IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HARRY BATISTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 65200

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sale of a controlled substance. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Appellant Harry Batiste first argues the district court erred by declining to instruct the jury on entrapment. Batiste asserts a police officer testified he and other officers set up Batiste for this crime and that the evidence at trial demonstrated the undercover officer initiated the conversation leading to the sale of the illegal prescription medication.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "Generally, the defense has the right to have the jury instructed on its theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 76-77 (2002) (quotation

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marks omitted). "[E]ntrapment is an affirmative defense" and "[t]he defendant bears the burden of producing evidence of governmental instigation." *Foster v. State*, 116 Nev. 1088, 1091, 13 P.3d 61, 63 (2000). An entrapment defense consists of two elements: the State presenting the opportunity to commit a crime and a defendant who was not predisposed to commit the act. *Miller v. State*, 121 Nev. 92, 95, 110 P.3d 53, 56 (2005).

The testimony demonstrated officers conducted an undercover operation to discover street-level drug dealers. One officer testified regarding "setting up" the officer team in the area so as to conduct the operation. There was no testimony presented that the officers were improperly framing innocent citizens. The undercover officer testified he viewed Batiste and another man, then asked them if they had any marijuana. They replied that they did not have marijuana and the officer then asked if they had crack cocaine. Batiste's companion stated he had crack cocaine to sell. Batiste then volunteered that he had "Soma" medication in his possession and offered to sell it to the officer. The officer then agreed to purchase the medication for $20. They completed the exchange and Batiste was then arrested.

We are not convinced Batiste met his burden to demonstrate that the sale of the Soma medication was initiated by the officer and therefore we conclude the district court did not abuse its discretion by denying Batiste's request for an entrapment instruction. *See id.* Even assuming Batiste had met his burden and he was entitled to the entrapment instruction, the failure to give the instruction was harmless

because the record clearly demonstrates Batiste was predisposed to commit the crime. *See State v. Colosimo*, 122 Nev. 950, 958, 142 P.3d 352, 357 (2006) (discussing factors which are helpful in determining whether a person is predisposed to commit a crime); *see also Guitron v. State*, 131 Nev. ___, ___, 350 P.3d 93, 102 (Ct. App. 2015) (stating a district court's error in refusing to give an instruction will not require reversal if the error is harmless beyond a reasonable doubt). Therefore, Batiste is not entitled to relief for this claim.

Second, Batiste argues the district court made prejudicial statements by characterizing Batiste's questions to witnesses as silly or ridiculous. We conclude this claim lacks merit. "While the district court must protect the defendant's right to a fair trial, a trial judge is charged with providing order and decorum in trial proceedings, and must also concern itself with the flow of trial and protecting witnesses." *Rudin v. State*, 120 Nev. 121, 140, 86 P.3d 572, 584 (2004) (quotation marks, brackets, and footnote omitted); *see also* NRS 50.115(1) ("The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence").

A review of the record reveals Batiste attempted to argue with witnesses and disputed their version of events during cross-examination. The district court's comments occurred because the court explained to Batiste that he would not be permitted to ask the witnesses inappropriate or irrelevant questions. Under these circumstances, the district court's comments did not improperly prejudice Batiste. *See Robins v. State*, 106

Nev. 611, 624, 798 P.2d 558, 566 (1990) (explaining the district court appropriately limited a defendant's questioning of a witness because the "cross-examination was founded on speculation and sought merely to elicit testimony that was unrelated, irrelevant and inadmissible"). Therefore, Batiste is not entitled to relief for this claim.

Third, Batiste argues the district court erred by permitting an expert witness to testify without establishing he was qualified to testify as an expert. Batiste did not object to the admission of the expert witness testimony, and thus, no relief would be warranted absent a demonstration of plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Under the plain error standard, we determine "whether there was error, whether the error was plain or clear, and whether the error affected the defendant's substantial rights." *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (internal quotation marks omitted). Batiste fails to demonstrate plain error for this claim.

During trial, the State's expert testified he was a forensic scientist employed by the Las Vegas Metropolitan Police Department, had been so employed for 16 years, and then explained the testing method he used to ascertain the type of controlled substances that were in the pills at issue in this case. *See Hallmark v. Eldridge*, 124 Nev. 492, 499, 189 P.3d 646, 650-51 (2008) (providing a non-exclusive list of factors courts should weigh when considering whether a witness is qualified to testify as an expert). Under these circumstances, Batiste fails to demonstrate

admission of the expert testimony was error affecting his substantial rights. Therefore, Batiste is not entitled to relief for this claim.

Fourth, Batiste argues the district court should have removed Batiste from acting as his own counsel following his improper questioning of witnesses. Batiste asserts he disrupted the judicial process, and therefore, the district court should have precluded him from continuing to act as his own attorney. This claim lacks merit.

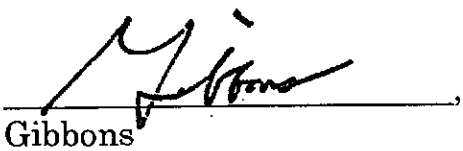
"A criminal defendant has an unqualified right to represent himself at trial so long as his waiver of counsel is intelligent and voluntary." *Tanksley v. State*, 113 Nev. 997, 1000, 946 P.2d 148, 150 (1997) (quotation marks omitted). However, the district court may deny a request for self-representation if the defendant abuses the right by disrupting the judicial process. *See O'Neill v. State*, 123 Nev. 9, 17, 153 P.3d 38, 44 (2007).

Batiste elected to represent himself at trial and the district court appointed standby counsel to assist him. During trial, the district court did not permit Batiste to ask certain questions it considered to be inappropriate or irrelevant. Batiste did not request standby counsel to replace him during trial and the record does not reveal that Batiste disrupted the judicial process in such a manner that would have warranted his removal as counsel. Therefore, Batiste is not entitled to relief for this claim.

Fifth, Batiste argues he should be entitled to represent himself on direct appeal. This claim lacks merit. The Nevada Supreme

Court has already concluded a criminal defendant does not have a right to self-representation on direct appeal. *Blandino v. State*, 112 Nev. 352, 355-56, 914 P.2d 624, 626-27 (1996). Accordingly, Batiste is not entitled to relief for this claim.

Having concluded Batiste is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.[1]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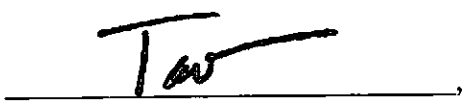
_____, J.
Tao


_____, J.
Silver

cc: Hon. Michelle Leavitt, District Judge
Keith C. Brower
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[1]Batiste also requests that this matter be assigned to a different district court judge upon remand. As we affirm the judgment of conviction, such a reassignment is not necessary.