

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

GERMAINE HAMPTON, A/K/A
JERMAINE HAMPTON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79683-COA

FILED

NOV 25 2020

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

Germaine Hampton appeals from a judgment of conviction, pursuant to a jury verdict, of robbery, conspiracy to commit robbery, and stop required on signal of a police officer. Eighth Judicial District Court, Clark County; Mary Kay Holthus, Judge.

Hampton and accomplice Robert Russell blocked a car with their car, allegedly pointed a gun at the driver, and stole several items from him.¹ After Hampton drove off with Russell as the passenger, the victim called 9-1-1 from the nearest business. A police officer quickly located the car matching the description of the vehicle Hampton was seen driving leaving the general area of the crime. After the police officer activated his lights and siren, Hampton and Russell evaded arrest by leading the officer on a high-speed pursuit, during which Hampton ran at least one red light. The chase ended when Hampton stopped at his apartment complex and Russell fled from the car on foot. Although Hampton did not run, police officers had to forcefully remove him from the car. The police searched the car and located several items of the victim's property. While the search did

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

not uncover a gun in Hampton's car or on his person, police officers located a gun near the path Russell had used to flee the scene.

Russell agreed to plead guilty pursuant to a plea agreement just before trial was to commence, so Hampton proceeded to trial alone. The jury found him guilty of robbery, conspiracy to commit robbery, and stop required on signal of a police officer, but found him not guilty of using a weapon during the robbery. The district court sentenced Hampton to an aggregate total sentence of 8-21 years in prison.

On appeal, Hampton argues (1) the district court abused its discretion by denying his motion to withdraw counsel and proceed pro se, (2) the district court impermissibly admitted evidence of his prior conviction, (3) the State engaged in prosecutorial misconduct when it referred to Russell as his co-conspirator, (4) the State engaged in prosecutorial misconduct when it referred to his post-arrest silence, (5) the district court impermissibly considered his subsequent arrest at sentencing, (6) the sentence imposed by the district court constituted cruel and unusual punishment, and (7) cumulative error warrants reversal.

Motion to proceed in pro se

Hampton first argues that the district court abused its discretion when it denied his oral motion to represent himself. Hampton belatedly made his request after both parties had announced ready for trial. He maintains that the district court did not give him an opportunity to demonstrate that reasonable cause existed for his untimely motion.

We review the district court's order denying Hampton the right to represent himself for an abuse of discretion. *Guerrina v. State*, 134 Nev. 338, 341, 419 P.3d 705, 709 (2018). The Sixth Amendment of the United States Constitution, made applicable to the states by the Fourteenth

Amendment, guarantees a criminal defendant the right to self-representation. *See Faretta v. California*, 422 U.S. 806, 819-20 (1975). Yet, the right to self-representation is not absolute because it compels abandonment of another constitutional right—the right to counsel. *See id.* at 835. A district court must determine if a defendant is competent to waive his or her right to counsel and that he or she has made a knowing and voluntary waiver of this right. *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993). A district court nonetheless may deny a request for self-representation if it is untimely, equivocal, or made for the purpose of delay. *O'Neill v. State*, 123 Nev. 9, 17, 153 P.3d 38, 44 (2007).

The Nevada Supreme Court created a two-part test to determine whether a request for self-representation is untimely. *Lyons v. State*, 106 Nev. 438, 445-46, 796 P.2d 210, 214 (1990), *abrogated in part on other grounds by Vanisi v. State*, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001). Under *Lyons*, if the request for self-representation can be granted “without need for a continuance, the request should be deemed timely.” *Id.* at 446, 796 P.2d at 214. However, if granting the request would require a continuance, the district court may deny the request as untimely if there is no “reasonable cause to justify [the] late request.” *Id.*

The district court did not abuse its discretion by denying Hampton’s motion to represent himself. Hampton made his request after multiple calendar call dates during which both parties had repeatedly announced ready for trial, and finally made his request only days before trial was scheduled to commence. He expressly told the district court that he would need more time to prepare if he were to represent himself. Hampton’s motion thus fails the first prong of *Lyons*. As for the second prong, Hampton could have justified the late request for a continuance had

he demonstrated reasonable cause, yet there is no evidence in the record of such justification. While Hampton did participate in a sealed hearing with counsel that related to his request for self-representation, Hampton failed to provide a transcript of that hearing on appeal. When parts of the record are missing, we presume that the missing portions favor the district court's conclusion. *See Greene v. State*, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980). There is also evidence in the record that Hampton had on-going issues with a parade of rotating trial counsels, and his issues were not new. Thus, Hampton has failed to demonstrate that there was reasonable cause to justify his late request, and the district court did not abuse its discretion in denying the motion to represent himself.

Prior conviction evidence

Hampton argues that the district court abused its discretion in admitting evidence of Hampton's prior conviction.² At trial, Hampton chose to testify and counsel asked him if he had a marijuana conviction, to which Hampton responded affirmatively. After the State concluded its cross-examination of Hampton and the district court excused Hampton, the State sought leave to recall Hampton to ask an additional clarifying question about the exact nature of his prior conviction. After both parties discussed the matter with the district court, the parties stipulated to the district court

²In addition, Hampton advances the argument that the State failed to provide discovery of Hampton's judgment of conviction. However, the State is not required to provide a judgment of conviction to the defense before questioning a witness. *Corbin v. State*, 111 Nev. 378, 382, 892 P.2d 580, 583 (1995) ("NRS 50.095 does not require that the judgment of conviction be presented before questioning a witness about prior felony convictions."). Therefore, we conclude there was no error.

informing the jury of the correct conviction, which was marijuana trafficking.

“We review a district court’s decision to admit or exclude evidence for an abuse of discretion.” *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). Under NRS 50.095(1), a party may impeach a witness by proving that he or she was previously convicted of a felony. Further, once a defendant opens the door to an issue that the State may otherwise not address, the State may provide evidence in response. See *Wesley v. State*, 112 Nev. 503, 513, 916 P.2d 793, 800 (1996).

Hampton argues that once he stepped off the witness stand he was no longer subject to impeachment. NRS 50.095 puts no express requirements on *when* the State can impeach a witness. Further, impeachment aside, Hampton voluntarily opened the door to his prior conviction by testifying and stipulating to it during direct examination and, moreover, his counsel stipulated to allowing the district court to further explain the nature of the conviction to the jury in lieu of further questioning. Under these circumstances, Hampton cannot show on appeal that the district court abused its discretion by admitting evidence of the prior conviction that he volunteered into evidence.

The State’s reference to a “co-conspirator”

Hampton argues the State engaged in prosecutorial misconduct when it referred to Russell as his “co-conspirator” during arguments and witness examinations.

While questioning witnesses, the State referred to Russell as Hampton’s “co-conspirator.” After the State referred to Russell as Hampton’s “co-conspirator” a few times, Hampton objected, and the district court sustained the objection. The State thereafter did not use this term in

any additional questioning of any witnesses. However, during its closing argument, the State again referred to Russell as Hampton's "co-conspirator" multiple times. Hampton failed to object to most of these, but did object after one such usage, and the district court overruled the objection. Thus, Hampton only objected to some, but not all, instances of the alleged misconduct that he now cites.

When assessing a claim of prosecutorial misconduct to which no objection was made, we review only for plain error. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). Under plain error review, this court does not reverse unless the error caused actual prejudice or a miscarriage of justice. *Id.* As such, this court determines whether there was prosecutorial misconduct, whether the misconduct was plain from the record, and whether the misconduct affected the defendant's substantial rights, *id.* at 1190, 196 P.3d at 478, or "so infected the proceedings with unfairness as to result in a denial of due process." *Byars v. State*, 130 Nev. 848, 865, 336 P.3d 939, 950 (2014).

When assessing a claim of prosecutorial misconduct to which a timely objection was made, we determine whether the prosecutor's conduct was improper and, if so, whether the conduct warrants reversal under a harmless error analysis. *Valdez*, 124 Nev. at 1188, 196 P.3d at 476.

Here, we conclude that the State did not commit prosecutorial misconduct. Hampton argues that the State was not allowed to call Russell his "co-conspirator" to this crime because he was innocent, but that was the very question that the trial was intended to answer. The State is permitted to base its examination of witnesses and make statements during closing arguments that are reasonably based upon evidence introduced at trial. *Domingues v. State*, 112 Nev. 683, 696, 917 P.2d 1364, 1373 (1996). "The

statements should be considered in context, and ‘a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone.’” *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (quoting *United States v. Young*, 470 U.S. 1, 11 (1985)). Further, there is a “high bar for overturning a jury verdict due to a prosecutor’s statements at closing argument.” *Byars*, 130 Nev. at 866, 336 P.3d at 951.

The State’s assertion that Russell and Hampton conspired to commit the crime together was logically based upon the evidence introduced at trial. Further, the district court correctly instructed the jury that closing arguments by counsel are not evidence, and that questions asked of a witness are also not evidence but only give meaning to the witness’s answers.³ The victim testified that it appeared the two were working together as they arrived and left the scene together in the same car and acted in concert during the crime itself, and Hampton himself admitted he took items out of the victim’s car and put them in his car pursuant to Russell’s direct request to do so. The victim also testified that during the crime, Hampton told Russell to keep an eye on the victim. Hampton was also charged with aiding, abetting or conspiring with Russell, and if believed by the jury, Hampton was legally responsible for all of Russell’s acts in furtherance of the conspiracy. When stopped, the police found the victim’s property in the car with Hampton and found a gun dropped along the path where Russell had fled on foot. Thus, the State’s references to Russell as a “co-conspirator” were reasonably based upon evidence and do

³Jury instruction 20 stated, in part, that “[s]tatements, arguments and opinions of counsel are not evidence in this case. . . . You must not speculate to be true any insinuations suggested by a question asked [of] a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.”

not amount to prosecutorial misconduct under any circumstances because of the way the case was charged.

Post-arrest silence

Hampton argues that the State improperly commented on his post-arrest silence during Hampton's cross-examination and the State's rebuttal closing argument. "It is well settled that the prosecution is forbidden at trial to comment upon an accused's election to remain silent following his arrest and after he has been advised of his rights as required by *Miranda v. Arizona*."⁴ *Morris v. State*, 112 Nev. 260, 263, 913 P.2d 1264, 1267 (1996) (internal quotation marks omitted). The Nevada Supreme Court "expanded this doctrine by concluding that a prosecutor also cannot use post-arrest, pre-*Miranda* silence to impeach a defendant." *Id.* The Nevada Supreme Court has held reversal is not

required if the prosecutor's references to the defendant's post-arrest silence are harmless beyond a reasonable doubt. Comments on the defendant's post-arrest silence will be harmless beyond a reasonable doubt if (1) at trial there was only a mere passing reference, without more, to an accused's post-arrest silence, or (2) there is overwhelming evidence of guilt.

Id. at 264, 913 P.2d at 1267-68 (citations omitted).

The following dialogue occurred when the State conducted its cross-examination of Hampton:

[State:] Okay. At no point in time when you were apprehended by the police did you say, hey man, this guy — this is the guy that did everything or you know what, I took no part in this as far as when you were apprehended; correct?

⁴384 U.S. 436 (1966).

[Hampton:] Yes. I remain not guilty the whole time.

[State:] No, sir. That's not my question. When you were stopped by multiple officers^[1] lights and sirens and they cornered you, you never at any point in time during that point said you know what, you got the wrong guy, he's the one that's going over there or you know what, I took no part of this; correct? You chose instead to be uncooperative and have to be forcefully removed from that car?

[Hampton:] Not correct.

[State:] Okay. Did you ever tell the police anything at that point in time?

[Hampton:] No.

[State:] No. Okay. So you had some time to think about it; right?

[Defense Counsel:] Objection Your Honor. Can we approach?

....

The Court: – I'm going to sustain this.

The State committed prosecutorial misconduct by improperly commenting on Hampton's right to remain silent and insinuating that Hampton's exercise of his right to remain silent indicated guilt. However, we conclude that the State's comments were harmless beyond a reasonable doubt for two reasons. First, Hampton objected to this questioning, and the district court sustained the objection, thereby mitigating the impact. Second, the evidence of Hampton's guilt was overwhelming. The victim testified that Hampton and Russell, who appeared to be working together, approached him and threatened him, and stole several items from his car. Police officers located Hampton and Russell driving away from the scene moments after the crime in a car that matched the victim's description and, when the police tried to stop the car, Hampton led them on a high-speed

pursuit. Police found the victim's stolen property in Hampton's car, a gun nearby, and during the trial Hampton admitted that, at Russell's request, he took items from the victim's car and put them into his car. Thus, while we conclude the State's line of questioning constituted prosecutorial misconduct, the comments were harmless beyond a reasonable doubt and the jury would have reached the same verdict even without the misconduct.⁵ *Valdez*, 124 Nev. at 1188-89, 196 P.3d at 476.

Consideration of subsequent arrest at sentencing

Hampton argues the district court abused its discretion when it considered at sentencing that Hampton was arrested for a subsequent offense. We review a district court's sentencing determination for an abuse of discretion. *Parrish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). "[T]his court generally will not disturb a district court's sentencing determination so long as it does not rest upon impalpable or highly suspect evidence." *Martinez v. State*, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999).

Here, the district court could have considered the fact that Hampton was later arrested for another crime. See *United States v. Weston*, 448 F.2d 626, 633 (9th Cir. 1971) (noting the "general proposition that evidence of other criminal conduct not resulting in a conviction may be considered in imposing sentence"). Also, the district court stated on the record that it was not taking into consideration the facts surrounding the subsequent arrest. There is no evidence that the district court relied on improper evidence at sentencing, and thus we conclude the district court did not abuse its discretion.

⁵Hampton did not object during the State's rebuttal closing argument to the alleged misconduct. Our review of the record does not reveal plain error. See *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018).

Cruel and unusual punishment

Hampton argues the district court's sentence constituted cruel and unusual punishment because it was disproportionate to his wrongdoing compared to Russell's involvement. Courts have wide discretion in imposing criminal sentences. *Pitmon v. State*, 131 Nev. 123, 126, 352 P.3d 655, 657 (Ct. App. 2015). "[R]egardless of its severity, a sentence that is within the statutory limits is not considered to violate the Eighth Amendment's proscription against cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Id.* (internal quotation marks omitted).

We conclude the district court did not abuse its discretion in imposing this sentence because the sentence was within the statutory limits and the sentence does not shock the conscience. In addition, Hampton's argument that the district court abused its discretion by failing to adequately balance his actions in the crimes with Russell's is meritless given the overwhelming evidence of Hampton's involvement with robbing the victim and his dangerous evasion of arrest. *See Nobles v. Warden*, 106 Nev. 67, 68, 787 P.2d 390, 391 (1990) (co-defendants are not constitutionally entitled to receive the exact same sentence). Accordingly, the district court did not abuse its discretion in sentencing Hampton.

Cumulative error


Finally, Hampton argues the cumulative effect of the errors below made it impossible for him to receive a fair trial, and this court should reverse his conviction. Cumulative error warrants reversal where the effect of the errors, viewed collectively, violates the defendant's right to a fair trial, even if each individual error was harmless. *Valdez*, 124 Nev. at 1195, 196


P.3d at 481. In reviewing a claim of cumulative error, this court considers “(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.” *Id.* (quoting *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

Here, we conclude that the State committed prosecutorial misconduct in suggesting that Hampton’s post-arrest silence reflected guilt. However, as there is only one error, there can be no cumulative error. *Carroll v. State*, 132 Nev. 269, 287, 371 P.3d 1023, 1035 (2016).

Based on the foregoing, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Mary Kay Holthus, District Judge
Gregory & Waldo, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk