IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAMIAN WESLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73153

FILED

SEP 21 2018

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

*ORDER OF AFFIRMANCE*

Damian Wesley appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of battery constituting domestic violence. Eighth Judicial District Court, Clark County; Kerry Louise Earley, Judge.

Police responded to an emergency call from a concerned neighbor and observed Wesley holding the victim (his fiancée and the mother of his child) against a wall while she pled with him to let her go. The victim was seriously injured and struggling to remain conscious. Officers arrested Wesley and the State thereafter charged Wesley with three category C felonies: (1) battery constituting domestic violence-strangulation, (2) battery constituting domestic violence resulting in substantial injury, and (3) third-offense battery constituting domestic violence. The victim, who initially told officers that Wesley beat her, recanted her testimony at trial. The jury nevertheless found Wesley guilty of two counts of battery constituting domestic violence, and the district court sentenced him to serve consecutive prison terms totaling 24-72 months in the aggregate.[1]

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

On appeal, we consider Wesley's arguments that (1) insufficient evidence supports the verdict, (2) the district court denied him his right to represent himself, (3) the district court denied him his right to a speedy trial, and (4) the district court abused its discretion in admitting a jail phone call.[2] We disagree.

First, Wesley argues that there was insufficient evidence to convict him because the victim recanted her initial statements to the police. In reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, we consider "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact 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) (internal quotation marks omitted). The jury weighs the evidence and determines whether it is sufficient to meet the elements of the crime, and we will not disturb a verdict that is supported by substantial evidence. *Id.*

To obtain a conviction for battery constituting domestic violence, a category C felony, the State must prove that the defendant used willful and unlawful force against another with whom he is in a dating relationship or has a child in common, and that he has two prior battery domestic violence convictions within the last seven years. NRS 33.018(1)(a); NRS 200.481(1)(a); NRS 200.485(1)(c).

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[2]Wesley did not raise his arguments regarding double jeopardy and redundancy below, we therefore deem them waived. *See Davis v. State*, 107 Nev. 600, 606, 817 P.2d 1169, 1173 (1991) (holding that an appellate court need not consider arguments raised on appeal that were not presented to the district court in the first instance), *overruled on other grounds by Means v. State*, 120 Nev. 1001, 103 P.3d 25 (2004).

Here, the State presented substantial evidence from which a rational jury could find that Wesley committed these acts. The neighbor heard screaming and banging sounds from the couple's apartment, and she called the police because she feared for the woman's life. The police found Wesley holding the victim, his fiancée and the mother of his child, against the wall as she asked him to let her go. Officers observed that the victim suffered extensive injuries, and she told the officers that Wesley beat and strangled her. The State also presented photographs and police body camera footage of the crime scene, and the victim's statements. Moreover, the State presented a jail phone call between Wesley and his sister where he stated that he "slapped that bitch." At sentencing, the State provided the district court with proof of Wesley's two prior battery constituting domestic violence convictions, thus elevating the instant offense to a category C felony. Therefore, we conclude that overwhelming evidence supports the verdict.

Next, Wesley argues that the district court denied him his right to represent himself. We review a district court's denial of self-representation under an abuse of discretion standard. *Gallego v. State*, 117 Nev. 348, 362, 23 P.3d 227, 236-37 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). "A criminal defendant has an unqualified right to represent himself at trial so long as his waiver of counsel is intelligent and voluntary." *O'Neill v. State*, 123 Nev. 9, 17, 153 P.3d 38, 43 (2007) (internal quotation marks omitted). However, a district court "may deny a request for self-representation that is untimely, equivocal, or made for the purpose of delay." *Watson v. State*, 130 Nev. 764, 782, 335 P.3d 157, 170 (2014). A request is equivocal when the defendant

does not "definitively acknowledge[ ] that he want[s] to act as his own sole legal representative." *Id.*

Here, Wesley's requests were equivocal. Each time he requested to represent himself, he ultimately decided to reconcile with his counsel. Therefore, the record does not demonstrate that he unequivocally requested, and was improperly denied, the right to represent himself.

Next, Wesley argues that the district court denied him his right to a speedy trial because of the 90-day delay between arraignment and trial. We review constitutional challenges de novo. *Grey v. State*, 124 Nev. 110, 117, 178 P.3d 154, 159 (2008). Defendants have a statutory and constitutional right to a speedy trial. NRS 178.556(1); *See Byford v. State*, 116 Nev. 215, 230, 994 P.2d 700, 710 (2000). NRS 178.556(1) provides, in relevant part: "If a defendant whose trial has not been postponed upon the defendant's application is not brought to trial within 60 days after the arraignment on the indictment or information, the district court may dismiss the indictment or information." However, when there is good cause for delay, dismissal is not mandatory. *See Huebner v. State*, 103 Nev. 29, 31, 731 P.2d 1330, 1332 (1987). Here, the district court found good cause for the delay. Wesley's trial date was set a mere 20 days from his initial arraignment when he invoked his right to a speedy trial. As a result, Wesley's counsel was not prepared to go forward and had not received all of the discovery in the case. Under these circumstances, the district court did not violate Wesley's statutory right to a speedy trial by the very short delay requested by both counsel.

As to Wesley's constitutional right to a speedy trial, we consider four factors: "the length of the delay, the reason for it, the defendant's assertion of his right, and resulting prejudice." *Sheriff v. McKinney*, 93 Nev.

313, 314, 565 P.2d 649, 650 (1977). First, the Nevada Supreme Court has repeatedly held that delays much longer than 90 days do not violate the Sixth Amendment right to a speedy trial where circumstances do not indicate the delay prejudiced the defendant. *See Byford*, 116 Nev. at 230, 994 P.2d at 710-11; *Manley v. State*, 115 Nev. 114, 126, 979 P.2d 703, 710 (1999); *Bailey v. State*, 94 Nev. 323, 324, 579 P.2d 1247, 1248 (1978). Second, a delay is not unreasonable when occasioned by the defendant's conduct, ordered for good cause, or due to the court's need to manage its calendar. *See Bates v. State*, 84 Nev. 43, 46, 436 P.2d 27, 29 (1968); *In re Application of Hansen*, 79 Nev. 492, 495, 387 P.2d 659, 660 (1963). Third, while prejudice "is of paramount concern," bare allegations of prejudice are not enough to constitute a speedy trial right violation. *See Sheriff v. Berman*, 99 Nev. 102, 107, 659 P.2d 298, 301 (1983) ("Bare allegations of impairment of memory, witness unavailability, or anxiety, unsupported by affidavits or other offers of proof, do not demonstrate a reasonable possibility that the defense will be impaired at trial or that defendants have suffered other significant prejudice.").

Wesley's 90-day delay is within the timeframe contemplated by the Nevada Supreme Court. We agree with the district court's finding of good cause, and after carefully reviewing Wesley's arguments regarding prejudice, we conclude that Wesley fails to demonstrate the short delay prejudiced him.

Finally, we have carefully considered Wesley's argument that the State's late disclosure of the jail call prejudiced him. Wesley waived any claim of prejudice because, while the district court denied Wesley's motion to exclude the jail call, the court attempted to cure any prejudice by offering to continue the trial, but Wesley expressly declined. *See* NRS 174.295(2);

*Langford v. State*, 95 Nev. 631, 635-36, 600 P.2d 231, 234-35 (1979). We conclude that the district court did not abuse its discretion by admitting the jail call into evidence. *Id.* Accordingly, having concluded that Wesley is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Silver

_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Kerry Louise Earley, Judge
Sandra L. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk