, they must find him guilty of the other. When read together, the jury instructions are clear that robbery and kidnapping are separate crimes, with different elements.

Fifth, Rogers argues the death penalty is cruel and unusual punishment in all circumstances, prohibited in all circumstances, and prohibited by the Eighth Amendment. The question of whether the death penalty is cruel and unusual punishment in all circumstances is moot

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[2]Instruction 20 read:

> [T]he State has charged the defendant with committing the crimes of kidnapping and robbery. A conviction on said charges may be had only if the State has proven beyond a reasonable doubt that it was the defendant himself who actually committed the crime whether alone or with another.

since Rogers was not sentenced to death. This court has repeatedly refused to render opinions on moot questions. See, e.g., Turner v. State, 98 Nev. 103, 108 n.4, 641 P.2d 1062, 1065 n.4 (1982) (citing Miller v. West, 88 Nev. 105, 109-10, 493 P.2d 1332, 1334-35 (1972)). Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_______________, J.
Hardesty

_______________, J.
Douglas

_______________, J.
Pickering

cc: Hon. Jennifer Togliatti, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk