IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAMIEN DARNELL ROBINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71540

FILED

FEB 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Damien Darnell Robins appeals from a judgment of conviction, pursuant to a jury verdict, of three counts of assault with a deadly weapon; one count of battery with use of a deadly weapon; four counts of battery with use of a deadly weapon resulting in substantial bodily harm; and one count of breaking, injuring, or tampering with a motor vehicle. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

On October 24, 2015, Robins used his vehicle and a sledgehammer to commit a series of attacks on nine victims throughout Boulder City and Henderson.[1] Robins was charged with eighteen counts: three counts of assault with a deadly weapon; six counts of attempt murder with use of a deadly weapon; three counts of battery with use of a deadly weapon; five counts of battery with use of a deadly weapon resulting in substantial bodily harm; and one count of break, injure, or tamper with a motor vehicle. After an eight-day trial, the jury found Robins guilty on eleven counts and deadlocked on the remaining seven. The district court sentenced Robins to an aggregated 34 to 85 years in prison.

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

Robins appeals the judgment of conviction, arguing the district court: 1) erred in issuing its own *Allen*[2] charge; 2) demonstrated judicial bias; and 3) erred in admitting graphic crime scene photographs. We disagree that reversal is warranted.

First, we consider whether Robins' rights were violated when the district court issued its own *Allen* charge that Robins argues was unduly coercive. During deliberations, the jury sent a note to the district court that it was deadlocked on seven counts. The State and Robins encouraged the court to give the stock *Allen* instruction from *Wilkins v. State*, 96 Nev. 367, 609 P.2d 309 (1980). Instead, the court issued its own *Allen* instruction. The following day, Robins moved for a mistrial, arguing the court erred in not providing the *Allen* instruction expressly approved by the Nevada Supreme Court. The court denied Robins' request, stating: "I set forth pretty much exactly what was in *Wilkins* although I added a little bit more information about the trial being expensive in terms of time, money, effort and so forth. So I don't see it as unduly coercive."

Later, the jury sent another note stating it was still deadlocked. The district court brought the jury into the courtroom, and the clerk of the court read the jury's verdicts on eleven counts. The district court then confirmed with the foreperson that the jury remained deadlocked on the same seven counts on which it had been undecided prior to the *Allen* charge.

We review a district court's ruling on a motion for a mistrial for abuse of discretion. *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). We also review a district court's decision regarding jury

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[2]*Allen v. United States*, 164 U.S. 492 (1896).

instructions for abuse of discretion. *Rose v. State*, 123 Nev. 194, 204–05, 163 P.3d 408, 415 (2007).

An *Allen* charge is an instruction admonishing a deadlocked jury "that the case must at some time be decided or that minority jurors should consider their positions in light of the majority view." *Farmer v. State*, 95 Nev. 849, 853, 603 P.2d 700, 703 (1979). The Nevada Supreme Court has "approved the *Allen* charge if it clearly informs the jury that each member has a duty to adhere conscientiously to his or her own honest opinion, and if it avoids creating the impression that there is anything improper, questionable or contrary to good conscience for a juror to create a mistrial." *Wilkins*, 96 Nev. at 373, 609 P.2d at 312. The court expressly approved and encouraged courts to use the version of the *Allen* charge found in *Wilkins*. *See Staude v. State*, 112 Nev. 1, 6, 908 P.2d 1373, 1377 (1996), *holding modified by Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002).[3]

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[3]The approved *Allen* instruction states:

> The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight

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Here, although the instruction given does remind the jury that they are not expected to give up their honest belief, as required under *Wilkins*, it did not "avoid[ ] creating the impression that there is anything improper, questionable or contrary to good conscience for a juror to create a mistrial." *Wilkins*, 96 Nev. at 373, 609 P.2d at 312. Here, the district court instructed, "it is your duty to agree upon a verdict if you can do so," which, when combined with some of the judge's other statements—namely her invocation of the trial's expense in "time, effort, money, and emotional strain" and her stated concern that failing to reach a verdict could result in retrial—imposes an improper obligation upon the jury to reach a verdict and not create a mistrial. Moreover, the approved *Allen* instruction is brief and in line with "[t]he judicial concern in regard to *Allen* charges [ ] that they not coerce jurors into reaching a verdict." *Staude*, 112 Nev. at 6, 908 P.2d at 1376. Whereas here, the instruction was considerably longer and asks the jury to reflect on far more considerations in its deliberations than the *Wilkins*' instruction does. Because the supreme court is reluctant to approve *Allen* charges and has directed district courts to use the specific language in *Wilkins*, the district court erred in giving its own broader *Allen* instruction.

...continued

> or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.
>
> You are not partisans. You are judges [–] judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Wilkins, 96 Nev. at 373 n.2, 609 P.2d at 313 n.2.

However, although the instruction was improper, the error was harmless. "Erroneous jury instructions are reviewable according to a harmless-error analysis." *Wegner v. State*, 116 Nev. 1149, 1155, 14 P.3d 25, 30 (2000) ("An error is harmless when it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006) *quoting Neder v. United States*, 527 U.S. 1, 18 (1999); *see* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Robins fails to demonstrate how he was prejudiced or how the outcome was affected by the court's *Allen* instruction. The district court confirmed with the jury foreperson in open court that the jury was undecided on the same seven counts before and after the *Allen* charge. Thus, the error was harmless because it did not affect Robins' substantial rights as it did not coerce the jury. Also, it is clear the jury would have found Robins guilty absent the error. Because the jury agreed on the same eleven counts both before and after receiving the disputed *Allen* charge, it must have determined he was guilty on those counts and would have convicted him of those eleven charges regardless of the admonition.

Next, we consider whether the district court demonstrated judicial bias by disparaging the defense in the presence of the jury. Robins argues that the district court violated his right to due process when it made a comment during the trial that led the jury to conclude that the defense was the reason the trial took so long. We disagree.

A judge is presumed to be impartial. *Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011). Judicial impropriety occurs when a judge's actions "are so pervasive and of such a magnitude that the trial

ambiance is discernibly unfair to the defendant when viewed from the cold record on appeal." *McNair v. State*, 108 Nev. 53, 62, 825 P.2d 571, 577 (1992). Here, Robins failed to object to the district court's comments below and therefore we review Robins' claim for plain error. *Oade v. State*, 114 Nev. 619, 621–22, 960 P.2d 336, 338 (1998) (noting that while failure to object to alleged misconduct generally precludes appellate review, this court may elect to review for plain error); *see Gaxiola v. State*, 121 Nev. 638, 654, 119 P.3d 1225, 1236 (2005) (concluding that plain error arises when error prejudicially impacts the verdict or seriously affects the judicial proceeding's integrity).

Here, Robins fails to show how the judge's comments substantially affected the trial or prejudiced him. The district court made several comments regarding the speed of trial and scheduling throughout the trial, and a plain reading of those comments does not reflect impropriety. *See Oade v. State*, 114 Nev. 619, 623, 960 P.2d 336, 339 (1998) ("It must be remembered that 'the words and utterances of a trial judge, sitting with a jury in attendance, are liable, however unintentional, to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced or injured thereby.'" (quoting *Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995)). Arguably, the judge's comments criticize the prosecution for not planning well enough rather than disparaging the defense. Therefore, we conclude there was no plain error.

Last, we consider whether the district court erred in admitting 42 photographs during the State's direct examination of one of the victims despite Robins' objection that the photos were duplicative and inflammatory. Although Robins couches his argument in words like

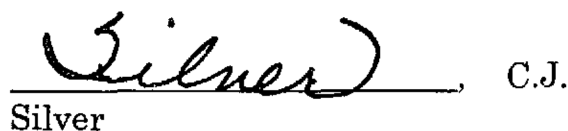
"inflammatory" and "duplicative," the true issue here is one of relevance. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Evidence, although relevant, is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. NRS 48.035. "Photographic evidence is admissible unless the photographs are so gruesome as to shock and inflame the jury." *Wesley v. State*, 112 Nev. 503, 513, 916 P.2d 793, 800 (1996). The Nevada Supreme Court has "repeatedly held that photographs that aid in the ascertainment of truth may be received in evidence, even though they may be gruesome." *Scott v. State*, 92 Nev. 552, 556, 554 P.2d 735, 738 (1976). 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).

First, according to the exhibit list, less than half of the exhibits Robins objected to contained photos showing the victims' injuries. Further, in the end, the State published only three photographs of the victims' injuries. Because the photos of the victims' injuries were probative to the State's case to show the size, location, and extent of the victim's injuries, the district court did not err in admitting the photos. Additionally, even if admitting any of the photos constituted an error, Robins failed to include the contested exhibits in the record on appeal. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). Without the photos, we cannot determine whether the district court had a basis for its evidentiary ruling or whether the photos were inappropriately admitted. Therefore, we conclude that the

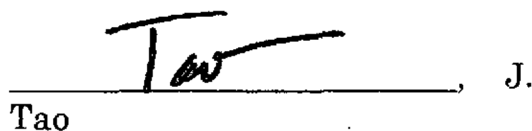
district court did not abuse its discretion in admitting the photographs. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (stating that when "appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision").

In light of the foregoing reasoning, we

ORDER the judgment of the district court AFFIRMED.



_______________, C.J.
Silver



_______________, J.
Tao

_______________, J.
Gibbons

cc: Hon. Susan Johnson, District Judge
Mayfield, Gruber & Sheets
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk