IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ANTHONY GRECO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67973

FILED

MAR 09 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a judgment of conviction, pursuant to a jury verdict. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

Anthony Greco was charged with First Degree Arson, Burning of Property with Intent to Defraud Insurer, and Insurance Fraud. The State alleged that Greco and his former fiancée, Kathie Rinaldi, burned Rinaldi's home and attempted to fraudulently collect insurance money by making a series of false statements to the insurance company about the condition of the house and whether it was occupied or under construction at the time of the fire. A jury convicted Greco only of the Insurance Fraud count and acquitted him of the other counts.[1] This appeal followed.

Greco argues the following errors on appeal: (1) the district court improperly denied his motion to compel discovery as to other fire and arson investigations in the Pahrump area; (2) the judge exhibited actual bias against him both in pre-trial and trial proceedings; and (3) the district court erred by allowing one of the insurance company's employees to read claim notes to the jury at trial.

[1]We do not recount the facts except as necessary to our disposition.

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Alleged discovery error

Greco contends that he was improperly denied discovery relating to other recent, similar fires that might have provided a defense to the arson charge by showing someone else was the perpetrator. But Greco was acquitted of the arson charge; he was only convicted of the crime of insurance fraud based upon false statements that he made to the insurance company after the fire occurred. Therefore, even if the district court committed any error in denying the requested discovery (a conclusion that we do not reach because we need not), any such error would not be material to Greco's appeal of the only charge on which he was actually convicted. *See Jimenez v. State*, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996) (an error is material if there is a reasonable possibility that the undisclosed evidence would have affected the trial's outcome).

The district court's alleged bias

Greco also contends that the trial judge exhibited actual bias against him. Greco's trial was continued on a number of occasions while he sought discovery relating to what he alleged was a grand conspiracy against him involving the police department, fire department, prosecutors, insurance investigators, judges, magistrates, and numerous other co-conspirators. At the calendar call before his trial, the district judge refused to continue the trial again, commenting that he was trying to decide whether Greco believed this grand conspiracy existed, but determined that Greco was doing these things to stall and delay the proceedings. The district judge then denied a further request for continuance. Greco responded by filing a motion to disqualify the judge from presiding over the trial, which another Fifth Judicial District judge

denied. Greco contends that this was error and his disqualification motion should have been granted.

NRS 1.230(1) provides that a judge must not preside in a matter if the judge has an actual bias or prejudice for or against one of the parties. *See Ivey v. Dist. Ct.*, 129 Nev. ___, 299 P.3d 354 (2013). In *Goldman v. Bryan*, the Nevada Supreme Court stated judges have a duty to preside and not disqualify themselves if there is no reason to do so, just as much as they have a duty to disqualify themselves if there are valid reasons. 104 Nev. 644, 649, 764 P.2d 1296, 1299 (1988), *disagreed with on other grounds by Halverson v. Hardcastle*, 123 Nev. 245, 265, 163 P.3d 428, 442-43 (2007) (internal quotations and citations omitted). We presume a judge is unbiased, and the burden is on the party asserting the challenge to establish sufficient factual grounds warranting disqualification. *Rivero v. Rivero*, 125 Nev. 410, 439, 216 P.3d 213, 233 (2009). Thus, we give substantial weight to a judge's decision not to recuse, and we review a denial of a motion to disqualify for a clear abuse of discretion. *Id.* Additionally, if a challenge fails to allege legally cognizable grounds supporting a reasonable inference of bias or prejudice, the trial court should summarily dismiss the motion to disqualify. *Id.*

Here, both the trial judge and another Fifth Judicial District judge found that Greco's disqualification motion was unsupported by any identifiable factual or legal basis for disqualification, and we agree. Greco complains the district judge should have given him more time to investigate his allegations of a grand conspiracy to frame him, but, as the district judge noted, Greco was given four years to locate any such evidence and failed to uncover anything. Greco does not identify any

avenue that he could not investigate during that time, or any additional evidence that he might have uncovered if given a few more weeks.

Greco also contends that the district judge's bias is evident because the judge permitted the State to call an additional witness after it announced it was resting its case-in-chief, even though Greco had no witnesses of his own ready to testify. Greco's allegation of bias is unsupported by any citations to authority or cogent argument; he cannot even explain how this ruling prejudiced him or reflected bias against him when he was not ready to begin his defense anyway. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

Alleged hearsay error

Finally, Greco contends that the district court erred by allowing into evidence insurance company claim notes that were contemporaneously written by employees of the insurance company describing telephone conversations between Greco and the insurance company during the initial claims process. At trial, Greco objected on the grounds that the claim notes were hearsay and that he was put at a disadvantage because he could not cross-examine the person with whom Greco allegedly spoke. The State maintained that the claim notes were admissible under the business records exception. The district court overruled the objection and allowed the notes to be read. On appeal, Greco again asserts that the testimony regarding the content of the claim notes was "hearsay and not subject to cross examination. Therefore, said testimony should not have been admitted."

A district court's decision to admit evidence will not be disturbed on appeal absent an abuse of discretion. *Chavez v. State,* 125 Nev. 328, 344, 213 P.3d 476, 487 (2009). The district court's determination as to whether a statement constitutes hearsay within an exception is also reviewed for an abuse of discretion. *Harkins v. State,* 122 Nev. 974, 980, 143 P.3d 706, 709 (2006).

Hearsay is a statement offered in evidence to prove the truth of the matter asserted. NRS 51.035. Hearsay statements are generally inadmissible unless a specific exception applies. NRS 51.065. NRS 51.135, colloquially the business records exception, allows admission of records of regularly conducted activity. The district court has considerable discretion in determining whether an adequate foundation has been laid for the admission of evidence under the business records exception to the hearsay rule. *Thomas v. State,* 114 Nev. 1127, 1148, 967 P.2d 1111, 1125 (1998).

Here, the statements made by Greco to his insurance company were not offered to prove the truth of the matter asserted; quite to the contrary, they were offered to prove the exact opposite: that Greco lied. Thus, they were not offered because they were truthful; they were offered because they were untruthful. Had the State presented Greco's statements through the testimony of the person who heard them, they would not have constituted hearsay at all.

The problem here is that, rather than introducing the non-hearsay statements through the testimony of the person who actually heard the statements, the State sought to introduce them through written records which were, in turn, read by a third person who did not either hear the statements or write the records. Thus, the alleged hearsay

consists not of Greco's false statements to the insurance company, but rather of the written description of those statements which was read into evidence by another person.

The "business records exception" to the hearsay rule is contained in NRS 51.135, and states:

> A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a regularly conducted activity, as shown by the testimony or affidavit of the custodian or other qualified person, is not inadmissible under the hearsay rule unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

In *Thomas*, the Nevada Supreme Court held that the elements of the business record exception can be established by "prima facie" evidence "sufficient to support a finding that the matter in question is what its proponent claims." 114 Nev. at 1148, 967 P.2d at 1124 (quoting *United States v. Workinger,* 90 F.3d 1409, 1415 (9th Cir. 1996)). The elements need not be established by the author of the record, but rather can be shown through the testimony of any qualified person, which is "broadly interpreted" as "anyone who understands the record-keeping system involved." *Id.* (citing *United States v. Ray*, 930 F.2d 1368, 1370 (9th Cir. 1990)).

Here, the State called Len Brannon, a former insurance claims examiner for Rinaldi's insurance company, who testified that he was familiar with the document in question; that it was created and maintained in the ordinary course of business; that it was a true and correct copy of the original claim notes; and described the process by which

the record was created, namely, that clams notes are created whenever a call regarding a claim is received in order to record the statements of the person making the claim.

In *Thomas*, the Nevada Supreme Court held that

> In this case, although neither Johnson nor Edwards personally completed the documents in question, they both knew that the documents were kept in the ordinary course of business and the procedures for completing those writings. Therefore, based on persuasive federal and California authority, we conclude that the proper foundation was laid for the documents to fall under the business records hearsay exception. Accordingly, the district court did not abuse its discretion in admitting them. *See People v. Beeler,* 9 Cal.4th 953, 39 Cal.Rptr.2d 607, 891 P.2d 153, 167–68 (Cal.1995), *cert. denied,* 516 U.S. 1053, 116 S. Ct. 723, 133 L.Ed.2d 675 (1996) (concluding that the trial court has wide discretion in determining whether sufficient foundation has been laid to qualify evidence as a business record).

114 Nev. at 1148, 967 P.2d at 1125. We conclude that, under *Thomas*, the State established a sufficient foundation for the business record exception. Just as in *Thomas*, Brannon did not author the document in question, but knew that it was kept in the ordinary course of business, and described the procedures under which the writing was created. Although Brannon's testimony was not as detailed as Greco might have preferred, all that the State was required to do was to make a "prima facie" case for admissibility, which it did under *Thomas*. The district court has "considerable discretion" in determining whether a prima facie foundation has been laid for the admission of evidence under the business records exception to the hearsay rule. *Id.* Under the circumstances of this case, we cannot conclude that the district court abused its "considerable"

discretion" when the State's questioning closely tracked the steps prescribed in *Thomas*.

Even if any error occurred in admitting the business records, the error was harmless because the statements made in the records merely duplicated other evidence that the jury already heard. The claims notes consisted of statements made by Greco and Rinaldi to a claims examiner. Even if the claims notes should not have been admitted, the exact same statements were repeated by Greco directly to Brannon during a subsequent personal interview described by Brannon, whose contents Greco did not object to. The statements attributed to Rinaldi in the claims notes duplicated her direct trial testimony. Therefore, everything contained in the claims notes merely duplicated other evidence, and any error in the admission of the claims notes was harmless.

Greco also contends that even if the business records exception applies, the notes should have been excluded for violating the Confrontation Clause. When a witness's out of court statement falls within a hearsay exception, the statement can still be inadmissible in a criminal case if the defendant did not have an opportunity to cross-examine the witness. *See Flores v. State*, 121 Nev. 706, 711, 120 P.3d 1170, 1174 (2005); *see also Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009). This is because the Confrontation Clause of the United States Constitution has been interpreted to exclude testimonial hearsay from evidence. *See Crawford v. Washington*, 541 U.S. 36, 68 (2004).

In *Crawford* the Supreme Court specified that business records are generally non-testimonial by their very nature. *Id.* at 56. However, the Supreme Court has rejected the application of the business records exception when "the regularly conducted business activity is the

production of evidence for use at trial." *Melendez-Diaz*, 557 U.S. at 321 (2009) (holding that affidavits of laboratory technicians were inadmissible testimonial hearsay pursuant to *Crawford*). Recently the Supreme Court clarified that while not categorically non-testimonial, statements made to persons other than law enforcement officers are much less likely to be testimonial. *Ohio v. Clark*, ___ U.S. ___, ___, 135 S. Ct. 2173, 2181 (2015) (holding that statements identifying a perpetrator made by a three-year-old child abuse victim to his pre-school teachers were non-testimonial).

"The threshold question in evaluating a confrontation right under *Crawford* and *Melendez–Diaz* is whether the statement was testimonial in nature." *Vega v. State*, 126 Nev. 332, 339, 236 P.3d 632, 637 (2010). A statement is testimonial if the totality of the circumstances of its making would "lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Harkins v. State*, 122 Nev. 974, 986-87, 143 P.3d 706, 714 (2006) (citing Flores v. State, 121 Nev. 706, ___, 120 P.3d 1170, 1178-79 (2005)). In *Harkins* the Nevada Supreme Court provided the following factors to assist in determining whether a statement is testimonial:

> (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question (*e.g.*, whether the statement was the product of a police interrogation); (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events made in a more formal setting sometime after the exigency had ended.

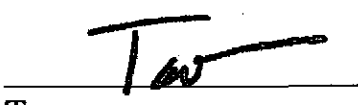
122 Nev. at 987, 143 P.3d at 714 (quoting *Flores v. State*, 121 Nev. 706, 719, 120 P.3d 1170, 1178-79 (2005) (emphasis in original)). The Nevada Supreme Court has held "that the materials resulting from an insurance company's investigation are not made 'in anticipation of litigation' unless the insurer's investigation has been performed at the request of an attorney." *Ballard v. Eighth Judicial Dist. Court*, 106 Nev. 83, 85, 787 P.2d 406, 407 (1990).

In this case, Allstate created the claim notes before it involved an attorney in the claim. Further, the insurance claim personnel are not agents of the State and were not recording information expressly for the purpose of supporting a criminal prosecution. *See Medina v. State*. 122 Nev. 346, 355-56, 143 P.3d 471, 476 (2006). Consequently, the notes were "non-testimonial" and their admission did not violate Greco's Confrontation Clause rights under the Sixth Amendment.

We therefore,

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
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