IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RENE GERARD HARRIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79467-COA

ORDER OF AFFIRMANCE

Rene Gerard Harris appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of conspiracy to commit robbery; one count of robbery with use of a deadly weapon; two counts of battery with intent to commit robbery; one count of attempted robbery with use of a deadly weapon, victim being an older person; two counts of assault with a deadly weapon; one count of battery resulting in substantial bodily harm, victim 60 years of age or older; and one count of stop required on signal of police officer. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Jason Rowe was beaten and robbed by two African American men, one of whom he later identified as Harris.[1] Harris was armed with a handgun during the attack. Harris and his accomplice, later identified as Tobias Hooks, took Rowe's phone. Harris and Hooks fled in a dark SUV.

Shortly thereafter, Paul Sear, age 67, was at a truck stop in a darkly lit parking lot half a mile away from where Rowe was attacked and robbed. At the truck stop, a dark Ford Escape SUV abruptly pulled up next to him. An African American male exited the front passenger seat and attacked Sear while holding a handgun. Sear's glasses were knocked off his

[1]We recount the facts only as necessary for our disposition.

face, but he fought back against his attacker. After the attack, the perpetrator got back into the passenger seat of the SUV, and the driver fled the area. Sear did not get a good look at his attacker or the driver of the SUV.

Officer Kolton Sampson of the Las Vegas Metropolitan Police Department dispatched to the scene of the first robbery. While taking Rowe's statement, the same dark SUV that Rowe initially saw, a black Ford Escape, pulled into the parking lot. Rowe immediately noticed the SUV and informed Officer Sampson that was the car his attackers drove. Officer Sampson got in his patrol cruiser, turned on his emergency lights and siren, and pursued the SUV, which eluded Sampson's pursuit.

Shortly after the car chase, the SUV was found abandoned in a parking lot located in the vicinity of the robberies. Police recovered Rowe's phone and latent fingerprints belonging to Harris and Hooks inside the car. Surveillance cameras captured footage of the two men parking and immediately abandoning the car.

Detective David Chudoba took over the investigation of the two robberies. Hooks voluntarily went to police a few days after the robberies. The detective interviewed Hooks, who confessed, and arrested him. The detective learned that Harris recently pawned something in the area. It was later discovered that Harris was in custody in California and was being extradited to Nevada for a different case.[2]

At trial, a jury found Harris guilty of all charges. Harris received an aggregate sentence of 23 to 63 years. This appeal followed.

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[2]*See Harris v. State*, Docket No. 80750 (Order of Affirmance, Ct. App., April 28, 2021).

Harris claims that (1) the district court erred by denying his pretrial motion to substitute counsel; (2) the State committed prosecutorial misconduct during trial; (3) the district court erred by not dismissing his case pursuant to the Interstate Agreement on Detainers Act (IAD); (4) Harris's sentence amounted to cruel-and-unusual punishment;[3] and (5) cumulative error warrants reversal.[4]

Harris first argues on appeal that the district court abused its discretion by denying his pro se motion to substitute counsel because his appointed counsel "did not properly investigate his case, . . . failed to

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[3]Harris's claim that his prison sentence was cruel and unusual lacks merit. He mainly contends that he was punished for taking his case to trial and his sentence was disproportionate to both the crimes he was convicted of and his co-conspirator's sentence. Harris does not provide a record of co-conspirator Hooks's sentence. *See Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (explaining that the appellate court "cannot properly consider matters not appearing in" the record on appeal). A sentence that falls within the statutory limits is not "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." *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotation marks omitted). Harris's sentence falls within the parameters of the relevant statutes. *See* NRS 199.480; NRS 200.380; NRS 193.165; NRS 200.400; NRS 200.471; NRS 193.330; NRS 193.167; NRS 200.481; NRS 484B.550. In fact, most of the sentences on these counts do not reach the statutory maximums, and eight counts run concurrently. Additionally, the district court declined to adjudicate Harris as a habitual criminal. Harris does not allege that these statutes are unconstitutional. We conclude that Harris's sentence is not grossly disproportionate to his crimes and therefore not cruel and unusual.

[4]There was no error below, so we need not address Harris's cumulative error claim. *See Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (noting "insignificant or nonexistent" errors do not warrant cumulative error review).

challenge the indictment, failed to file an IAD motion[,] and . . . made verbal threats." The State counters that there was no breakdown in the attorney-client relationship. We review the denial of a motion for substitution of counsel for abuse of discretion. *Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). A defendant must show adequate cause to warrant substitution of existing counsel. *Id.*

Here, the record on appeal does not include a written order on this matter, nor is there a transcript of the pretrial proceedings indicating the district court's findings and conclusions. Harris only provides a minute order, which reflects he made a pro se oral motion just prior to the commencement of trial. Because we presume that the missing transcript and written order (if one was issued) supports the district court's ruling, Harris fails to demonstrate that the district court abused its discretion by denying his motion to substitute counsel. *See Johnson*, 113 Nev. at 776, 942 P.2d at 170 (explaining that the appellate court "cannot properly consider matters not appearing in" the record on appeal). Additionally, Harris filed his written motion a few days before trial, which was not timely and if granted would have delayed the trial, so the court did not abuse its discretion in denying it. *See Garcia v. State*, 121 Nev. 327, 338-39, 113 P.3d 836, 843-44 (2005), *modified on other grounds by Mendoza v. State*, 122 Nev. 267, 130 P.3d 176 (2006) (noting a substitution of counsel is disfavored when it would result in unnecessary inconvenience and delay of trial); *see generally* NRS 174.125.

Harris next argues three bases for prosecutorial misconduct: the State elicited testimony about his co-conspirator's confession through an investigating detective in violation of *Bruton v. United States*, 391 U.S. 123 (1968); the State elicited testimony about his co-conspirator's guilty plea

agreement through the same detective, in violation of the confrontation clause; and, the State asked too many leading questions throughout trial. The State counters that it did not engage in misconduct because it did not violate *Bruton*—instead, it offered the fact that Hooks pleaded merely to blunt an attack on the detective's credibility, and did not ask leading questions. Harris did not object to any of this alleged misconduct at trial.

When a defendant raises an issue on appeal that he or she did not raise before the district court, we review for plain error. *See* NRS 178.602 ("Plain errors . . . may be noticed although they were not brought to the attention of the court."); *Jeremias v. State*, 134 Nev. 46, 52, 412 P.3d 43, 49 (2018) (citation omitted). This includes unpreserved claims of prosecutorial misconduct. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008). We will only reverse a forfeited error when a defendant "demonstrate[s] that: (1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights." *Jeremias*, 134 Nev. at 50, 412 P.3d at 48 (citation omitted). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

First, with respect to Harris's argument under *Bruton*, this doctrine only applies when a defendant and co-conspirator are tried jointly. *See* 391 U.S. at 124-26; *Gray v. Maryland*, 523 U.S. 185, 188 (1998); *see also Byford v. State*, 116 Nev. 215, 229, 994 P.2d 700, 710 (2000) (noting that a co-conspirator's confession may be admitted at trial without violating the defendant's Sixth Amendment right of confrontation if the defendant's trial is severed and admission of the confession complies with the rules of evidence). Harris and Hooks were not tried jointly. Moreover, the State

inquired only if Hooks "was arrested, charged, and eventually plead in connection with these two robberies?" This does not qualify an admission of guilt or a confession under *Bruton*. The State did not inquire as to what Hooks actually told the detective, nor did the State characterize the fact Hooks "plead" as a confession by commenting on the plea in further detail. Therefore, there was no error involving prosecutorial misconduct under *Bruton*.

We next address Harris's prosecutorial misconduct claims as to whether the reference to co-conspirator Hooks's plea was improper. A guilty plea of one person is not admissible as substantive evidence against another charged with the same offense. *Hilt v. State*, 91 Nev. 654, 662, 541 P.2d 645, 650 (1975) (citation omitted). However, a prosecutor may elicit a co-conspirator's guilty plea to blunt attacks on the co-conspirator's credibility as a witness. *United States v. Veltre*, 591 F.2d 347, 349 (5th Cir. 1979). Some courts also permit this evidence in situations where a co-conspirator is "conspicuously absent" from trial, or fairness concerns warrant disclosure. *See generally United States v. Bryza*, 522 F.2d 414, 425 (7th Cir. 1975).

Here, a casual inspection of the record shows that the testimony elicited from the detective does not qualify as plain error. The prosecutor's question did not ask if Hooks pleaded *guilty* to the crimes charged here. He inquired only if Hooks pleaded generally in relation to the events of this case. However, we acknowledge that legal professionals might interpret this term to mean that Hooks entered a guilty plea. Even so, the jury was not told what type of plea it was. *See Crawford v. Washington*, 541 U.S. 36, 64 (2004) (holding that *guilty plea allocutions* are testimonial hearsay subject to the Sixth Amendment's right of confrontation). The general reference to a plea does not necessarily connote a guilty plea to a jury; it could have been a not

guilty, no contest, or other plea that does not admit culpability. Harris has the burden to demonstrate that the plea was, in fact, a guilty plea presented to the jury, which he has not.[5] As such, the district court's inaction regarding this testimony was not in error based on a casual inspection of the record.

Further, the jury was never informed that the co-conspirator was charged with the same crimes as Harris. Nor did the State comment on Hooks's plea during opening or closing remarks. The district court adequately instructed the jurors that they "are to determine the guilt or innocence of [Harris] from the evidence in the case" and "are not called upon to return a verdict as to the guilt or innocence of any other person." Another instruction provided "[t]he fact that you may find a defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to any other defendant [or] offense charged." These signaled to the jury that it had to determine the guilt of Harris only based on the evidence presented during the trial.

Additionally, this testimony appeared to be foundation for the detective's later testimony. This helped the jury understand how police came to confirm Harris as a suspect and explained why they later determined that he sold items at a pawnshop. The pawnshop ticket confirmed that Harris was in the Las Vegas area on the day of the robberies.

Finally, under the third prong of *Jeremias*, Harris does not explain how his substantial rights were prejudiced, nor does he address the substantial inculpatory evidence presented at trial, including: testimony of

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[5]We note, however, that eliciting testimony that a non-testifying, severed co-conspirator entered a guilty plea in relation to the same events as the defendant violates the Confrontation Clause. *See Crawford*, 541 U.S. at 64.

the victims, Rowe's in-court identification, Harris's fingerprints found inside Hooks's SUV, the surveillance footage depicting Harris abandoning the SUV with Hooks, and the fact that Rowe identified Harris out of a photo lineup prior to trial. Therefore, Harris has not demonstrated misconduct constituting plain error in eliciting the testimony regarding Hooks's entry of a plea.

We now turn to Harris's last claim of alleged prosecutorial misconduct regarding the State's use of leading questions. We review claims of improper leading questions for abuse of discretion. *Leonard v. State*, 117 Nev. 53, 70, 17 P.3d 397, 408 (2001). NRS 50.115(3)(a) prohibits leading questions on direct examination "without the permission of the court." "Leading questions are permissible which direct the attention of the witness to the subject matter" of his or her testimony. *State v. Helm*, 66 Nev. 286, 311, 209 P.2d 187, 199 (1949), *overruled on other grounds by Culverson v. State*, 106 Nev. 484, 797 P.2d 238 (1990).

Here, there is no error stemming from the State's questions because they were either foundational or rendered with permission of the court. The district court never instructed the State to rephrase, so we infer that the district court permitted the State to ask foundational leading questions. Most of these questions pointed toward certain subject matter, which is appropriate for laying foundation. *See id.* Therefore, this was not error or misconduct, and the district court did not abuse its discretion in permitting some leading questions. Additionally, Harris has not demonstrated how his substantial rights were prejudiced by leading questions. *See Jeremias*, 134 Nev. at 51, 412 P.3d at 49.

Harris next claims that the district court erred by denying his motion to dismiss his case under the IAD because he was not brought to trial

within the 180-day requirement. The State counters that Harris caused the additional delay by requesting multiple continuances.

We review IAD claims de novo. *Snyder v. Sumner*, 960 F.2d 1448, 1452 (9th Cir. 1992). The IAD is an interstate compact approved by the United States Congress to which Nevada is a party. *Wilson v. State*, 121 Nev. 345, 363, 114 P.3d 285, 297 (2005). Nevada codified the IAD in NRS 178.620. "[T]he IAD provides for expeditious and orderly resolution of criminal charges pending in one state against a prisoner in another state." *Diaz v. State*, 118 Nev. 451, 452, 50 P.3d 166, 166 (2002). Article III of the IAD requires a Nevada prosecutor to bring the defendant to trial within 180 days after the defendant transmits a request for disposition to the prosecuting officer. NRS 178.620 art. III. And, when a defendant requests a continuance, then the additional delays attributed to the continuance toll the 180-day limitation. *Snyder v. State*, 103 Nev. 275, 279, 738 P.2d 1303, 1306 (1987).

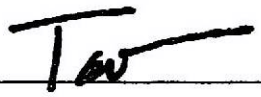
Here, Harris's IAD detainer was for a different case in Nevada. *See Harris v. State*, Docket No. 80750 (Order of Affirmance, Ct. App., April 28, 2021). Harris cites no authority that his request for extradition and a speedy trial for a different case also applies to a separate matter not originally contemplated. *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).

Regardless, on the merits, Harris was tried within the time constraints of the IAD. Harris's trial commenced on June 10, 2019. The mail records on appeal indicate that the State received the request for disposition on June 5, 2018. Using this as the accrual date, Harris's trial

commenced within a 370 days of receipt of the IAD forms. However, Harris requested multiple continuances, which aggregate to 236 total days of delays attributable to Harris. This means that the IAD clock tolled for 236 of the 370 days, and thus, Harris was brought to trial within 134 days of when he transmitted notice to the State.[6] Accordingly, Harris was tried in accordance with the IAD, and the district court did not err. We therefore,

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
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cc: Hon. Michael Villani, District Judge
Law Office of Betsy Allen
Aisen Gill & Associates LLP
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[6]Even if we use the date that Harris signed the request for disposition, May 22, 2018, as the accrual date, his trial commenced in 384 days. So accounting for the 236 days of delays, the IAD clock would have run for a total of 148 days, well within the 180-day limit. Finally, even if we used May 22 as the accrual date and did not toll the four weeks that Harris waived to accommodate the district court's calendar, Harris still went to trial within 176 days after signing the request. Thus, we are unconvinced that Harris requested a speedy trial and was not timely tried.