

IN THE SUPREME COURT OF THE STATE OF NEVADA

VALENTIN ZUNIGA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 58267

**FILED**

NOV 29 2012

ORDER OF AFFIRMANCE

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and discharging a firearm at or into a structure. Eighth Judicial District Court, Clark County; James M. Bixler, Judge.

Appellant Valentin Zuniga was convicted of murdering his former friend, Julian Roman. The charges stemmed from an incident in September 2009, in which Zuniga shot Roman at close range after Roman opened the front door of his home.

After Zuniga was bound over to the district court, a police investigator obtained a grand jury subpoena duces tecum in order to gain information from Zuniga's cell phone service provider. The subpoena covered historical cell-site-location information (CSLI) for all calls Zuniga made and received on the morning of Roman's murder. The CSLI listed the cell phone towers that transmitted calls to and from Zuniga's cell phone. The State called the custodian of records for Zuniga's cell phone provider to explain how CSLI works and what information could be gleaned from the records. In addition to the custodian of records' testimony, the police investigator testified using a map that he created based on the CSLI. Using this information at trial, the State was able to

show that Zuniga was in the vicinity of Roman's home, rather than at work, as Zuniga claimed, around the time of the murder.

The State also presented testimony of a number of lay witnesses who testified to witnessing the shooting or speaking to Zuniga regarding the murder before or after it occurred. Roman's girlfriend and several other eyewitnesses testified to seeing Zuniga's distinctively colored vehicle stopped in front of Roman's home. Five witnesses—Zuniga's friends, former friends, or acquaintances—testified to Zuniga's statements and telephone calls after Roman's death. The State also called the manager at Zuniga's place of employment to testify to the time that Zuniga arrived to work on the morning of the shooting. It then called one of Zuniga's friends to testify that Zuniga had asked to borrow a gun and asked the friend to get him bullets. Finally, the State called Edgar Santillan, Zuniga's cellmate at the Clark County Detention Center. Santillan testified to speaking to Zuniga regarding Roman's shooting, stating that Zuniga said that he went to Roman's house and shot Roman in the head, and also shot through the door after Roman shut the door.

A jury convicted Zuniga on all charges, and the district court sentenced Zuniga to life in prison without the possibility of parole, as well as to consecutive sentences of 48 to 72 months and 8 to 20 years on the discharge of a firearm at or near a structure and the deadly weapon enhancement, respectively. Zuniga now appeals his conviction. As the parties are familiar with the facts, we do not recount them further except as necessary to our disposition.

It was harmless error for the district court to admit the CSLI records improperly obtained through a grand jury

Zuniga contends that the State improperly obtained a grand jury subpoena for his CSLI records because there was no grand jury convened at the time, he had already been bound over to the district court, and consequently the subpoena was essentially an improper way for the State to obtain further evidence to be used at trial. The State replies by arguing that although a defendant has been charged with particular crimes, a grand jury can be used to inquire into charges that have not yet been filed.

“[This court] review[s] a district court’s decision to admit or exclude evidence for an abuse of discretion.” Ramet v. State, 125 Nev. 195, 198, 209 P.3d 268, 269 (2009). However, if there was error that did not affect the defendant’s substantial rights, it should be disregarded. NRS 178.598.

NRS 172.107 provides that “[a] district attorney shall not use a grand jury to discover tangible, documentary or testimonial evidence to assist in the prosecution of a defendant who has already been charged with the public offense by indictment or information.” In the federal grand jury system, “prosecutors cannot utilize the grand jury solely or even primarily for the purpose of gathering evidence in pending litigation. Once a defendant has been indicted, the government is precluded from using the grand jury for the ‘sole or dominant purpose’ of obtaining additional evidence.” United States v. Moss, 756 F.2d 329, 332 (4th Cir. 1985) (citations omitted) (quoting United States v. (Under Seal), 714 F.2d 347, 350 (4th Cir. 1983)). Further, the defendant bears the burden to show that the prosecutor’s “sole or dominant purpose [for] seeking the


evidence post indictment is to prepare for . . . trial.” In re Grand Jury Proceedings, 632 F.2d 1033, 1041 (3d Cir. 1980). “In the absence of a contrary factual showing, the grand jury proceedings are entitled to a presumption of lawfulness and regularity.” Id.

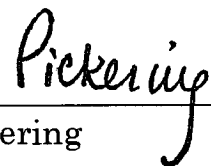
The evidence obtained pursuant to the subpoena was Zuniga’s phone records pertaining to the hours surrounding Roman’s murder. Zuniga had already been charged with Roman’s murder at the time these records were subpoenaed. There is no evidence that the records were used for anything except proving Zuniga was in the area of Roman’s home on the morning of the shooting. It would be a stretch to say that these records could be used for any purpose other than to show Zuniga’s general location during the commission of the crime for which he was already charged. The circumstances of this case fit squarely within the “sole or dominant purpose” test. (Under Seal), 714 F.2d at 350 (quoting In re Grand Jury Proceedings, 632 F.2d at 1041).

Looking to Nevada’s provision regarding the use of a grand jury, the language of NRS 172.107 is clear: a grand jury cannot be used to assist the prosecution in obtaining evidence to be used against a defendant who has already been charged. We therefore give the statute its plain meaning. State v. Catanio, 120 Nev. 1030, 1033, 102 P.3d, 588, 590 (2004). Consequently, it was error to allow evidence obtained through the use of a grand jury subpoena issued after Zuniga had been charged and bound over to the district court. The error, however, was harmless

because evidence of his guilt was overwhelming, and any error did not affect Zuniga's substantial rights.<sup>1</sup> We therefore

ORDER the judgment of the district court AFFIRMED.<sup>2</sup>

 \_\_\_\_\_, J.  
Saitta

 \_\_\_\_\_, J.  
Pickering

 \_\_\_\_\_, J.  
Hardesty

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<sup>1</sup>We do not reach Zuniga's constitutional arguments regarding his Fourth Amendment expectation of privacy in the CSLI records because the record is not sufficiently developed to allow for our meaningful review. Even crediting Zuniga's arguments, any possible error did not contribute to the jury verdict because there was overwhelming evidence to support the verdict. See Ramet v. State, 125 Nev. 195, 199-200, 209 P.3d 268, 270 (2009) (concluding that error is harmless if it did not contribute to the verdict obtained).

<sup>2</sup>Zuniga's remaining contentions are: (1) the district court abused its discretion in allowing a detective to testify about a map that he created using the CSLI records, (2) the district court abused its discretion and deprived Zuniga of his right to confrontation when it precluded him from cross-examining a witness for the State regarding threats that the witness made to Zuniga's girlfriend's family, (3) the district court erred in allowing a medical examiner to testify, (4) the prosecutor committed prosecutorial misconduct during his opening and closing statements, (5) the district court erred in sentencing Zuniga to life without parole, and (6) cumulative error warrants reversal. We conclude that these contentions are without merit.

cc: Hon. James M. Bixler, District Judge  
Special Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk