IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW KAY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59175

FILED

NOV 15 2012

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary (count II) and malicious destruction of property (count IX), two counts of conspiracy to commit a crime (counts I, X), and six counts of grand larceny (counts III-VIII). Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Jury instruction

Appellant Andrew Kay contends that the district court erred by rejecting his proposed jury instruction on good faith because he did not believe he was committing a crime when he seized the property in question. Kay specifically argued below that his proposed instruction on intent appropriately addressed "accident" or "misfortune." The State argued that Kay's proposed instruction was not appropriate because it was too broad and did not apply equally to both the general and specific intent crimes he was charged with committing. The district court agreed with the State, rejected Kay's instruction, and provided the jury with several instructions setting forth the requisite intent necessary to commit the charged crimes, including an instruction addressing "ignorance" and "mistake of fact." We conclude that the district court did not abuse its

discretion by rejecting Kay's instruction. See Ouanbengboune v. State, 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009) ("This court reviews a district court's decision to issue or not to issue a particular jury instruction for an abuse of discretion.").

Proposed settlement agreement

Kay contends that the district court erred by admitting evidence of a proposed settlement agreement between himself and the victim in a related civil action. The State counters that it sought the admission of a paragraph on the first page of the unexecuted, proposed settlement agreement in order "to demonstrate Appellant's attempt to get [the victim] to sign off on Appellant's intent, in essence, to obstruct Appellant's criminal prosecution." See NRS 48.105(2). The district court initially agreed to allow the State to introduce only the first page of the agreement; however, defense counsel stated that he wanted the entire document admitted because "other parts of it . . . could become relevant." And in fact, Kay moved for the admission of the entire agreement during his cross-examination of the victim. When a defendant participates in an alleged error, he is "estopped from raising this claim on appeal because he invited the error." Rhyne v. State, 118 Nev. 1, 9, 38 P.3d 163, 168 (2002); Jones v. State, 95 Nev. 613, 618, 600 P.2d 247, 250 (1979). Therefore, because Kay acquiesced to the State's request to admit a portion of the proposed settlement agreement and ultimately introduced the entire document himself and moved for its admission, we conclude that he is estopped from raising this issue on appeal.

Conspiracy/inconsistent verdicts

Kay contends that because the jury found his two codefendants not guilty on all counts, his conviction on the two counts of

conspiracy must be reversed. And citing to Bolden v. State, 121 Nev. 908, 915, 124 P.3d 191, 196 (2005), overruled in part by Cortinas v. State, 124 Nev. 1013, 1026-27, 195 P.3d 315, 324 (2008), for support, Kay claims that because conspiracy as a theory of liability is therefore "legally erroneous," his conviction on the remaining counts (II-IX) must also be reversed because the jury returned a general verdict without specifying under which of the three alternative theories he was guilty

Initially, we note that the holding in Bolden relied on by Kay was specifically overruled in Cortinas, 124 Nev. at 1026-27, 195 P.3d at 324 (retreating from Bolden and holding that "harmless-error review applies when a general verdict may rest on a legally valid or a legally invalid alternative theory of liability"). Further, we have declined to adopt the rule of consistency in conspiracy cases and have held that inconsistent jury verdicts are valid even when they cannot be rationally reconciled. See Bollinger v. State, 111 Nev. 1110, 1116-17, 901 P.2d 671, 675-76 (1995); see also United States v. Powell, 469 U.S. 57, 65-66 (1984) (similarly addressing inconsistent verdicts in federal criminal cases). In U.S. v. Hughes Aircraft Co. Inc., 20 F.3d 974, 978 (9th Cir. 1994), the Ninth Circuit Court of Appeals stated that the acquittal of coconspirators does not necessarily indicate that the remaining defendant did not engage in an agreement to act with others. Based on the evidence presented in the instant case, the jury could have reasonably determined that Kay conspired with others even though his codefendants were acquitted. See U.S. v. Valles-Valencia, 823 F.2d 381, 382 (9th Cir. 1987) ("Each case must be examined carefully to see whether evidence of conspiring with others, known or unknown, was produced during the trial."). Therefore, we conclude that Kay's contention is without merit.

Prior bad acts/impeachment

Kay contends that the district court abused its discretion by granting the State's motion to admit evidence of a prior bad act, specifically, that he threatened to harm a witness, Doug Mangie, and his children if he testified against him. We disagree.

"A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed . . . absent manifest error." Somee v. State, 124 Nev. 434, 446, 187 P.3d 152, 160 (2008). In its motion, the State sought to admit evidence pertaining to Kay's threats to Mangie in order to show consciousness of guilt. See NRS 48.045(2). According to the district court minutes, the district court conducted a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), and allowed the State to introduce the evidence as an "admission by a party opponent" but precluded the State from arguing that the threats constituted a crime. We conclude that Kay failed to demonstrate that the district court abused its discretion by admitting the evidence in question. 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); cf. Evans v. State, 117 Nev. 609, 628, 28 P.3d 498, 512 (2001) (evidence that a defendant threatened a witness after a crime "is directly relevant to the question of guilt" and "is neither irrelevant character evidence nor evidence of collateral acts requiring a hearing before its admission").

Kay also contends that the district court's limitation on his right to impeach Mangie with testimonial evidence that Mangie attempted to dissuade a witness from testifying against him in his own unrelated

case was "incredible." Kay failed to support his claim with citation to the record, see NRAP 3C(e)(1)(C) ("Every assertion in the fast track statement regarding matters in a rough draft transcript or other document shall cite to the page and volume number, if any, of the appendix that supports the assertion."), and provide us with the relevant portions of the trial transcript, see Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("Appellant has the ultimate responsibility to provide this court with 'portions of the record essential to determination of issues raised in appellant's appeal.'" (quoting NRAP 30(b)(3))); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Kay also failed to offer any cogent argument or legal authority in support of his claim and therefore we need not address it. Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Prosecutorial misconduct

Kay contends that the State committed misconduct by charging a defense witness with a crime in order to render her unavailable to testify on his behalf. According to the district court minutes, the "Court stated she does not see any prosecutorial misconduct." And according to Kay, the district court denied his motion to dismiss based on the alleged prosecutorial misconduct.

Once again, Kay failed to include the relevant portion of the trial transcript in the appendix submitted on appeal; although transcripts submitted by the State contain much of the argument, the portion of the transcript containing the remaining arguments and the district court's specific ruling on the matter was not provided. We also note that on appeal, Kay again failed to offer any persuasive argument or relevant authority in support of his contention, see id., and when combined with

the inadequate record, we conclude that Kay failed to demonstrate that he is entitled to relief based on prosecutorial misconduct.

Kay also contends that the prosecutor committed misconduct by introducing testimonial evidence from a State witness that he knew, or should have known, was false. The evidence in question, however, was elicited by Kay during his cross-examination of the State's witness, and referred to again during the cross-examination of the same witness by counsel for Kay's codefendants. Therefore, Kay's contention that the prosecutor committed misconduct in this regard is belied by the record and without merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.[1]

_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Parraguirre

[1]Although we filed the fast track statement and appendix submitted by Kay, they fail to comply with the Nevada Rules of Appellate Procedure. As noted multiple times above, throughout Kay's fast track statement, he refers to matters in the record without specific citation to the appendix, see NRAP 3C(e)(1)(C); NRAP 28(e)(1), and the appendix does not contain all of the documents and transcripts necessary for the disposition of his appeal, see NRAP 30(b)(2). Counsel for Kay, Frank J. Cremen, is cautioned that the failure to comply with the briefing and appendix requirements in the future may result in the imposition of sanctions. See NRAP 3C(n); Smith v. Emery, 109 Nev. 737, 743, 856 P.2d 1386, 1390 (1993).

cc: Hon. Michelle Leavitt, District Judge
Cremen Law Offices
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk