IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JONATHAN TROYNELL COWART,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 74541-COA

ORDER OF AFFIRMANCE

Jonathan Troynell Cowart appeals from a judgment of conviction, pursuant to a jury verdict, of one count of conspiracy to commit robbery, one count of robbery, and one count of burglary. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Saul Murillo and A.M. were accosted in a convenience store parking lot and robbed and beaten by Christopher Stewart and Treavon Taylor. During the robbery, Cowart was walking towards the parking lot when Stewart noticed Cowart and called him over to the car where A.M. was being held. Stewart offered Cowart money to participate in the robbery and later act like he did not see anything, which Cowart accepted. Stewart gave the victim's debit card to Cowart, who took it inside the convenience store and used it to withdraw funds from A.M.'s account. Stewart pulled A.M. out of the car, walked with her behind a wall separating the convenience store and an adjacent apartment complex, and sexually assaulted her. After Cowart approached them, Stewart asked Cowart if he wanted to have sex with A.M. Cowart then walked behind A.M., undid his belt, and told her to be quiet. Once Stewart walked away, Cowart told A.M. that he was not going to harm her and helped her pull her pants up. Cowart stayed with A.M. and tried to keep her awake as she drifted in and out of consciousness. Cowart told A.M. his name and age. Eventually, Cowart and A.M. walked out

towards the parking lot where police officers had arrived, and Cowart was taken into custody.

The State charged Cowart with conspiracy to commit robbery, robbery, burglary, and battery with intent to commit robbery. After an eight-day joint trial of Cowart and Stewart, the jury found Cowart guilty of conspiracy to commit robbery, robbery, and burglary, but acquitted him of battery with intent to commit robbery.[1] The district court sentenced Cowart to 32-84 months in prison.

On appeal, Cowart argues that: (1) the district court violated his rights to due process and a fair trial when it admitted uncharged bad act evidence without holding a *Petrocelli*[2] hearing, (2) the district court abused its discretion when it denied his motion for mistrial, (3) the district court committed reversible error when it denied his for-cause challenges during jury selection, (4) the evidence was insufficient to support his conviction, and (5) the district court abused its discretion when it rejected two of his proposed jury instructions and accepted two of the State's jury instructions.

First, we consider whether the district court violated Cowart's due process and fair trial rights by admitting uncharged bad act evidence without a *Petrocelli* hearing. At trial, Stewart's counsel asked A.M. if Cowart tried to kiss her while they were behind the wall, to which A.M. responded "[y]es." The defense objected to the question, but the district court determined at a later hearing that it was admissible. Whether to admit evidence is within the sound discretion of the district court. *State v. Shade*,

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[1]Stewart was found guilty on 14 counts, which included multiple counts for sexual assault.

[2]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

111 Nev. 887, 892, 900 P.2d 327, 330 (1995). Accordingly, "[t]his court will not reverse such a determination absent manifest error." *Id.*

"Evidence of another act or crime" is admissible as res gestae if it "is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime." NRS 48.035(3). Thus, "the statute refers to a witness's ability to describe—not explain—a charged crime." *Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005) (internal quotation marks omitted), *rejected on other grounds by Farmer v. State*, 133 Nev. ___, 405 P.3d 114 (2017). And "the determinative analysis is not a weighing of the prejudicial effect of evidence of other bad acts against the probative value of that evidence . . . , [rather], the controlling question is whether witnesses can describe the crime charged without referring to related uncharged acts." *Shade*, 111 Nev. at 894, 900 P.2d at 331. The district court is not required to hold a *Petrocelli* hearing when it admits evidence as res gestae. *See Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 180 (2005). And a limiting instruction must be given only "at the request of an interested party." NRS 48.035(3).

Here, we note that A.M.'s testimony about the kiss was elicited by co-defendant Stewart, not the State. As a defendant, Stewart had the right to elicit the complete story of the crime as it pertained to his theory of the case, which was that Cowart was the one who sexually assaulted A.M. *See Cosio v. State*, 106 Nev. 327, 330, 793 P.2d 836, 838 (1990) (stating "the due process clauses of our constitutions guarantee a defendant the right to introduce into evidence any testimony or documentation which would tend to prove the defendant's theory of the case" (internal quotation marks

omitted)).[3] Stewart's ability to do so would have been severely inhibited if he could not elicit testimony from A.M. about Cowart asking her for a kiss. Therefore, the district court did not abuse its discretion when it admitted A.M.'s testimony as res gestae.

The testimony in question also did not constitute improper bad act evidence under NRS 48.045. It was not focused on "other crimes, wrongs, or acts" but rather was focused on one of *the acts* at issue in the case: the sexual assault of A.M. *See Salgado v. State*, 114 Nev. 1039, 1042, 968 P.2d 324, 326 (1998) (noting the distinction between uncharged crimes and other prior bad acts, and facts directly relating to the charged crime); *see also United States v. Warren*, 25 F.3d 890, 895 (9th Cir. 1994) (stating that evidence should not be viewed as "other crimes evidence" when the act and evidence are "inextricably intertwined" with the crime charged). Stewart's counsel elicited this testimony to undermine the victim's credibility and to show that Cowart, not Stewart, was the one who committed the sexual assault at issue.

Further, because Cowart's motion for mistrial was premised on his argument that the district court erroneously admitted A.M.'s testimony regarding the kiss, we likewise conclude that the district court did not abuse its discretion when it denied his motion for mistrial.

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[3]We reject Cowart's invitation to adopt the reasoning from the concurring opinion in *Chartier v. State* regarding co-defendant misconduct. 124 Nev. 760, 768, 191 P.3d 1182, 1188 (2008) (Cherry, J., concurring). Since *Chartier* was decided over a decade ago, the Nevada Supreme Court has never adopted the concurrence's reasoning, and we will not do so now. Moreover, *Chartier* is distinguishable because it concerned a pattern of misconduct by co-defendant's counsel, whereas here, Stewart's counsel elicited testimony that the district court deemed admissible and made one comment in closing based on that testimony.

Next, we consider whether the district court committed reversible error when it denied Cowart's for-cause challenges during jury selection. Importantly, even if the district court errs in ruling on a for-cause challenge, if the empaneled jury is nonetheless impartial, "the fact that a defendant had to use a peremptory challenge to achieve that result does not mean that the defendant was denied his right to an impartial jury." *Blake v. State*, 121 Nev. 779, 796, 121 P.3d 567, 578 (2005). Thus, such error is considered harmless. Here, none of the prospective jurors that Cowart challenged ended up on the jury, and he does not argue that the empaneled jury was biased. Therefore, even assuming the district court erred in denying Cowart's for-cause challenges, we conclude any error was harmless.[4]

We next consider whether the evidence at trial was sufficient to support Cowart's conviction. When reviewing a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the prosecution and determines whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 4008, 414 (2007)). "[A] verdict supported by substantial evidence will not be disturbed by a reviewing court." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Moreover, so long as the

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[4]We also reject Cowart's invitation to depart from harmless-error review on this issue. The Nevada Supreme Court has repeatedly made clear that harmless-error analysis applies when the empaneled jury was nonetheless impartial. *See Blake*, 121 Nev. at 796, 121 P.3d at 578; *Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996). And not even a year ago, this court accepted and applied the harmless-error standard when a district court erroneously failed to strike a juror for cause, but the empaneled jury was itself impartial. *See Sayedzada v. State*, 134 Nev. ___, ___, 419 P.3d 184, 194 (Ct. App. 2018).

victim testifies with some particularity about the incident, that testimony alone is sufficient to uphold a conviction. *See Rose*, 123 Nev. at 203, 163 P.3d at 414. Here, the jury saw surveillance video depicting Cowart's participation in the crime, and it heard testimony from both victims and a resident of a nearby apartment implicating Cowart. Thus, the evidence was sufficient to support Cowart's conspiracy to commit robbery, robbery, and burglary convictions.

Finally, we consider whether the district court abused its discretion by rejecting two of Cowart's proposed jury instructions and accepting two of the State's proposed instructions. This court reviews a district court's decision settling jury instructions for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). But this court reviews de novo whether a jury instruction accurately stated the law. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009). Cowart challenges Instructions 13 and 15, and argues that his "subjective certitude" and "two reasonable interpretations" instructions should have been given to the jury.

We conclude that Instructions 13 and 15 correctly state the law. Instruction 13 is based on *Doyle v. State*, 112 Nev. 879, 921 P.2d 901 (1996).[5] In that case, the supreme court held that a conspiracy does not need an express agreement, but rather, can be inferred from a coordinated series of acts. *Id.* at 894, 921 P.2d at 911. Instruction 13 makes this point by stating that an express agreement is not necessary, and that "[t]he formation and existence of a conspiracy may be inferred from" surrounding circumstances.

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[5]*Doyle* has been overruled in part, but the overruling is on grounds that do not impact the jury instruction given below. *Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004) (overruling *Doyle*'s requirement of racial identification between a defendant and excused jurors for *Baston* challenges).

Moreover, such an instruction does not constitute reversible error when the jury is further instructed that "[a] conspiracy is an agreement between two or more persons to commit any criminal or unlawful act." *Garner v. State*, 116 Nev. 770, 787, 6 P.3d 1013, 1024 (2000), *overruled on other grounds by Sharma v. State*, 118 Nev. 648, 56 P.3d 868 (2002). The jury here was given Instruction 12, which states just that. Likewise, Instruction 15 correctly states the law based on *McDowell v. State*, 103 Nev. 527, 746 P.2d 149 (1987). There must be "slight evidence" of a conspiracy before a jury can consider a co-conspirator's statements or acts, and statements or acts occurring before the defendant joined the conspiracy that were made in furtherance of the conspiracy can be used against the defendant. *See id.* at 529-30, 746 P.2d at 150; *Burnside v. State*, 131 Nev. 371, 395, 352 P.3d 627, 644 (2015). Instruction 15 correctly states that point. Thus, we conclude that the district court did not abuse its discretion when it provided the jury with Instructions 13 and 15.

Moreover, the district court did not err in rejecting Cowart's proposed instructions. Cowart's "subjective certitude" instruction proffered a definition of reasonable doubt other than the statutorily prescribed one, and the statute provides the only definition of reasonable doubt that can be given to a jury in a criminal case. *See* NRS 175.211(1)-(2). Also, a district court does not err by refusing to give a "two reasonable interpretations" instruction "where the jury has been properly instructed on the standard of reasonable doubt." *See Mason v. State*, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002); *see also Crawford*, 121 Nev. at 754, 121 P.3d at 589 (noting that a defendant is "[not] entitled to instructions that are misleading, inaccurate, or duplicitous"). Here, the jury was given Instruction 5, which correctly stated the reasonable doubt standard. Therefore, the district court did not

abuse its discretion when it rejected Cowart's proposed reasonable doubt instructions.[6]

Based on the foregoing, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Tao

_____, J.
Gibbons

_____, J.
Bulla

cc: Hon. Douglas W. Herndon, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[6]To the extent that Cowart argues that the jury was not instructed about his theory of the case, that argument is without merit. The jury was instructed as to Cowart's necessity defense, which was his theory all along. Also, Cowart's argument that placing "guilty" before "not guilty" on the verdict form violated his constitutional right to a presumption of innocence was not cogently argued and is likewise without merit. *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.").; *see also Rucker v. State*, 510 S.E.2d 816, 820 (Ga. 1999) (holding that listing "guilty" before "not guilty" on a verdict form "does not render the verdict form misleading so as to constitute reversible error"); *State v. Wilkerson*, 91 P.3d 1181, 1190 (Kan. 2004) (holding that listing "guilty" before "not guilty" on a verdict form did not prejudice the defendant).