IN THE COURT OF APPEALS OF THE STATE OF NEVADA

AARON L. SLEDGE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73281-COA

ORDER OF AFFIRMANCE

Aaron L. Sledge appeals his judgment of conviction, pursuant to a jury verdict, of one count of invasion of the home and one count of being a habitual criminal. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.[1]

Sledge was convicted for kicking in the door of an apartment in which his ex-girlfriend was living.[2] On appeal, Sledge asserts a number of errors revolving principally around a juror's use of a laptop computer to type up trial notes. Upon learning about the laptop, the district court initiated a conference call with Sledge's counsel and the State. Sledge did not participate in the call. During the call, the district court proposed resolving the matter by not allowing the juror to use his typed notes during deliberation. Sledge's counsel agreed and did not request a canvass of the juror, nor did he ask that Sledge be present or be included in the discussion. The trial resumed and the jury ultimately convicted Sledge of invasion of the home. On appeal, Sledge argues that his constitutional rights were violated when the district court failed to canvass the juror about the laptop use and

[1]Senior Justice Robert E. Rose presided at trial.

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

19-03934

because Sledge was not included in the conference call. He also argues that the district court abused its discretion in denying his motion for a new trial, and further when it adjudicated him as a habitual criminal.

First, we consider whether the district court engaged in constitutional error by not canvassing the juror about his laptop use.[3] The Sixth Amendment guarantees a criminal defendant a trial before an impartial jury. *See* U.S. Const. amend. VI; *Daniel v. State*, 119 Nev. 498, 517, 78 P.3d 890, 903 (2003). And juror misconduct can violate a criminal defendant's constitutional right to an impartial jury. *See Valdez v. State*, 124 Nev. 1172, 1185, 196 P.3d 465, 474 (2008). But when resolving issues of alleged juror misconduct, the district court has wide discretion. *See Nunnery v. State*, 127 Nev. 749, 781, 263 P.3d 235, 256 (2011); *Viray v. State*, 121 Nev. 159, 164, 111 P.3d 1079, 1082-83 (2005) (recognizing the district court's discretion to remove a juror for misconduct). A district court does not err by not canvassing a juror about alleged misconduct when it nonetheless conducts an adequate inquiry into the allegations. *See Nunnery*, 127 Nev. at 781, 263 P.3d at 256 (upholding a district court's decision to not have a hearing regarding alleged misconduct after considering testimony from an attorney who overheard juror comments). Also, the onus is on the parties to

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[3]Sledge mainly argues that this court should presume that he was prejudiced by the district court's failure to canvass the juror about his laptop use. However, the supreme court has stated that a juror's "exposure to extraneous information via independent research or improper experiment is . . . unlikely to raise a presumption of prejudice." *Meyer v. State*, 119 Nev. 554, 565, 80 P.3d 447, 456 (2003). Thus, even if we were to assume that the juror committed misconduct, which Sledge has not established, it would be of the kind that is unlikely to raise a presumption of prejudice. Accordingly, this court will not simply assume that Sledge was prejudiced.

request an inquiry into purported juror misconduct, not the court to do so sua sponte. *See Jeffries v. State*, 133 Nev. ___, ___, 397 P.3d 21, 27 (2017) (holding that "the district court was not required to act sua sponte to investigate whether actual prejudice attached as a result of the juror misconduct . . . [rather] [i]t was upon the defense counsel to make such a request").

Here, the district court held a conference call notifying the attorneys regarding the juror's laptop use during which the court clerk recounted his interaction with the juror. Sledge's counsel initially suggested a canvass of the juror but, as the discussion progressed, instead agreed without objecting to the district court's proposal to not allow the juror to use the typed-up notes generated from the laptop without any further inquiry or investigation. Because Sledge's counsel agreed to this proposal without objecting rather than pursue a canvass, and after learning about the agreement Sledge failed to timely object, he has waived his right to appeal this issue and the district court did not commit constitutional error by not conducting the canvass.

Second, we consider whether Sledge's right to due process was violated when the district court conducted the conference call with Sledge's counsel but without Sledge himself.

Criminal defendants generally have a right to be present at all levels of legal proceedings. *See Gallego v. State*, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011); *see also Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (holding that a defendant has a due process right "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge") (quoting *Snyder*

v. Massachusetts, 291 U.S. 97, 105-06 (1934)). But that right is not absolute. *Gallego*, 117 Nev. at 367, 23 P.3d at 240. "Violations of the right to be present are reviewed for harmless error." *Rose v. State*, 123 Nev. 194, 208, 163 P.3d 408, 417 (2007). A constitutional error is harmless only if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder v. United States*, 527 U.S. 1, 18 (1999); *see also Valdez*, 124 Nev. at 1189, 196 P.3d at 476. A defendant must show that being absent prejudiced him or her. *Kirksey v. State*, 112 Nev. 980, 1001, 923 P.2d 1102, 1115 (1996). The due process aspect of the right to be present is implicated when "a fair and just hearing would be thwarted by the defendant's absence." *Id.* at 1000, 923 P.2d 1115. But this right is not violated when such "presence would be useless, or the benefit but a shadow." *Stincer*, 482 U.S. at 745 (quoting *Snyder*, 291 U.S. at 106-07).

Here, Sledge has failed to show that a fair and just hearing was thwarted by his absence. The record reflects that the juror did nothing more with his laptop than use it to make notes, notes that ultimately were never taken into the deliberation room anyway. Sledge fails to present any evidence either that his presence during the discussion of the laptop would have changed anything or that his absence from the discussion prejudiced him in any way. Thus, the district court did not err.

Third, we consider whether the district court abused its discretion when it denied Sledge's motion for new trial. A defendant may move for a new trial on two grounds: newly discovered evidence or as a matter of law. NRS 176.515(1). A motion for new trial based on newly discovered evidence must be made within two years after the verdict or finding of guilt, and if it is based on other grounds, then within seven days after the verdict or finding of guilt. *See* NRS 176.515(3)-(4). Here, the purported misconduct

based on the juror's laptop use was addressed at trial, and therefore cannot be considered newly discovered evidence. *Cf. Hennie v. State*, 114 Nev. 1285, 1290, 968 P.2d 761, 764 (1998). Also, Sledge did not move for a new trial until June 18, 2017, more than seven days after the jury rendered its verdict on May 23, 2017 and well after the seven-day deadline imposed by NRS 176.515(4). Because Sledge's motion for new trial as a matter of law was untimely and did not meet the substantive requirements in any event, the district court did not abuse its discretion when it denied the motion.

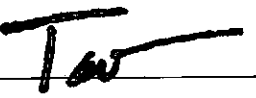
Fourth, we consider whether the district court abused its discretion when it adjudicated Sledge as a habitual criminal. The district court possesses "*the broadest kind of judicial discretion*" in deciding whether to sentence an offender as a habitual criminal. *Tanksley v. State*, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997) (quoting *Clark v. State*, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993)); *see* NRS 207.010(2). NRS 207.010 "makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court." *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). "[T]his court looks to the record as a whole to determine whether the sentencing court actually exercised its discretion." *O'Neill v. State*, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007) (alternation in original) (citation omitted). Here, the district court heard argument from both parties and a statement from Sledge himself. It considered Sledge's criminal history, the nature of the conduct underlying his felony convictions, the recentness of his felony convictions,

and other relevant considerations. Accordingly, the district court did not abuse its discretion when it adjudicated Sledge as a habitual criminal.

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, A.C.J.
Douglas



_____, J.
Tao

_____, J.
Gibbons

cc: Hon. Lynne K. Simons, District Judge
Tanner Law & Strategy Group, Ltd.
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk