IN THE SUPREME COURT OF THE STATE OF NEVADA

ROMMIE MOSS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54712

FILED

JUL 19 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 two counts of attempted murder with the use of a deadly weapon, and one count each of discharging a firearm out of a motor vehicle and discharging a firearm at or into a structure. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Evidence of Traffic Stop

Appellant Rommie Moss contends that the district court erred by denying his motion to exclude evidence of a prior traffic stop. The district court held a hearing on the matter and determined that evidence of the traffic stop could be admitted. However, our review of the record does not demonstrate that any such evidence was admitted at trial. Accordingly, we conclude that this contention is moot, and we need not address it. See University Sys. v. Nevadans for Sound Gov't, 120 Nev. 712, 720, 100 P.3d 179, 186 (2004) (the court's duty is to decide actual controversies and not to render opinions upon moot questions which cannot affect the matter before it).

Jail Calls

Moss contends that the district court erred by admitting statements made during phone calls he placed while in jail. We review the

district court's decision to exclude or admit evidence for an abuse of discretion. Ramet v. State, 125 Nev. ___, ___, 209 P.3d 268, 269 (2009). However, if a defendant fails to object to the admission of evidence, we review the district court's decision for plain error. Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

First, Moss alleges that the calls contained numerous improper references to his in-custody status including statements about bail, the initial salutation, statements about potential visitors, and the background noise of the jail. See Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) (references to a defendant's in-custody status are improper). The redacted version of the calls did not contain any references to bail or the detention center's salutation. Further, the record before this court does not indicate that Moss objected to the calls based on statements about visitors and we conclude that Moss has failed to demonstrate that the district court plainly erred by declining to exclude the calls on that basis. Finally, Moss has failed to include audio recordings of the calls in the appendix or have them transmitted to this court, and we are therefore unable to determine whether the district court abused its discretion by failing to exclude the calls based on background noise. See Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) (it is appellant's responsibility to provide this court with the portions of the record necessary to resolve the issues raised on appeal).

Moss also alleges that the State's introduction of the calls as "jail calls" infringed on his right to the indicia of innocence. See Haywood, 107 Nev. at 288, 809 P.2d at 1273. We agree that this statement was improper. See id. However, Moss did not object on this basis and we conclude that he has failed to demonstrate that his substantial rights were affected. See id.

Second, Moss contends that the district court erred by admitting the statements on the calls because they were an inappropriate commentary on his defense and shifted the burden of proof. See Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 882-83 (1996). We conclude that Moss has failed to demonstrate how the introduction of his statements constituted a commentary on his defense or shifted the burden of proof. To the extent Moss contends that the district court erred by admitting the calls because they were not indicative of a consciousness of guilt or inconsistent with innocence, see Abram v. State, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979) ("[d]eclarations made after the commission of the crime which indicate consciousness of guilt, or are inconsistent with innocence" may be admissible as relevant to the issue of guilt), we conclude that Moss has failed to demonstrate an abuse of discretion.

Third, Moss alleges that the district court erred by admitting the call between him and Lontisha Harrison because the statements made during the call constituted hearsay. We disagree. Moss' own statements during the calls were clearly not hearsay. See NRS 51.035(3)(a). Regarding Harrison's statements, it does not appear from the record before this court that Moss objected to the admission of her statements on a hearsay basis, and we conclude that Moss has failed to demonstrate plain error. Cf. Wade v. State, 114 Nev. 914, 918, 966 P.2d 160, 162-63 (1998) (recorded statements of an unavailable confidential informant offered for the limited purpose of providing a context for the defendant's statements on the same recording are not hearsay), modified on rehearing by 115 Nev. 290, 986 P.2d 438 (1999).

Conversely, Moss seems to contend that the district court erred by excluding certain statements on the calls that demonstrated the bias of a witness because the statements could have been used to impeach

that witness. Moss does not explain how the district court erred by excluding the statements and does not offer any citation in support of this assertion. Therefore, we decline to address this contention. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (this court need not address issues presented without relevant authority and cogent argument).

Motion to sever

Moss contends that the district court erred by denying his motion to sever his trial from his codefendant's. "[T]he decision to sever a joint trial is vested in the sound discretion of the district court and will not be reversed on appeal unless the appellant carries the heavy burden of showing that the trial judge abused his discretion." Chartier v. State, 124 Nev. 760, 764, 191 P.3d 1182, 1185 (2008).

Moss' defense that he was not present at the shooting was antagonistic to the codefendant's defense that he was not present and Moss was the shooter. However, "mutually antagonistic defenses are not prejudicial per se," Marshall v. State, 118 Nev. 642, 647, 56 P.3d 376, 379 (2002); a defendant must also demonstrate that the joint trial "prevented the jury from making a reliable judgment regarding guilt or innocence" or compromised a specific trial right. Id. at 646, 56 P.3d at 380. Moss alleges that he was prejudiced by the joinder because he was placed in the position of "snitching" on the codefendant and evidence which demonstrated a witness' bias against Moss was excluded because it tended to incriminate the codefendant. We disagree. Moss has not demonstrated that his ability to testify was infringed upon by the joint trial. Further, the record does not support Moss' contention that the statements alleged to demonstrate bias were excluded because they incriminated the codefendant. Accordingly, we conclude that Moss has failed to

demonstrate that the district court abused its discretion by denying the motion to sever.

Jury instruction

Moss complains that the district court erred by declining to give his proposed jury instruction on self-defense. This court reviews the district court's decision regarding jury instructions for judicial error or an abuse of discretion. Funderburk v. State, 125 Nev. ___, ___, 212 P.3d 337, 339 (2009). Moss has failed to provide a copy of the proposed instruction for this court's review. Accordingly, we are unable to address this claim. See Thomas, 120 Nev. at 43 & n.4, 83 P.3d at 882 & n.4.

Having considered Moss' contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Kathy A. Hardcastle, District Judge
Legal Resource Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk