IN THE COURT OF APPEALS OF THE STATE OF NEVADA

TAREK DIAB GOHAR, A/K/A TAREK DIAB GOHAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73872

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Tarek Diab Gohar appeals from a judgment of conviction, pursuant to a jury verdict, of two counts each of insurance fraud and attempt to obtain money by false pretense in the amount of $650 or more. Eighth Judicial District Court, Clark County; Michael Villani, Judge.[1]

Gohar's Mercedes was towed and stored by Action Towing.[2] Gohar made some inquiries regarding the cost of retrieving the vehicle, but eventually made no effort to recover it. Thereafter, Gohar took out an automobile insurance policy for the Mercedes as well as a personal property insurance policy. Later, Gohar called the police and reported the Mercedes stolen. He then made two insurance claims: one for the Mercedes and another for personal property that he had placed inside the Mercedes. The Mercedes had been in Action's possession all along, and Action eventually sold the Mercedes at auction for $1,147.09 a couple of months later.

[1]Several judges presided over various matters throughout this case. Pertinent to this appeal, the Honorable Eric Johnson, District Judge, presided over the calendar call at issue, and the Honorable Nancy Saitta, Senior Judge, presided over the jury trial.

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

A claims specialist for State Farm investigated Gohar's claims, ultimately denying both. Gohar was charged with two counts each of insurance fraud and attempt to obtain money by false pretense in the amount of $650 or more stemming from the two insurance claims. The court appointed counsel to represent him. After Gohar invoked his right to a speedy trial, the district court ordered trial to begin 19 days after his arraignment. Four days before trial, Gohar personally made an oral request to find substitute counsel, claiming that his appointed counsel was unprepared for trial and did not adequately communicate with him. Gohar did not submit an affidavit in support of his request or ask for a formal hearing. The district court denied his request. At trial, a jury found him guilty on all counts. He was sentenced to concurrent suspended prison terms of 16-42 months and placed on probation for a period not to exceed three years.

On appeal, Gohar argues that (1) the district court abused its discretion in denying his request to continue the trial to retain private counsel, (2) the district court erred in failing to hold a hearing on his request to substitute counsel, (3) his convictions violate the Double Jeopardy Clause, and (4) there was insufficient evidence to support two counts of attempt to obtain money by false pretense in the amount of $650 or more.

We first consider whether the district court erred by denying Gohar's request for a continuance to retain counsel, which he claims violated his right to counsel of choice. "When an action is called for trial, or at any time previous thereto, the court may, upon sufficient cause shown by either party by affidavit, direct the trial to be postponed to another day." NRS 174.515(1). This court reviews a district court's determination on a motion to continue for an abuse of discretion. *Batson v. State*, 113 Nev. 669,

674, 941 P.2d 478, 482 (1997). "[B]road discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel." *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (internal quotation marks omitted); *see also United States v. Garrett*, 179 F.3d 1143, 1144-45 (9th Cir. 1999) (reviewing a district court's decision to deny a continuance that implicated defendant's right to counsel of choice for abuse of discretion).

Below, the district court denied Gohar's personal request for a continuance because Gohar had not hired an attorney, and had not yet acquired the funds at the time to hire an attorney, and because Gohar's counsel and the State both represented they were ready for trial. We conclude that the district court did not abuse its discretion in denying Gohar's unsupported request for a continuance. The record shows that Gohar invoked his right to a speedy trial and did not waive it. Further, he was out of custody prior to trial and had time and opportunity to prepare his defense with his appointed counsel or, alternatively, retain private counsel instead; Gohar never prepared a formal motion or explained what he did with that time.

Additionally, nothing appearing in the record nor argued on appeal shows how Gohar was prejudiced by his appointed counsel's representation or by the court's denial of his request for a continuance. Thus, the district court did not abuse its discretion in denying Gohar's request when he failed to establish sufficient cause to justify a continuance. *See Rimer v. State*, 131 Nev. 307, 326-27, 351 P.3d 697, 711 (2015) (holding district court did not abuse its discretion in denying defendant's request for a 90-day continuance on the eve of trial to substitute his court-appointed

counsel with private counsel because they differed on strategy); *Brinkley v. State*, 101 Nev. 676, 679, 708 P.2d 1026, 1028 (1985) (holding district court did not abuse its discretion in denying motion for continuance where defendants reasons for being displeased with their "court-appointed counsel were unnoteworthy" and the motion was brought five days before trial).

Next, we discuss whether the district court erred in failing to consider or to conduct a hearing regarding Gohar's request to substitute counsel based on a claimed conflict. The Sixth Amendment "right to counsel extends to any critical stage of the criminal proceeding." *Brinkley*, 101 Nev. at 678, 708 P.2d at 1028 (emphasis omitted). But the right to choose one's counsel is not absolute, "and a court has wide latitude in balancing the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar." *Patterson v. State*, 129 Nev. 168, 175, 298 P.3d 433, 438 (2013) (internal quotation marks omitted). And "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006); *cf. Ryan v. Eighth Judicial Dist. Court*, 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) ("Under the Sixth Amendment, criminal defendants who can afford to retain counsel have a qualified right to obtain counsel of their choice." (internal quotation marks omitted)).

Here, both parties employed the incorrect analysis for determining whether the district court abused its discretion in denying Gohar's request to substitute counsel. So, we take this opportunity to reiterate two different rights guaranteed within the Sixth Amendment right to counsel, as laid out by the Nevada Supreme Court in *Patterson v. State*: "the right to effective assistance of counsel and the right of a nonindigent defendant to be represented by the counsel of his or her choice." 129 Nev.

at 175, 298 P.3d at 438. Gohar and the State both analyze the district court's decision under factors set forth in *Young v. State*: "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." 120 Nev. 963, 968, 102 P.3d 572, 576 (2004) (internal quotation marks omitted). However, the Nevada Supreme Court in *Patterson* made clear that the *Young* factors are "used to evaluate an attempt to substitute one appointed attorney for another," which invokes the right to effective assistance of counsel. 129 Nev. at 175, 298 P.2d at 438. Because, instead, Gohar sought to replace appointed counsel with retained counsel, "the focus is on the right to counsel of one's choice." *Id.* Thus, the appropriate test under *Patterson* "is whether denying the substitution: (1) would have significantly prejudiced [the defendant], or (2) was untimely and would result in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." *Id.* at 176, 298 P.2d at 438 (internal quotation marks omitted).

We conclude that the district court did not abuse its discretion under either prong of the disjunctive *Patterson* test. Under the first prong, Gohar fails to show how denying his request significantly prejudiced him. Gohar remained out of custody prior to trial, and the record shows that counsel was appointed early in the case, knew the details of the case, and was prepared for trial. Therefore, Gohar fails to show that denying his request to substitute counsel significantly prejudiced him.

Under the second prong, Gohar's request to substitute was untimely and would have resulted in a disruption of the "orderly processes of justice unreasonable under the circumstances of the particular case." *Id.* Gohar invoked his right to a speedy trial and he never formally waived that right. The State and the defense were both prepared for trial at the time

Gohar requested time to possibly substitute counsel. Further, although his counsel represented him through arraignment and the preliminary hearing, Gohar did not express any concern until four days prior to trial at the calendar call. Moreover, Gohar's request may not have amounted to anything even had it been granted, since Gohar claimed he was trying to save money and merely "wish[ed]" to get another attorney but was not yet sure he could afford one, and he never repeated the request at any later stages of the case, or otherwise documented or memorialized his original request.

Thus, the district court did not abuse its discretion in denying Gohar's request for substitution under either prong of the disjunctive *Patterson* test because its denial did not significantly prejudice him and because his request was untimely and would have disrupted the judicial process. Additionally, because under *Patterson* there is no requirement to conduct a hearing on an alleged conflict, the district court did not abuse its discretion by considering Gohar's informal request to substitute only at the calendar call when ruling on his motion to continue.

Third, we consider whether the Double Jeopardy Clause precludes one of Gohar's two insurance fraud convictions. U.S. Const. amend. V; Nev. Const. art. 1 § 8, cl. 1. He argues that he made only one "statement" that contained an alleged misrepresentation and that "NRS 686A.2815(1)(b) unambiguously only authorizes prosecution on a 'per-statement' basis." However, Gohar failed to raise this issue in the district court, so we review it only for plain error. *Martinorellan v. State*, 131 Nev. 43, 48, 343 P.3d 590, 593 (2015).

First, Gohar fails to provide any authority to support his assertion that NRS 686A.2815(1)(b) authorizes prosecution on a "per-

statement" basis. *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."). And second, the plain language of the statute supports prosecution on a "per claim" basis, not a "per-statement" basis. *See generally Perelman v. State*, 115 Nev. 190, 192, 981 P.2d 1199, 1200 (1999) ("Although NRS 686A.291 makes the filing of a false statement a crime, the overall intent of the statute is to address the filing of a false claim through the use of fraud, misrepresentations, or false statements. Thus, when multiple false statements are made in support of one claim, only one crime has been committed."). Therefore, although Gohar's misrepresentations may have been made in one statement, they regarded two claims made on two different policies, rendering his Double Jeopardy Clause arguments meritless.

Last, we consider whether there was sufficient evidence to support Gohar's two felony convictions of attempt to obtain money by false pretense in the amount of $650 or more. Gohar argues that the State failed to present evidence to prove beyond a reasonable doubt that he attempted to obtain more than $650 from State Farm for each insurance claim. The State counters that a rational trier of fact could have found Gohar guilty on the two felony counts based on evidence that the car was auctioned for $1,147.09 and the common-sense calculation of the value of the various personal property items that were inside the car.

In reviewing a challenge to the sufficiency of evidence supporting a conviction, this court considers "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) (emphasis and internal quotation marks omitted). The jury weighs the evidence and determines the credibility of the witnesses, and it concludes whether these are sufficient to meet the elements of the crime; this court will not disturb a verdict that is supported by substantial evidence. *Id.*

The crime of obtaining money by false pretense under NRS 205.380(1) is defined as follows:

> A person who knowingly and designedly by any false pretense obtains from any other person any chose in action, money, goods, wares, chattels, effects or other valuable thing . . . with the intent to cheat or defraud the other person, is a cheat, and, unless otherwise prescribed by law, shall be punished:
>
> (a) If the value of the thing or labor fraudulently obtained was $650 or more, for a category B felony . . . .
>
> (b) If the value of the thing or labor fraudulently obtained was less than $650, for a misdemeanor, and must be sentenced to restore the property fraudulently obtained, if it can be done . . . .

NRS 205.0831 defines "value" as "the fair market value of the property or services at the time of the theft." "Fair market value" is defined as "[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect." *Value*, Black's Law Dictionary (10th ed. 2014).

The issue that Gohar raises here is whether the State presented sufficient evidence of the fair market value of the insurance claim—namely whether State Farm would have had to pay in excess of $650 if it had found his claims credible for the Mercedes and, separately, for the personal

property. Whenever a criminal statute specifically designates a dollar amount as an element of the crime, the State is required to produce evidence to prove that the value exceeds that statutory amount. *See Sellers v. State*, 108 Nev. 1017, 1019, 843 P.2d 362, 364 (1992) ("A fact, by statute made essential to the efficacy of the judgment, is missing from the verdict and cannot be imported into it by reference to the information or by conjecture or anything of the kind." (internal quotation marks omitted)).

The State argues that the subsequent auction price of $1,147.09 establishes the value of the vehicle. But if so, the insurance payment—$1,147.09, less the $500 deductible that Gohar would have had to pay to receive the funds from State Farm—would have amounted to only $647.09, which is less than the $650 threshold set by NRS 205.380(1). The State suggests that the jury could have inferred that the vehicle was worth slightly more than the auction price. But assessing the fair market value of an insurance payout for a '96 Mercedes is not something a reasonable jury could determine absent evidence of its condition, its upgrades, its service record or maintenance history, or any other details about the vehicle. Had the vehicle been relatively new and evidence was presented that it was in good condition, a reasonable jury may have been able to infer the fair market value of an insurance payout for that vehicle. But without knowing these facts here, the fair market value of the insurance policy on the Mercedes could have been more than the auction price, but not necessarily so, and the jury's conclusion would have been nothing more than speculation. *See Stratacos v. State*, 748 S.E.2d 828, 838 (Ga. 2013) (holding that there was insufficient evidence for the jury to find the value, "directly or by deduction," because without more detailed evidence, any determination the jury made as to value "would be speculative rather than

properly based on the evidence presented"). Consequently, the State failed to present sufficient evidence of the fair market value of the insurance claim for the Mercedes to allow the jury to find that Gohar attempted to obtain an amount of money exceeding $650. *See State v. Labuwi*, 178 N.W. 479, 480 (Wis. 1920) (holding that when a statute prescribes a greater penalty where the money amount obtained by false pretense exceeds a certain amount, the exact amount received is immaterial, but whether the amount received is in excess of that amount is material).

Similarly, the State failed to present any evidence as to the value of the insurance payout for the personal property claim. The only *evidence* presented at trial was testimony regarding the items Gohar listed in the claim. But the State presented no evidence at trial establishing the condition of the items, their age, or the fair market value of an insurance claim for those items. Therefore, because the value of each of the insurance claims must have exceeded $650 to justify the felony conviction, and the State failed to present sufficient evidence as to the value of the claims, no "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair*, 108 Nev. at 56, 825 P.2d at 573 (internal quotation marks omitted).

However, although the State failed to present sufficient evidence for the jury to find Gohar guilty of the two felony convictions, it did present sufficient evidence to support two misdemeanor counts of attempt to obtain money by false pretense because a rational trier of fact could have found that the claims had at least some value, even though less than $650. Because the jury here was instructed on the lesser-included misdemeanor offense, we reverse and remand and direct the district court to conduct a

new sentencing hearing on the two counts of attempt to obtain money by false pretense of less than $650. *See* NRS 193.330(1)(b); NRS 205.380(1)(b).

Accordingly we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Tao

_____, J.
Gibbons

SILVER, C.J., dissenting:

Gohar was formally arraigned on March 8, 2016. Only 15 days later, on March 23, 2017, the district court at calendar call denied out-of-custody Gohar's request to continue trial to retain private counsel. Gohar stated he believed that the public defender was not prepared to go to jury trial on multiple counts of insurance fraud. The district court summarily and without explanation denied Gohar's request, forcing the case to go to trial only four days later in an overflow department.

This was a first request for a continuance by an out-of-custody defendant. Moreover, Gohar requested the court allow him time to retain counsel after being in district court a mere 15 days. This district court judge did not even preside over the case—instead sending the case to an overflow judge. Under these facts, with only 20 days from formal arraignment to jury trial, I believe the district court's erroneous refusal to allow Gohar his

choice of counsel was unreasonable and, therefore, the district court abused its discretion. *See United States v. Gonzales-Lopez*, 548 U.S. 140, 144 (2006); *Patterson v. State*, 129 Nev. 168, 175, 298 P3d 433, 438 (2013). As a result, I would reverse the district court, vacate the conviction, and remand the matter for further proceedings. *See Gonzales-Lopez*, 548 U.S. at 152 (concluding reversal and remand was necessary where the district court erred by denying the defendant his choice of counsel).

 , C.J.
Silver

cc: Hon. Michael Villani, District Judge
Hon. Eric Johnson, District Judge
Clark County Public Defender
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