

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK BRISTOW HUMPHREYS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52525

FILED

NOV 25 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of making terrorist threats and aggravated stalking. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Mark Bristow Humphreys appeals from a judgment of conviction for making terrorist threats and aggravated stalking. The conviction stems from threats and harassing phone calls Humphreys made to various employees of the Hard Rock Hotel in Las Vegas.

Humphreys makes multiple claims of error on appeal. The only claims that merit extended analysis center on the district court's competency determination.¹ We conclude that the district court did not err in its determination of Humphreys's competency, and thus affirm.

¹Humphreys's competency-related claims include: (1) the district court abused its discretion in denying the defense's motion for a continuance to evaluate competency just after the start of the trial; (2) the district court erred in not granting a mistrial based on the competency questions raised during trial; and (3) in conducting the trial without Humphreys present, the district court violated his constitutional and statutory rights, since he was not competent to waive those rights.

Humphreys's mistrial and waiver claims necessarily depend on the same arguments and evidence as his claim that he was entitled to a continuance. As we have concluded that the district court did not err in

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DISCUSSION

The district court did not err in denying Humphreys's request for a continuance to evaluate competency

Shortly after trial began, defense counsel requested a continuance so that Humphreys's competence could be evaluated. As grounds, defense counsel offered anecdotal reports that Humphreys was refusing to take his psychiatric medication and refusing to cooperate with counsel. Judge Bell denied the request, concluding that Humphreys was capable of assisting with his defense, but was unwilling to do so.

Humphreys contends that Judge Bell erred because defense counsels' reports of Humphreys refusing to take his psychiatric medication and to cooperate in preparing for trial raised a significant doubt as to Humphreys's ability to assist in his own defense. Humphreys further argues that Judge Bell based his decision to deny the continuance solely upon Judge Glass's competency finding seven months earlier. We disagree.

Criminal defendants have a constitutional right not to be tried while incompetent. Scarbo v. Dist. Ct., 125 Nev. ___, ___, 206 P.3d 975, 977 (2009). This court reviews a district court's rulings with respect to

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denying Humphreys's request for a continuance because there was insufficient evidence presented to require a hearing on competency, we will not discuss Humphreys's mistrial and waiver claims here other than to note that we find them to be without merit.

competency for abuse of discretion. Olivares v. State, 124 Nev. ___, ___, 195 P.3d 864, 869 (2008).

Nevada law defines an incompetent defendant as one who does not have the present ability to understand either the nature of the criminal charges against him or the nature and purpose of the court proceedings, or is not able to aid and assist his counsel in the defense at any time during the proceedings with a reasonable degree of rational understanding.^[2]

Id. at ___, 195 P.3d at 868 (citing NRS 178.400(2)). Nevada's statutory competency standard is derived from and consistent with the standard established in Dusky v. United States, 362 U.S. 402 (1960) ("the test [for competency] must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has rational as well as factual understanding of the proceedings against him." (quotation marks and citation omitted)). Calvin v. State, 122 Nev. 1178, 1182, 147 P.3d 1097, 1100 (2006).

A district judge cannot rely solely on prior determinations of competency—rather, he or she must remain alert to new information that raises doubts about the competency of a defendant. Drope v. Missouri, 420 U.S. 162, 181 (1975). Throughout a proceeding where there is doubt about a defendant's competency, the trial judge must continue to "assess

²Humphreys's appeal only addresses the latter of these two bases for finding incompetency—that he should have been granted a continuance to evaluate whether he was able to "[a]id and assist his counsel in the defense at [that time in] the proceedings with a reasonable degree of rational understanding." NRS 178.400(2)(c).

firsthand a defendant's present ability to consult with his or her lawyer and determine whether a defendant's present behavior and demeanor during trial demonstrate that he or she is not competent to stand trial." Fergusen v. State, 124 Nev. ___, ___, 192 P.3d 712, 718 (2008).

Nevada's governing statutes, as interpreted by this court, set up a two-stage procedure that the district court must follow whenever the question of a defendant's competency has been raised: First, the district court must evaluate if there is any doubt as to the defendant's competency. If there is, the court must suspend the proceedings and hold a hearing to fully consider the doubts. Olivares, 124 Nev. at ___, 195 P.3d at 868 (citing NRS 178.405(1)); see also Scarbo, 125 Nev. at ___, 206 P.3d at 977. Second, if as a result of fully considering those doubts, the district court finds there is reasonable doubt regarding a defendant's competency, the district court must order a full competency evaluation pursuant to the provisions of NRS 178.415. Olivares, 124 Nev. at ___, 195 P.3d at 869; Scarbo, 125 Nev. at ___, 206 P.3d at 977.

This court's standard for requiring a suspension of proceedings to consider the question of competency was arguably not met here. Defense counsel, in making their oral motion shortly after the trial proceedings began, offered no arguments or evidence not previously considered by Judge Togliatti in a number of hearings during the preceding five weeks, including the competency hearing sixteen days earlier. At that competency hearing, Judge Togliatti considered Humphreys's medical records, defense counsel's arguments, and her own

observations of Humphreys, and concluded that he was competent to stand trial under the Dusky standard.³

Judge Bell appropriately considered and gave credit to Judge Togliatti's findings regarding Humphreys's competency sixteen days earlier, though he was not able to rely solely on Judge Togliatti's decision. In addition, as the trial judge, Judge Bell was required to independently evaluate Humphreys's competency on an ongoing basis in light of the medical records, the reasoning and recent timeframe of Judge Togliatti's findings, any new evidence proffered relevant to Humphreys's competency that Judge Togliatti did not receive, and importantly and essentially, Judge Bell's own observations of Humphreys's behavior and thinking, which the record, while terse, shows he did. Judge Bell appears to have been aware of and to have considered Humphreys's mental health records, as well as Judge Togliatti's recent findings with respect to the question of competency. Judge Bell further appears to have concluded, based on his own interactions with Humphreys, that Humphreys's oppositional conduct

³Humphreys does not contend that Judge Togliatti's finding of competence on February 25, 2008, was in error. Rather, Humphreys's briefs do not discuss Judge Togliatti's findings, let alone acknowledge that Judge Bell appeared to be well aware of, and considered them, in reaching the decision he did.

We also note that Judge Togliatti's finding of competency was not doubt-free—in fact, she continued to have significant, residual concerns about Humphreys's mental health. However, our review of the record leads us to conclude that whether by express findings or by implication, Judge Togliatti continued to find that Humphreys was competent to stand trial, until and including her last hearing with Humphreys on March 6, 2008, just six days before the start of the trial in Judge Bell's court.

in the courtroom and with his counsel was the result of an unwillingness to assist in his own defense rather than an inability to assist—a finding consistent with Humphreys’s psychological assessments in the previous year, and Judge Togliatti’s review of the question of competency just sixteen days earlier. And, importantly, defense counsel introduced no evidence relevant to the question of Humphreys’s competency that Judge Togliatti had not considered in making her determination of competency.

While the record is replete with evidence of Humphreys’s oppositional behavior, and the difficulty that presented to his counsel, there was scant evidence directed specifically to the question of whether he was competent under the Dusky standards. For example, Humphreys’s counsel, both at trial and in their briefs here, have not alleged that any medical examiner, whether appointed by the state, or independently engaged by Humphreys, found him incompetent.⁴ By contrast, Judge Glass, in finding that Humphreys was competent in August 2007, did so based on the medical diagnoses of Humphreys’s medical examiners at Lakes Crossing—all three of whom found Humphreys to be competent. Humphreys was further evaluated in the summer of 2008, after trial and before sentencing, and both doctors, again, found him to be competent.

⁴While Judge Glass found Humphreys to be incompetent in May of 2007, a review of the hearing minutes and transcript indicates that her finding of incompetency was not based on medical testimony—rather it was a necessary finding in order to have Humphreys committed to Lakes Crossing so that the statutory medical health evaluations could be conducted, as he had refused to be evaluated by one of the two required mental health examiners.

Further, and significantly, at no point during the proceedings below did defense counsel offer any medical assessments, either from a review of Humphreys's medical records or by an independent evaluator, directed to whether Humphreys was then incompetent under the Dusky standard—rather they relied almost exclusively on their own anecdotal observations about their difficulty in representing Humphreys, and that Humphreys was no longer taking his medication, matters identical to those tendered to and reviewed by Judge Togliatti just sixteen days before trial began.

Also, defense counsel never proffered a theory based on medical testimony or Humphreys's medical records that described Humphreys as having a psychiatric condition where competency or incompetency might vary according to treatment, circumstances, or progression of the disease. Nor, in offering as evidence of incompetency that Humphreys was no longer taking his psychiatric medication, did defense counsel ever proffer any medical evidence that tied his taking that medication to his maintenance or loss of competency.

In sum, the evidence offered went to Humphreys's oppositional conduct, lack of self-control, and unwillingness to work with his counsel. This proof, while it may establish unwillingness to assist in the defense, does not, without more, meet the Dusky standards of inability to rationally comprehend the proceedings or inability to assist counsel.⁵

⁵This court's precedent, as well as that from other jurisdictions, suggests that oppositional conduct at trial and during trial preparation by a defendant does not support a finding of inability to assist in his defense under Dusky when his conduct is clinically attributable only to a personality disorder—despite often significant impairment of his defense.

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Thus, we conclude that the district court did not abuse its discretion in denying Humphreys's request for a continuance to evaluate competency.

None of Humphreys's other contentions on appeal rise to the level of reversible error

None of Humphreys's other contentions rise to the level of reversible error.

Humphreys's conviction on counts of making terrorist threats and aggravated stalking did not violate the double jeopardy clause of the United States Constitution. The double jeopardy clause prohibits multiple punishments for the same offense. Whalen v. United States, 445 U.S. 684 (1980). Multiple punishments for the same offense are identified when one conviction is for a lesser included offense of another conviction. Blockburger v. United States, 284 U.S. 299 (1932); McIntosh v. State, 113 Nev. 224 (1997). "The general test for determining the existence of a lesser included offense is whether the offense in question cannot be committed without committing the lesser offense." Id. at 226, 932 P.2d at 1073. Aggravated stalking is not a lesser included offense of making terrorist threats, as making terrorist threats can be committed without also committing aggravated stalking. Humphreys's conviction on both

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See, e.g., Colwell v. State, 118 Nev. 807, 813, 59 P.3d 463, 468 (2002); United States v. Kokoski, 865 F. Supp. 325, 338-39 (S.D.W.Va. 1994); United States v. Turner, 602 F. Supp. 1295, 1304 (S.D.N.Y. 1985). The mental health professionals who evaluated Humphreys in 2007, as well as the ones who evaluated him in 2008, appear to have concluded that Humphreys's oppositional conduct was the result of a personality disorder rather than some other form of mental disorder.

counts also does not violate redundancy principles as those convictions were based on separate acts on his part—even if those separate acts occurred, at times, during the same telephone call. McIntosh v. State, 113 Nev. 224, 226, 932 P.2d 1072, 73 (1997); Salazar v. State, 119 Nev. 224, 227-28, 70 P.3d 749, 751-52 (2003).

Humphreys also argues that count one—making terrorist threats—was statutorily and constitutionally defective because it stated that Humphreys threatened to blow up the Hard Rock Hotel, but did not specify any individual person Humphreys threatened. However, the statute requires an “intent to . . . [i]njure, intimidate or alarm any person,” which was alleged in count one, and does not require that the threat be made to a specific identified person as a separate element of the crime. NRS 202.448(1)(a).

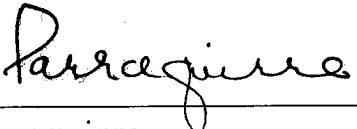
Humphreys further contends that Detective Umberger testified as an undisclosed expert witness in violation of the expert disclosure requirements in NRS 174.234 and 174.235. However, Humphreys did not raise this objection at trial. Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 71 (2008) (“Generally, the failure to object [at trial] precludes appellate review absent plain error.”). Humphreys has failed to demonstrate that the error was plain and affected his substantial rights. Furthermore, a careful reading of Umberger’s testimony suggests that he testified as a fact witness to events relevant to this case.

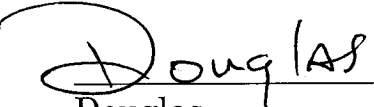
With respect to Humphreys’s contention that testimony by witnesses who were not named in the amended information was inadmissible prior bad act testimony in violation of NRS 48.045(2), the record indicates this testimony was offered to corroborate the testimony of the complaining witnesses, and thus it was not offered to prove character

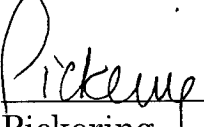
or propensity. Similarly, considered in context, see Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001), the prosecutor's mention of John Lennon's killer appears to have illustrated a disputed element of the charged crime—that it was not necessary for the state to prove that a stalking victim knows that he or she is being followed by the defendant—and, if error, was harmless.

We reject Humphreys's claim that the court erred in its jury instructions, as we see no basis to conclude that it abused its broad discretion in formulating those instructions. Nolan v. State, 122 Nev. 363, 376, 132 P.3d 564, 572 (2006). We also conclude that Humphreys's right to a speedy trial was not violated as there was good cause for his trial to start six weeks after the date required by NRS 178.556's 60-day rule. Lastly, we conclude that substantial evidence supported Humphreys's conviction for both making terrorist threats and aggravated stalking.

For the foregoing reasons, we ORDER the judgment of the district court AFFIRMED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 7, 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