

IN THE SUPREME COURT OF THE STATE OF NEVADA

CORNELIUS EDWARD BROWN, SR.,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 53891

**FILED**

**FEB 03 2011**

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of lewdness with a minor under the age of 14 and five counts of sexual assault of a minor under the age of 14. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

The district court sentenced appellant Cornelius Edward Brown, Sr., to life in prison with the possibility of parole after 10 years for 3 counts of lewdness with a minor under the age of 14; and life in prison with the possibility of parole after 35 years for 5 counts of sexual assault. Brown appeals his conviction on multiple grounds: (1) the district court's failure to grant his motions for continuance, (2) the district court's granting of his motion to dismiss counsel and allowing him to represent himself, (3) the district court's denial of his motion for mistrial, (4) failure to admit evidence, (5) prosecutorial misconduct, (6) the district court's refusal to give the jury his proffered instruction, and (7) cumulative error. Because we find no error occurred in this case, we affirm the judgment of conviction.

Denial of motions for continuances

Brown argues that he was unable to adequately prepare for trial because he did not receive the victim's school and MySpace records in advance and he did not have a DNA expert prepared to testify. Thus, he

argues, the district court erred in denying his motions for continuances. We review a district court's decision to deny a motion for continuance for an abuse of discretion. Higgs v. State, 126 Nev. \_\_\_, \_\_\_, 222 P.3d 648, 653 (2010). A request for a continuance is evaluated under the circumstances of each case; however, if the continuance was denied, the appellant must demonstrate that he or she was prejudiced by the district court's decision. Id. (citing Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007)). Because Brown has failed to demonstrate prejudice, we conclude that the district court did not abuse its discretion in denying his motions for continuance.

#### School and MySpace records

At a pretrial hearing, Brown complained that he did not receive the victim's school and MySpace records from his investigator and moved for a continuance. The State objected to the motion, asserting that the records were irrelevant and inadmissible character evidence that would not be able to be used to attack the victim's credibility. Despite the objection, the State offered to obtain the school records in order to avoid any delays, and Brown indicated that he would be prepared to proceed when he received the records. After the school records were provided, the district court reviewed the records with the parties and determined that nothing within the documents challenged the victim's credibility. Because the school records were irrelevant and inadmissible to impeach the victim's credibility, we conclude that Brown was not prejudiced by the district court's denial of his motion for continuance.

Additionally, Brown has failed to demonstrate prejudice from not receiving information regarding the victim's MySpace page. Brown had adequate familiarity with the contents of the MySpace page to effectively cross-examine the victim regarding inaccurate reflections of her

age on her MySpace page. Therefore, we conclude that the district court did not abuse its discretion when it denied Brown's motion for a continuance.

#### DNA expert

During trial, Brown again moved for a continuance in order to obtain a DNA expert, which the district court denied. Brown argues that he was unprepared and prejudiced by the district court's denial of a continuance in order to obtain a DNA expert witness to counter the State's evidence at trial. We disagree.

Brown was notified of the State's intent to present DNA evidence nearly four months prior to trial and had been repeatedly apprised by the court that he would be held to the same standards for preparation and execution of court proceedings as an attorney. Additionally, while entertaining Brown's motion for a continuance, the district court clarified that the basis for Brown's challenge to the DNA evidence was not that the DNA testing was inaccurate but, rather, that someone else intentionally deposited his DNA on the victim's clothing.

Brown offers no reason for why he failed to obtain a DNA expert prior to trial, despite having been put on notice months earlier that the State intended to introduce DNA evidence. A district court's denial of a motion for continuance is not an abuse of discretion if the delay is the defendant's fault. See Rose, 123 Nev. at 206, 163 P.3d at 416. Moreover, because Brown's challenge to the DNA evidence did not invoke the accuracy of the DNA testing, additional expert testimony would have been inconsequential. Thus, Brown has failed to demonstrate that any prejudice resulted from the district court's denial of his motion for continuance.

### Brown's right to self-representation

Next, Brown argues that the district court should not have granted his motion to dismiss his counsel, and the court did not adequately evaluate his mental health before allowing him to represent himself. The Nevada Constitution and the Sixth Amendment of the United States Constitution grant a criminal defendant the right to self-representation. Vanisi v. State, 117 Nev. 330, 337, 22 P.3d 1164, 1169 (2001). When confronted with a motion to dismiss counsel, the district court is required to conduct a Faretta canvass<sup>1</sup> in order “to apprise ‘the defendant fully of the risks of self-representation and of the nature of the charged crime so that the defendant’s decision is made with a “clear comprehension of the attendant risks.’”” Hooks v. State, 124 Nev. 48, 54, 176 P.3d 1081, 1084 (2008) (quoting Johnson v. State, 117 Nev. 153, 164, 17 P.3d 1008, 1016 (2001) (quoting Graves v. State, 112 Nev. 118, 124, 912 P.2d 234, 238 (1996))).

To invoke the right of self-representation, the defendant must satisfy the court that his or her decision was made “knowingly, intelligently, and voluntarily.” Id.; Vanisi, 117 Nev. at 337-38, 22 P.3d at 1169-70. SCR 253(1) additionally provides that “the court should make a specific, penetrating and comprehensive inquiry of the defendant to determine whether the defendant understands the consequences of his or her decision to proceed without counsel.” It is irrelevant that the defendant does not possess the same skills as an attorney so long as “the record . . . establish[es] that the accused was ‘made aware of the dangers

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<sup>1</sup>See Faretta v. California, 422 U.S. 806 (1975).

and disadvantages of self-representation.” Vanisi, 117 Nev. at 338, 22 P.3d at 1170 (quoting Faretta v. California, 422 U.S. 806, 835 (1975)). Accordingly, when reviewing a district court’s decision to permit self-representation, we consider the canvass by the court and the record as a whole, and “[w]e give deference to the district court’s decision.” Hooks, 124 Nev. at 55, 176 P.3d at 1085.

Here, the record reflects that the district court conducted the required Faretta canvass and concluded that Brown sufficiently demonstrated that his choice to represent himself was knowingly, voluntarily, and intelligently made. During the canvass, Brown indicated that he understood the nature of the charges, acknowledged that he understood the potential penalties, and was apprised of the dangers of self-representation. Additionally, the record shows that Brown was able to articulate arguments, file motions citing relevant caselaw, and effectively object to inadmissible testimony. Because the district court thoroughly vetted Brown’s request to dismiss counsel through a Faretta canvass, and the record demonstrates Brown’s ability to formulate arguments and function according to trial procedures, we conclude that the district court did not abuse its discretion by granting Brown’s motion to dismiss counsel.

#### Denial of Brown’s motion for mistrial

Next, Brown asserts that the victim’s brother improperly testified by revealing Brown’s custodial status to the jury, and therefore, the district court should have granted his subsequent motion for mistrial. We disagree.

On redirect examination, the State was attempting to rehabilitate the brother from any alleged animosity between him and Brown:

Q: Did you want to come in and testify?

A: I didn't. I don't think—I don't think no man should be in jail at all, because I feel like that's just not the place to be. But it's decisions that you make and the actions that you take, that you do, and that's a consequence for that. And I believe that happened, sexual intercourse. Because that's not usual, they're laying—

In denying the motion, the district court determined that the testimony did not reveal Brown's custodial status. Despite this determination, the district court instructed the jury that it is their duty to determine only guilt or innocence and not to be preoccupied with the punishment.

A defendant has the right to appear before a jury with the appearance of innocence. Haywood v. State, 107 Nev. 285, 287, 809 P.2d 1272, 1273 (1991). "Informing the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom." Id. at 288, 809 P.2d at 1273. We review the district court's decision to deny a motion for mistrial for an abuse of discretion. Rose, 123 Nev. at 206-07, 163 P.3d at 417.

In this case, the victim's brother did not specifically refer to Brown's custodial status, but rather made a general statement about the possible consequences of Brown's actions. Furthermore, despite the fact that the brother did not specifically testify that Brown was in custody, the district court still instructed the jury on the presumption of innocence. Accordingly, we conclude that the district court did not abuse its discretion in denying Brown's motion for mistrial.

### Admission of evidence

Brown next argues that he was unable to present evidence in support of his theory of defense because he was prevented from asking questions concerning (1) the victim and her brother running away from home, (2) the victim and her brother having members of the opposite sex at the home, (3) whether the victim watched “dirty movies,” (4) the victim’s MySpace username, (5) the victim’s relationship with her mother, (6) whether other men came to the home, and (7) the victim’s mother’s potential bias or motive to lie due to resentment towards Brown.

“Trial courts have considerable discretion in determining the relevance and admissibility of evidence.” Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004) (quoting Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996), overruled on other grounds by McConnell v. State, 120 Nev. 1043, 1063, 102 P.3d 606, 620 (2004), as recognized in Bejarano v. State, 122 Nev. 1066, 1076 146 P.3d 265, 272 (2006)). Relevant evidence is evidence that has the tendency to make a fact more or less probable, and is generally admissible; however, the evidence is not admissible if the probative value of the relevant evidence is outweighed by potential prejudice. Chavez v. State, 125 Nev. \_\_\_, \_\_\_, 213 P.3d 476, 487 (2009); NRS 48.015; NRS 48.025; NRS 48.035. A district court’s decision to admit or exclude evidence is reviewed for an abuse of discretion. Chavez, 125 Nev. at \_\_\_, 213 P.3d at 487.

Here, allowing Brown to inquire as to whether the victim and her brother ran away from home, the victim’s relationship with her mother, and the victim’s MySpace username were not relevant to whether Brown sexually assaulted the victim. And Brown does not explain how such questions regarding any of these issues would have been relevant. Likewise, and in addition to being irrelevant, the issue of whether the

victim brought members of the opposite sex to the home would be inadmissible under NRS 50.090 as an attempt to present character evidence of previous sexual conduct of the victim. Thus, the district court did not abuse its discretion by refusing to allow Brown to pursue these questions.

Notwithstanding the irrelevant nature of the question, the district court permitted Brown to ask the victim whether she had watched dirty movies, which she answered in the negative. Later, Brown attempted to ask her whether she watched “porno[s],” but the district court sustained the State’s objection as having been asked and answered. Similarly, although there were some objections throughout the line of questioning, Brown was allowed to explore whether the victim’s mother possessed any bias toward Brown because he had previously brought another woman into her home.

Because the evidence Brown sought to admit through his questioning of the victim and her mother was objected to as having been asked and answered or was irrelevant, we conclude that the district court did not abuse its discretion by refusing to admit the evidence.

#### Prosecutorial misconduct

Next, Brown asserts that the State committed misconduct by disparaging his defense theory that the DNA evidence was contaminated. In its closing argument, the State referenced Brown’s contamination theory:

But what else has to happen? Here’s the interesting part. How did they get—if they’ve got this big conspiracy going, how did they get this guy’s sperm? Let’s think about it for a minute. Because he’s going to stand up and tell you that somehow, some way there’s contamination or



something strange happened with this 12 and 15-year-old.

Well, either there's a lot of the defendant's sperm just flying around that house, or this 12-year-old girl is some sort of fertility expert and has a needle to penetrate his testicles to extract sperm from his vas deferens inside his genitals. And so somehow they get his sperm that way and then come back, preserve it and then decide hey, this is just the perfect day, July 14th. Let's set him up. We've extracted this sperm or his sperm's flying around the house, we've gathered it up. Let's go smear it right in the crotch of her panties. He's going to stand up and he's going to tell you that's possibly how some of these things took place.

Prejudicial prosecutorial misconduct occurs when “a prosecutor’s statements so infected the proceedings with unfairness as to result in a denial of due process.” Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005). We must examine the context in which a prosecutor’s statements were made and not overturn a conviction “unless the misconduct is ‘clearly demonstrated to be substantial and prejudicial.’” Miller v. State, 121 Nev. 92, 99, 110 P.3d 53, 58 (2005) (quoting Sheriff v. Fullerton, 112 Nev. 1084, 1098, 924 P.2d 702, 711 (1996)).

Although Brown failed to object, we will consider prosecutorial misconduct, under plain-error review, “if the error either: (1) had a prejudicial impact on the verdict when viewed in context of the trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings.” Gaxiola v. State, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) (quoting Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002)); NRS 178.602. The burden rests with Brown “to show actual prejudice or a miscarriage of justice.” Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

The State's closing argument directly challenged Brown's claim that the DNA evidence was contaminated or purposely planted on the victim's clothing. Although the State's proposed theories were fairly dramatic, Brown failed to demonstrate how the State's closing argument was prejudicial or a miscarriage of justice. Thus, we conclude that this challenge does not rise to the level of plain error and reversal is not warranted.

#### Jury instruction

On the last day of trial, Brown proposed the following jury instruction:

You must acquit on count [\_\_\_], [\_\_\_\_\_] unless it is patently unreasonable to believe that the DNA evidence was a result of cross-contamination; it is patently unreasonable for you to believe the victim lied; it is patently unreasonable for you to believe that the result of the medical examination conducted upon the alleged victim indicated sexual activity occurred.

Brown offered no case authority for this instruction, specified no count to which it applied, and provided no further argument. On appeal, Brown argues that the district court erred by not giving the jury his proposed jury instruction.

"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). The district court abuses its discretion if "[its] decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id. (quoting Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). However, the district court is justified in "refus[ing] an instruction when the law in that instruction is adequately covered by

another instruction given to the jury.” Rose, 123 Nev. at 205, 163 P.3d at 415 (quoting Doleman v. State, 107 Nev. 409, 416, 812 P.2d 1287, 1292 (1991)).

Here, the district court evaluated Brown’s proposed jury instruction, determined that it was unsupported by any case authority and was an inaccurate statement of the law, and that any legal elements of the instruction were already covered by other instructions. We agree and thus conclude that the district court did not abuse its discretion by refusing give Brown’s proposed instruction to the jury.

Cumulative error

Finally, Brown asserts that cumulative error violated his right to a fair trial. Because, as discussed above, there was no error, and thus no error to cumulate, we conclude that no relief is warranted.

Having considered Brown’s claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Douglas, C.J.  
Douglas

Hardesty, J.  
Hardesty

Pickering, J.  
Pickering

cc: Hon. David B. Barker, District Judge  
Attorney General/Carson City  
Clark County District Attorney  
Law Office of Jeannie N. Hua, Inc.  
Eighth District Court Clerk