IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RANDY KYLE CHAPPELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 80540-COA

FILED

JAN 25 2021

ORDER OF AFFIRMANCE

Randy Kyle Chappell appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of lewdness with a child under 14 years of age. Third Judicial District Court, Lyon County; John Schlegelmilch, Judge.

Lyon County Deputy Sheriffs received information that Chappell inappropriately touched his three-year-old granddaughter, AC. When deputies interviewed Chappell, he voluntarily admitted touching AC's bare vagina with his hand on four separate occasions at his Dayton home. Deputies released Chappell, who then traveled to Los Angeles. Based on the interview, the Lyon County District Attorney's Office charged Chappell with two counts of lewdness with a child under 14 years of age.

Shortly after arriving in Los Angeles, Los Angeles Police Department (LAPD) officers arrested Chappell on suspicion of inappropriately touching his other granddaughter, eight-year-old AC2, which allegedly occurred in Los Angeles. After receiving proper *Miranda*[1] warnings, Chappell admitted to "superficial[ly]" touching AC2's bare vagina without penetration. He denied doing this for sexual gratification but

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[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

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alluded to Satan's influence tempting him to engage in this misconduct. He described the touching as teasing and playing that got "out of hand."

Seven times during the LAPD interrogation, Chappell stated he was unsure if he was supposed to answer questions or ask for a public defender. The LAPD detectives reaffirmed Chappell's right to have a public defender present and continued questioning. Later, in a *Petrocelli* hearing,[2] the district court ruled that Chappell's confession to inappropriate touching in California was admissible as prior bad act evidence under NRS 48.045(2) to show sexual intent when he touched AC in Nevada. Furthermore, the district court determined there were no *Miranda* violations that would require exclusion of the evidence. The State introduced the confession through an LAPD detective and the bad act through AC2's testimony.

During jury selection, a venire member who later served on the jury indicated that he wanted to hear all of the evidence, including testimony from Chappell. Before Chappell's counsel could follow up on this remark, the district court paused voir dire questioning and sidebar conferenced with counsel. After the sidebar, the district court asked the venire, "You're not relying on the Defendant to present evidence to acquit himself, you're relying on the State to prove beyond a reasonable doubt; is that right?" The panel responded in the affirmative. Later, while outside the presence of the prospective jurors, the district court prohibited Chappell's counsel from asking the venire if anyone would hold it against Chappell if he did not testify. The court reasoned that the question went to the merits of the case and said it would be covered by a later jury instruction.

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[2]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Flowers v. State*, 136 Nev. 1, 5, 456 P.3d 1037, 1043 (2020).

On appeal, Chappell claims that the district court (1) erred in admitting his prior bad act confession to LAPD detectives in violation of *Miranda*,[3] and (2) committed structural error by prohibiting defense counsel from asking the venire about Chappell's constitutional right not to testify. We disagree.

Under his first claim, Chappell argues that the totality of his several "imperfect" invocations of the right to counsel under *Miranda* culminate into an unambiguous invocation. The State counters that there was no unambiguous invocation and that each reference to counsel was made equivocally because Chappell stated he was unsure with each reference. We review for clear error "the district court's factual finding concerning the words a defendant used to invoke the right to counsel." *Carter v. State*, 129 Nev. 244, 247, 299 P.3d 367, 370 (2013) (internal quotation marks omitted). But we review "[w]hether those words actually invoked the right to counsel" de novo. *Id.* (alteration in original) (internal quotation marks omitted).

As a rigid, prophylactic rule, if a suspect invokes his or her right to counsel during an interrogation, all questioning must cease until the suspect confers with counsel. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981). To be valid, an invocation "must unambiguously request counsel." *Davis v. United States*, 512 U.S. 452, 459 (1994). An invocation is unambiguous if "a reasonable police officer in the circumstances would understand the [suspect's] statement to be a request for an attorney." *Id.* at 458. Law enforcement officers are not required to ask clarifying questions

[3]Chappell does not challenge the evidentiary basis for admitting his confession as bad act evidence; he argues only that detectives from the LAPD obtained it in violation of *Miranda*.

when a suspect makes an ambiguous or equivocal invocation. *Id.* at 461-62. "Unless the suspect [unambiguously] requests an attorney, questioning may continue." *Id.* at 462. "Maybe I should talk to a lawyer" is insufficient to invoke a request for counsel under *Miranda*. *Id.* *See also Kaczmarek v. State*, 120 Nev. 314, 330 (2004) ("*Davis* set forth a bright-line standard under which a statement referring to counsel is . . . "'an assertion to the right of counsel or it is not'"") (citations omitted).

Here, Chappell made seven references about being unsure if he should have a public defender present or answer questions. However, each reference to a public defender or confusion about answering the detectives' questions was equivocal and not an invocation because Chappell made each reference by saying, "I don't know" or "I'm not sure," which indicates uncertainty that does not rise to the level of an unequivocal request. The district court found that any mention of a public defender was made with a substantial degree of uncertainty, so it was equivocal and not a clear invocation of his right to counsel. It reasoned that the interrogating officers need not encourage a suspect to request a public defender or counsel, and here, the detectives even reaffirmed midway during the interview that Chappell could have a public defender present, so it was a valid confession under *Miranda*.

Nor do Chappell's purported invocations collectively constitute a valid invocation. The detectives did not pressure or coerce Chappell to speak with them, and they reassured Chappell that he had the right to the presence of a public defender. At the outset of the interrogation, Chappell acknowledged that he understood his rights to silence and counsel, and the record indicates that he freely and voluntarily continued to speak with the

detectives.[4] Consequently, we conclude that the testimony about the confession to the LAPD detectives was not admitted as evidence in violation of *Miranda*.

Under Chappell's second claim on appeal, he argues that it was structural error for the district court to prohibit him from asking the venire if it understood Chappell's privilege against self-incrimination under the Fifth Amendment. We review "de novo whether the district court's actions constituted structural error"; however, we review voir dire decisions for abuse of discretion. *Morgan v. State*, 134 Nev. 200, 207, 210, 416 P.3d 212, 221, 223 (2018).

"A criminal defendant has a constitutional right to be tried by a fair and impartial jury." *Azucena v. State*, 135 Nev. 269, 273, 448 P.3d 534, 538 (2019). The purpose of voir dire examination is to determine whether a prospective juror can and will render a fair and impartial verdict based on the applicable law and evidence. *Id.* A defendant also enjoys the privilege against self-incrimination under the Fifth Amendment to the United States Constitution. U.S. Const. amend. V ("nor shall [any person] be compelled in any criminal case to be a witness against himself"); *see also* Nev. Const. art. 1, § 8(1); NRS 175.181(1) ("No instruction shall be given relative to the failure of the person charged with the commission of crime or offense to testify, except, upon the request of the person so charged, the court shall instruct the jury that, in accordance with a right guaranteed by the Constitution, no person can be compelled, in a criminal action, to be a witness against himself or herself."). Notwithstanding these constitutional

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[4]*See Mendoza v. State*, 122 Nev. 267, 276, 130 P.3d 176, 182 (2006) (providing that "a waiver may be inferred from the actions and words of the person interrogated" and no written waiver is necessary).

rights, the district court may generally limit voir dire questioning regarding "issues of law to be covered in future jury instructions," among other things. *Hogan v. State*, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987).

Here, Chappell cites no authority that treats a limitation of voir dire questioning as structural error nor does he develop the argument. Therefore, we need not address the structural error component of his argument. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority).

The district court informed the inquiring juror, as well as the entire venire, that Chappell need not present any evidence and that it was the State's burden to prove guilt. The venire acknowledged that it understood this rule. Although the district court's action in severely limiting the voir dire questioning may be viewed as arbitrary, *see* NRS 175.031 (permitting counsel to question members of a prospective jury panel, which "must not be unreasonably restricted"), it was not capricious because the court advised the prospective jury after the sidebar conference, and confirmed with the entire venire that it understood, that Chappell need not present any evidence.

Additionally, Chappell did not provide this court with a record of the jury instructions, to which he voluntarily assented, to demonstrate that the jury was not properly instructed on his privilege against self-incrimination, the presumption of innocence, or the burden of proof. Moreover, the record reveals that at the start of voir dire, the district court advised the jury on Chappell's presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt, and the court briefly reiterated these advisements when the prospective juror indicated that he wanted to hear Chappell testify. Therefore, the jury was instructed on these

rights several times, which militates against any confusion that the jury might have had with Chappell's privilege against self-incrimination and right not to testify. *See* NRS 175.191 (stating that a defendant is presumed innocent and cannot be convicted without proof of guilt beyond a reasonable doubt). Finally, because Chappell opted to testify, any error in failing to question the venire or instruct the jury on his right not to testify is moot or harmless. *See* NRS 175.171 (stating that no special instructions shall be given related to a defendant's testimony); NRS 175.181 (stating that no instructions shall be given related to a defendant's failure to testify except upon the defendant's request); NRS 177.255 (stating that on appeal, technical errors or defects shall be disregarded if they do not affect substantial rights). Therefore, we find both of Chappell's arguments on appeal unpersuasive.[5] Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_______________, C.J.
Gibbons

_______________, J.
Tao

_______________, J.
Bulla

cc: Hon. John Schlegelmilch, District Judge
Walther Law Offices, PLLC
Attorney General/Carson City
Lyon County District Attorney
Third District Court Clerk

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[5]We have considered Chappell's other arguments and find that they do not have merit.