IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS KIRK SUDBERRY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 60597

FILED

NOV 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY R. Malone
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of aggravated stalking and use or possession of explosives during the commission of the crime of aggravated stalking. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant Dennis Kirk Sudberry was convicted of aggravated stalking and use of an explosive device in that stalking charge in 2006. He appealed, and the judgment of conviction was vacated because Sudberry had been denied his right to counsel. Sudberry's case was remanded for a new trial. Sudberry v. State, Docket No. 55467 (Order of Reversal and Remand, September 29, 2010). In November of 2010, a hearing was held so that Sudberry could be appointed counsel. At this time, Sudberry invoked his right to a speedy trial. In December 2010, an attorney was inadvertently appointed—he was no longer accepting criminal trial appointments. The district court appointed another attorney in early January 2011 and scheduled a trial for May. In late January, Sudberry filed a proper person petition for a writ of habeas corpus in this court. We declined to exercise original jurisdiction and denied the petition. Sudberry v. State, Docket No. 57597 (Order Denying Petition, February 14, 2011). Sudberry filed a petition for rehearing which was also subsequently

denied. Sudberry v. State, Docket No. 57597 (Order Denying Rehearing, April 6, 2011). In late April, Sudberry filed a proper person motion for recusal of the trial judge. Several days later, Sudberry's counsel told the trial court that Sudberry was not cooperating with him. Sudberry requested that the trial court appoint him a new attorney. The trial court agreed and appointed a new attorney, who filed a notice of appearance in early June. In early August, the trial judge was recused and a new judge assigned. In September, a status conference was held with the new trial judge, and Sudberry's case was tried in December.

At trial, the victim testified that her marriage to Sudberry had deteriorated and they separated, after which Sudberry began calling and leaving notes for her. At first, the victim felt like the notes were an attempt to reconcile, but as time went on the notes and calls became more threatening. After about a month of leaving notes and making calls, Sudberry came to the victim's residence. He asked her for some paperwork he needed and threatened to blow up the house if he didn't get it. The next day, the victim received a pack of matches and a note from Sudberry referencing the prior day's conversation. Several weeks later, Sudberry called and left a message at the victim's residence to "check all exhaust pipes." Shortly after getting that message, the victim searched her driveway and found a piece of pipe with a turquoise wick. Thinking that it might be parts from a friend's diesel truck, she took it to him to determine what it was. Her friend believed it was a pipe bomb. They returned the pipe to the driveway and called the police, who arrived and removed the pipe. The victim and her friend were interviewed. Initially, they told the detective that the pipe had not been moved, but several weeks later admitted that they had moved it. The pipe was taken by the

bomb squad and detonated. Several officers from the bomb squad examined the remnants of the pipe and testified that it was a pipe bomb. Sudberry was convicted and raises seven issues on appeal.

First, Sudberry claims that insufficient evidence supports his conviction for possession of an explosive device during the commission of an aggravated stalking offense. The standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). Sudberry complains that there is insufficient evidence because the pipe bomb was small, no fingerprints or DNA was found, police could not identify what explosive material was used to make the bomb, the victim lied about moving the bomb, and no evidence was found at Sudberry's home indicating that he had made the bomb. But the defense was able to cross-examine the State's witnesses and expose these shortcomings and it is the jury's duty to determine the credibility and weight of conflicting testimony. See id. Based on the testimony of the victim, bomb squad technicians, and the evidence described above, we conclude that sufficient evidence exists to sustain Sudberry's conviction. See NRS 202.820.

Second, Sudberry contends that his constitutional rights to a speedy trial were violated. Four factors are weighed to determine whether a defendant's right to a speedy trial has been violated: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. Barker v. Wingo, 407 U.S. 514, 530 (1972). Here, the combined delay after the time Sudberry's case was

remanded was about thirteen months. The bulk of this delay was the result of Sudberry's own actions. Sudberry invoked his speedy trial rights but then delayed the trial by refusing to cooperate with his attorney, filing a pretrial writ petition, and filing a motion to recuse the trial judge. Sudberry claims that the delays were prejudicial because the State's explosives expert gained more experience which allowed him to opine during this trial that the pipe bomb was a "live device". Our balancing of the relevant factors leads us to conclude that Sudberry was not deprived of a speedy trial. See Bates v. State, 84 Nev. 43, 46, 436 P.2d 27, 29 (1968) (where procedural delays are either ordered for good cause or the result of the defendant's actions, the defendant's right to a speedy trial is not violated).

Third, Sudberry contends that he is entitled to a new trial because of jury misconduct. The question of misconduct and any resulting prejudice is ultimately a question of fact for the district court, and this court will not disturb the determination of the district court absent an abuse of discretion. Walker v. State, 95 Nev. 321, 323, 594 P.2d 710, 711 (1979). Here, the district court learned that a juror had failed to inform the court about an existing relationship with a deputy district attorney who was unconnected to this case. The juror and deputy district attorney were questioned by the district court and claimed that they were casually acquainted. They attended the same church and were in a weight-loss group. Their wives were friends and were "technically" involved in a business, but the deputy district attorney's wife "does nothing with [the business]." The juror testified that because he was merely a church acquaintance of the deputy district attorney, the relationship had not occurred to him during the voir dire process. And the juror testified that

he harbored no bias based on his acquaintance with the deputy district attorney. We conclude that the district court did not abuse its discretion when it found that the juror's concealment was unintentional and allowed him to remain on the jury panel.

