

IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY B. KELLY,

No. 35816

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**FILED**

**AUG 10 2001**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT

BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

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, burglary while in possession of a firearm, conspiracy to commit robbery and murder, and robbery with the use of a deadly weapon. The district court sentenced appellant to two consecutive terms of life in prison with the possibility of parole, in addition to several concurrent terms of imprisonment. The district court credited appellant with 1364 days for time served.

Appellant first contends that he was deprived of a fair trial when the substitute judge heard the testimony of one witness and ruled on an evidentiary issue prior to certifying his familiarity with the complete record of the case. As to that portion of the case over which the substitute judge presided prior to so certifying, appellant argues that the substitute judge thereby violated NRS 175.091, which provides:

If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

01-15607

After reviewing the record, we conclude that the district court was sufficiently familiar with the limited issues before it to properly preside over that portion of the trial to which appellant takes exception. Although the district court acknowledged that it was not at that time familiar with all aspects of the trial, the court nevertheless indicated that it had been briefed in chambers, with both counsel present, as to the limited issues before it. We are satisfied that the briefing in chambers provided the district court with sufficient familiarity to proceed with that portion of the trial. Moreover, appellant did not object to the district court's decision to proceed as it did. Accordingly, we conclude that appellant's argument lacks merit.

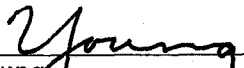
Appellant next argues that prosecutorial misconduct warrants reversal of his conviction for a new trial. Specifically, appellant cites the prosecutor's question during cross-examination of appellant: "You understand you're not entitled to put on any defense, correct?" Appellant responded that he did not understand the question and the prosecutor immediately ceased that line of questioning: "I'm going to leave that alone." Appellant contends that the question was improper because it gave the false impression that appellant was not entitled to testify on his own behalf or otherwise put on a defense -- thus leaving the jury open to the inference that appellant was being given special treatment in being allowed to testify. Thus, appellant asserts that it appears more probable than not that the purported misconduct affected the jury's verdict and thereby denied appellant a fair trial.

Although appellant contends that this issue should be reviewed as plain error, our standard of review is abuse of discretion, as this issue was the subject of appellant's


motion for a mistrial.<sup>1</sup> Because appellant has failed to make a "clear showing of abuse of discretion," we affirm the district court's decision to deny the motion for a mistrial.<sup>2</sup> Moreover, we agree with the district court that the prosecutor's question, albeit ill-framed, did not warrant a mistrial under these circumstances. Given that the question was impliedly withdrawn without being answered, and that the district court correctly instructed the jury several times throughout the trial regarding the State's burden to prove the offenses charged (and that appellant was not required to present any evidence), no mistrial was warranted in this case.

Having reviewed appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
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Young J.

  
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Leavitt J.

  
\_\_\_\_\_  
Becker J.

cc: Hon. John S. McGroarty, District Judge  
Attorney General  
Clark County District Attorney  
Paul E. Wommer  
Clark County Clerk

<sup>1</sup>See Lisle v. State, 113 Nev. 679, 700, 941 P.2d 459, 473 (1997) (setting forth the standard of review of a district court's denial of a motion for a mistrial).

<sup>2</sup>Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).