

IN THE SUPREME COURT OF THE STATE OF NEVADA

DOMONIC RONALDO MALONE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 61006

FILED

DEC 18 2013

ORDER OF AFFIRMANCE

TAMIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury trial, on two counts of first-degree murder and eleven other counts. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Jason McCarty and Appellant Domonic Malone kidnapped and murdered Victoria Magee and Charlotte Combado in the desert near Boulder Highway in Las Vegas. The State charged Malone with first-degree murder of the two women and eleven other charges. Malone attempted to represent himself during the court proceedings. However, after indicating that he wanted counsel and failing to follow the district court rules, the district court revoked Malone's right to self-representation and reappointed counsel. After a sixteen-day trial, the jury convicted Malone of two counts of first-degree murder, in addition to eleven other counts.

Malone now appeals, arguing that (1) the district court erred in reappointing Malone's counsel, violating his right to self-representation; (2) the district court erred in failing to instruct the jury that robbery is a specific intent offense; and (3) the district court erred in giving a presumption of innocence instruction based on NRS 175.191 because this instruction did not define the material elements of the offenses.

The district court properly revoked Malone's right to self-representation

Malone argues that the district court denied his constitutional right to self-representation by reappointing counsel. We disagree.

We review a district court's decision of whether to revoke a defendant's right of self-representation for an abuse of discretion. See *Vanisi v. State*, 117 Nev. 330, 340-41, 22 P.3d 1164, 1171 (2001). Further, we review a district court's finding that a defendant's waiver is equivocal for clear error as it is a finding of fact. *United States v. Mendez-Sanchez*, 563 F.3d 935, 944 (9th Cir. 2009).

The district court conducted an extensive *Faretta* hearing and determined that Malone knowingly and voluntarily waived his right to counsel. This determination is not an issue on appeal. However, after the district court granted Malone's motion to represent himself, Malone repeatedly failed to follow procedural rules. Each time Malone appeared in court, the district court repeatedly admonished him about self-representation by explaining the difficulties of self-representation, especially while in custody, and inquired whether he still wanted to represent himself.

At one hearing, Malone indicated that he wanted counsel appointed. However, after a discussion with the district court, he decided to continue representing himself. Malone also wrote a memorandum to the district court stating that (1) he had "been forced to represent himself," (2) he "did not want to represent himself," (3) the district court refused to help him, and (4) he had "always been more than willing to accept proper assistance . . . however this Court has not allowed him." At the hearing regarding this memorandum, the district court told Malone that it was clear from his pleadings that he "did not want to represent himself," and

Malone responded affirmatively. As a result of Malone's actions and representations, the district court revoked Malone's right to represent himself.

A defendant has a constitutional right to represent himself. *Faretta v. California*, 422 U.S. 806, 819 (1975). However, a different waiver analysis applies to the right to self-representation than to the right to counsel. *Brown v. Wainwright*, 665 F.2d 607, 610 (5th Cir. 1982). In order to invoke the right to self-representation, a defendant must "knowingly and intelligently" waive his right to counsel in a clear and unequivocal manner. *Faretta*, 422 U.S. at 835. Further, a district court may determine that a defendant who is representing himself has waived this right through his actions. *McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984); *Faretta*, 422 U.S. at 834 n.46. The district court also has the discretion to deny the defendant's right to self-representation. *Gallego v. State*, 117 Nev. 348, 356-57, 23 P.3d 227, 233 (2001) (holding that the district court may deny the right of self-representation if the defendant is incompetent to waive the right to counsel, the request is untimely, equivocal, or made for purposes of delay, or the defendant disrupts the judicial process), *abrogated on other grounds by Nunnery v. State*, 127 Nev. ___, ___ n.12, 263 P.3d 235, 253 n.12 (2011).

A defendant waives the right to self-representation through vacillating positions. *United States v. Bennett*, 539 F.2d 45, 51 (10th Cir. 1976) (finding that the defendant waived the right to represent himself when he changed his mind about representing himself multiple times); *People v. Marshall*, 931 P.2d 262, 275 (Cal. 1997) (finding that the defendant's conduct and statements were equivocal and made for the purpose of delay). Some courts favor representation by counsel as opposed

to self-representation when a defendant's actions and statements are ambiguous. *United States v. Frazier-El*, 204 F.3d 553, 559 (4th Cir. 2000) (stating that when a defendant appears to be manipulating a court with ambiguous and vacillating statements, a court "must ascribe a constitutional primacy to the right to counsel because this right serves both the individual and collective good, as opposed to only the individual interests served by protecting the right of self-representation" (internal quotation marks omitted)).¹

We conclude that the district court's decision to revoke Malone's right to self-representation was not an abuse of discretion. The district court's finding that Malone's actions were equivocal and appeared to be made for the purposes of delay was not clear error. Malone went back and forth several times when deciding whether he wanted to represent himself, and even accused the district court of forcing him into representing himself. Malone also stated in his memorandum that he wanted proper assistance of counsel. After further canvassing from the district court, Malone confirmed that he did not want to represent himself. Therefore, we conclude that the district court's decision to revoke Malone's right of self-representation was within its discretion.

¹Malone argues that the district court erred in revoking his right to self-representation based on the complexity of the case. We have previously held that the complexity of a case is a relevant factor when determining whether the defendant knowingly and voluntarily waived his right to counsel, but "is not an independent basis for denial of a motion for self-representation." *Vanisi*, 117 Nev. at 341, 22 P.3d at 1171-72. We conclude that while the district court should not have considered the complexity of the case in revoking Malone's right to self-representation, sufficient other grounds existed to support the district court's decision.

The district court properly instructed the jury that robbery is a general intent crime

Malone argues that we should overturn existing precedent and hold that robbery is a specific intent crime. We decline to do so.

The district court has broad discretion to settle jury instructions. *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). We review a district court's decision to approve or reject an instruction for an abuse of discretion or judicial error. *Id.* However, we will review whether a particular instruction is a correct statement of law de novo. *Id.*

The district court approved a jury instruction defining robbery as a general intent crime. Nevada defines robbery as an "unlawful taking" with no specific intent required. NRS 200.380. We have repeatedly found that robbery is a general intent crime since we overruled *Turner v. State*, 96 Nev. 164, 165, 605 P.2d 1140, 1141 (1980). See *Litteral v. State*, 97 Nev. 503, 508, 634 P.2d 1226, 1228-29 (1981) (overruling *Turner* and holding that robbery is a general intent crime), *disapproved of on other grounds by Talancon v. State*, 102 Nev. 294, 301, 721 P.2d 764, 769 (1986); see also *Leonard v. State*, 117 Nev. 53, 76-77, 17 P.3d 397, 412 (2001); *Chappell v. State*, 114 Nev. 1403, 1408, 972 P.2d 838, 841 (1998). Therefore, we conclude that the district court did not abuse its discretion and properly instructed the jury that robbery is a general intent crime.²

²Malone also argues that even if we find that robbery is a general intent crime, it should nevertheless be considered a specific intent crime when used as the underlying felony for felony murder. We disagree. Robbery remains a general intent crime even when it is the underlying felony for felony murder. *Daniels v. State*, 114 Nev. 261, 269, 956 P.2d 111, 116 (1998); see NRS 200.030(1)(b) (stating that robbery may be used

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The district court properly instructed the jury on the presumption of innocence

Malone argues that the district court's instruction on the presumption of innocence was incorrect. We disagree.

The district court has broad discretion to settle jury instructions. *Cortinas*, 124 Nev. at 1019, 195 P.3d at 319. We review a district court's decision to approve or reject an instruction for an abuse of discretion or judicial error. *Id.* However, we will review whether a particular instruction is a correct statement of law de novo. *Id.*

The district court approved a jury instruction on the presumption of innocence that placed the burden on the State of "proving beyond a reasonable doubt every material element of the crime." Malone argues that this instruction gave the jury discretion to decide which elements of the crime were "material" and was confusing, misleading, and lessened the State's burden of proof.

We have previously upheld this instruction and conclude that the district court's approval of the jury instruction on the presumption of innocence was not an abuse of discretion. *Nunnery*, 127 Nev. at ___, 263 P.3d at 259-60 (finding that the district court did not abuse its discretion


. . . continued


as the predicate felony for the felony murder rule and does not require specific intent for the predicate felony).

by approving a presumption of innocence jury instruction that did not define the material elements of the crime).³

Accordingly, we ORDER the judgment of the district court AFFIRMED.


_____, J.
Gibbons


_____, J.
Douglas


_____, J.
Saitta

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

³We have considered the parties' remaining arguments and conclude that they are without merit.