Fourth, Sudberry contends that the district court made improper evidentiary rulings. Sudberry points to two pieces of evidence which he contends were admitted in error: a 2004 act of physical abuse against the victim and Sudberry's admission that he possessed a pipe bomb in 2003. And he contends that the district court erred by determining that his wire fraud conviction could be used to impeach him if he testified. "We review a district court's decision to admit or exclude evidence for an abuse of discretion." Mclellan v. State, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). As to the act of physical abuse and the possession of a pipe bomb, the district court held a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1333-34, 930 P.2d 707, 711-12 (1996). Here, the district court found that the abuse was relevant "to complete the story of the crime," to "show the defendant's intent," and "to show the state of mind of the victim." The district court found that Sudberry's previous possession of a pipe bomb was also relevant. Both pieces of evidence were documented in police reports and proven by clear and convincing evidence. And the district court found that neither piece of evidence was unduly prejudicial. Additionally, the district court provided proper limiting instructions contemporaneously with the admission of the prior act and at the close of evidence. See Tavares v. State, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001). Sudberry did not testify, but the district court was correct when it reasoned that his prior

wire fraud conviction could be used to question his veracity if he chose to testify because fraud convictions involve an element of dishonesty. See NRS 50.085(3); Butler v. State, 120 Nev. 879, 890, 102 P.3d 71, 79 (2004). We conclude that the district court did not abuse its discretion in admitting the two pieces of evidence and determining that the fraud conviction could be used for impeachment.

Fifth, Sudberry argues that the district court's decision not to provide his requested instruction on free speech was erroneous. Prior to the close of the trial, Sudberry requested a jury instruction that stated that he could only be convicted if his conduct was not protected by the First Amendment. The district court declined his request but instructed the jury that to convict Sudberry of aggravated stalking, it must find that he intended to cause his victim to "be placed in reasonable fear of death or substantial bodily harm." "This court reviews a district court's decision to issue or not to issue a particular jury instruction for an abuse of discretion." Ouanbengboune v. State, 125 Nev. 763, 774, 220 P.3d 1122, 1129 (2009). Here, the instruction given by the court required the jury to find that Sudberry's communications were "true threats," which are not protected by the First Amendment. Virginia v. Black, 538 U.S. 343, 359-60 (2003). Because the instructions given adequately protected Sudberry's First Amendment rights, the district court's decision to deny the requested instruction was not an abuse of discretion.

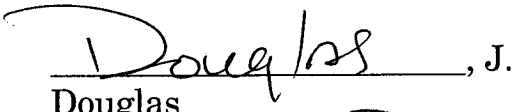
Sixth, Sudberry contends that the district court erred by not properly applying credit at sentencing. As noted above, Sudberry served a portion of his sentence during his first appeal; during that time he paroled out of his first sentence and started serving his second sentence. After the convictions were set aside he was retried and is now arguing that the

district court should have ordered the credit he earned from his original sentence to be divided so that he receives the benefit of his previously awarded parole from his original sentence. The district court reasoned that credit determinations, beyond determining the total days spent in confinement before conviction is the responsibility of the Department of Corrections. We agree. The Department of Corrections, not the district court, is authorized under NRS 209.4465 to compute sentence credit awards after sentencing. A claim concerning credit for time served is not appropriate on direct appeal, and should be filed as a writ of habeas corpus to NRS 34.720(2). See Griffin v. State, 122 Nev. 737, 742, 137 P.3d 1165, 1168 (2006) (observing that a petition for a writ of habeas corpus is the only remedy to challenge the computation of time served pursuant to a judgment of conviction); see, e.g., Mays v. District Court, 111 Nev. 1172, 1173, 901 Nev. 639, 640 (1995) (noting that defendant filed a post-conviction "motion for recalculation of sentence" after the Department of Corrections failed to properly credit his sentence following retrial). Accordingly, we will not consider Sudberry's claim here on direct appeal.

Seventh, Sudberry contends that cumulative error warrants reversal. Because we have rejected Sudberry's assignments of error, we conclude that his allegation of cumulative error also lacks merit. See U.S. v. Rivera, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

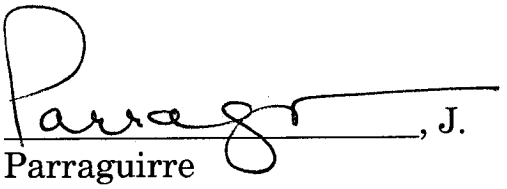
Having considered Sudberry's claims and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons



_____, J.
Parraguirre

cc: Hon. Janet J. Berry, District Judge
Karla K. Butko
Marc Picker, Esq., Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk