IN THE SUPREME COURT OF THE STATE OF NEVADA

KEITH R. CURRIE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54795

FILED

JUL 15 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
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DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of voluntary manslaughter with the use of a deadly weapon and one count of discharging a firearm out of a motor vehicle. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Recusal

Appellant Keith Currie contends that District Court Judge Barker erred by not recusing himself after receiving ex parte communications from the victim's family. Currie filed a motion for recusal, Judge Barker filed an affidavit in response to the motion, and Senior District Court Judge Stewart Bell heard and determined the question of Judge Barker's recusal. See NRS 1.235. Judge Bell denied Currie's motion after finding that (1) Judge Barker did not see the e-mails and letter and disclosed what he had heard about them, (2) the e-mails and letter would not affect Judge Barker's ability to be fair and impartial, and (3) Judge Barker indicated that he would be fair and impartial. We conclude that Judge Bell's findings of fact are supported by substantial evidence, see Carr-Bricken v. First Interstate Bank, 105 Nev. 570, 573-74,

779 P.2d 967, 969 (1989), and that Judge Barker did not err in refusing to recuse himself.

Changing evidentiary rulings

Currie contends that the district court erred by changing its evidentiary rulings between his first and second trials and allowing expert ballistic testimony and evidence of his marijuana use, and he argues that the State should not benefit from a mistrial that it caused. We note that (1) the record does not support Currie's contention that the State purposefully caused the mistrial, (2) the district court was not bound by evidentiary rulings made during an invalid proceeding, see Carlson v. Locatelli, 109 Nev. 257, 260, 849 P.2d 313, 315 (1993) (defining a mistrial as an invalid proceeding), and (3) the district court conducted a Petrocelli hearing before ruling on the evidence of Currie's marijuana use, see Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996), and we conclude that Currie has not demonstrated that the district court's evidentiary rulings constitute an abuse of discretion, see Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

Hearsay

Currie contends that the district court erred by refusing to admit a deceased witness's voluntary police statement into evidence. The witness's statement contained the hearsay statement of another declarant. Currie claims that the witness's statement "offered strong assurances of accuracy" and the declarant's statement was "relevant and constituted the main thrust of [his] defense" and fell within the "then existing state of mind" exception to the hearsay rule. See NRS 51.105(1); NRS 51.315; Buff v. State, 114 Nev. 1237, 1246, 970 P.2d 564, 569 (1998). We conclude that

Currie has not demonstrated that the statements were admissible under exceptions to the hearsay rule, see NRS 51.067; Tabish v. State, 119 Nev. 293, 309-11, 72 P.3d 584, 595 (2003) (the state of mind exception to the hearsay rule applies only to the declarant's state of mind); Miranda v. State, 101 Nev. 562, 566, 707 P.2d 1121, 1123-24 (1985) (witness statements made to police officers are hearsay and must fall under a separate and distinct exception to the hearsay rule), implicitly overruled on other grounds as recognized by Bejarano v. State, 122 Nev. 1066, 146 P.3d 265 (2006), and therefore Currie has not shown that the district court's evidentiary ruling constituted an abuse of discretion, see Mclellan, 124 Nev. at 267, 182 P.3d at 109.

Motions for mistrial

Currie contends that the district court erred by refusing to grant a mistrial after discovering that two of the jurors were married to each other. The married jurors were questioned and stated that they had not discussed the case with each other and that they were able to independently examine and consider the evidence, draw their own conclusions, and discuss the case during deliberations. Currie declined the district court's suggestion to remove one or both of the jurors and use the alternate jurors instead and the district court denied Currie's subsequent motion for a mistrial. See Viray v. State, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005) (in appropriate circumstances the district court can replace a juror with an alternate juror instead of declaring a mistrial). Because Currie had ample opportunity to learn of the jurors' marital relationship during voir dire, has not shown that the presence of the married jurors deprived him of a fair and impartial jury, and has not cited any law that prohibits married couples from being empaneled on the

same jury, we conclude that he has not demonstrated that the district court abused its discretion by denying his motion for a mistrial. See Ledbetter v. State, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006).

Currie also contends that the district court erred by refusing to grant a mistrial after the State violated a motion in limine ruling that excluded evidence that the gun was unregistered. Currie requested a mistrial after the State provided the jury with transcripts and played a recording of a police interview that indicated that a detective asked Currie whether the gun was registered. The district court noted that Currie answered the question by saying "I'm only 19 . . . I got it from a friend," observed that the jury's inquiry was not focused on whether the possession of the gun was illegal, and found insufficient grounds for a mistrial. We conclude that Currie has not demonstrated that the district court abused its discretion by denying his motion for a mistrial. See Ledbetter, 122 Nev. at 264, 129 P.3d at 680.

Jury instructions

Currie contends that the district court erred by failing to individually tailor the self-defense instructions and allowing a "flight" instruction despite the fact that he turned himself in within a few hours of the shooting. "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 record reveals that the district court considered the State's proposed self-defense instructions individually and determined that they were all appropriate, see Runion v. State, 116 Nev. 1041, 1051, 13 P.3d 52, 58-59 (2000), and it specifically found that the State presented sufficient evidence to support a flight instruction, see

Rosky v. State, 121 Nev. 184, 199, 111 P.3d 690, 699-700 (2005). We conclude that Currie has not demonstrated that the district court abused its discretion or otherwise erred in settling the instructions.

Motions for new trial

Currie contends that the district court erred by not granting him a new trial based on juror misconduct during deliberations. Currie claims that a juror committed misconduct by sharing his specialized knowledge of the modified vehicles driven by handicapped people. We note that the juror twice disclosed his experience with handicapped people during voir dire, see Meyer v. State, 119 Nev. 554, 571, 80 P.3d 447, 459-60 (2003) (issues concerning specialized knowledge or expertise may be dealt with during voir dire), his written note to the district court asking whether he could share his life experiences during deliberations went unanswered, and he subsequently determined that the jury instructions permitted him to share his life experiences. During deliberations, the juror informed the other jurors that his handicapped friend's car had hand-controls, described what they looked like, and explained how they work. We conclude that this information was used "only to interpret the exhibits and testimony" and "not as independent evidence," it was not extrinsic evidence, and the juror did not commit misconduct by sharing it during deliberations. See id. at 568, 571, 80 P.3d at 458, 459. Accordingly, Currie has failed to demonstrate that the district court abused its discretion by denying his motion for a new trial. See id. at 561, 80 P.3d at 453.

Currie also contends that the district court erred by not granting him a new trial based on an intentional disruption that was attributable to the victim's family. During Currie's closing argument, an

observer sitting with the victim's family and friends suffered a seizure. The district court immediately admonished the jurors and ordered the bailiff to escort them out of the courtroom. The district court then conducted a brief hearing, heard that the observer suffered a real seizure and was not trying to disrupt the trial, and denied Currie's motion for a mistrial. When the trial resumed, the district court admonished the jurors that a courtroom observer had fallen ill, this was the reason for the recess, and this incident should not influence their consideration and attention to the evidence and arguments of counsel. Following a post-verdict hearing, the district court denied Currie's motion for a new trial. We conclude that any prejudice arising from this disruption was minimal, see Johnson v. State, 122 Nev. 1344, 1358-59, 148 P.3d 767, 777 (2006), and that Currie has not demonstrated that the district court abused its discretion by denying his motion for a mistrial, see Ledbetter, 122 Nev. at 264, 129 P.3d at 680, or shown that he is entitled to a new trial as a matter of law, see NRS 176.515(1).

Presentence credit

Currie contends that the district court erred by refusing to award credit against his sentence for the time that he spent on house arrest. Currie is a paraplegic and he claims that his unique health problems necessitated medical care that the county jail could not provide and therefore his placement on house arrest was based on medical necessity and not on convenience. The district court heard argument on this issue, noted that it had viewed "the day in the life" video provided by the defense, found that Currie's reality on house arrest was Currie's reality before he committed the offenses, and ruled that Currie would be treated like any other defendant and awarded credit only for time actually

served in jail. We conclude that Currie has not demonstrated that the district court erred in this regard, see NRS 176.055(1); State v. Dist. Ct. (Jackson), 121 Nev. 413, 418-19, 116 P.3d 834, 837 (2005) ("house arrest does not constitute time 'actually spent in confinement' for which the duration of a sentence may be credited"), and we decline Currie's invitation to create an exception to our holding in Jackson.

Having considered Currie's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. David B. Barker, District Judge
Bailus Cook & Kelesis
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk