IN THE COURT OF APPEALS OF THE STATE OF NEVADA

NICHOLAS JAY BARASH VIETTI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86911-COA

ORDER OF AFFIRMANCE

Nicholas Jay Barash Vietti appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of intimidating a public officer using an immediate threat of physical force. Second Judicial District Court, Washoe County; Kathleen M. Drakulich, Judge.

Vietti, a United States Marine Corps veteran, had been diagnosed with post-traumatic stress disorder (PTSD) and filed a disability claim with the Department of Veterans Affairs (VA) in 2008.[1] The VA interviewed Vietti four times between 2008 and 2015 to determine the extent of his disability and corresponding benefits, and the results of those interviews were memorialized in four Compensation and Pension (C&P) Exams.

In 2022, Vietti uploaded podcasts to the internet containing threatening statements directed at Washoe County District Attorney Christopher Hicks and Washoe County Sheriff Darin Balaam. Vietti was arrested and charged with two counts of intimidating a public officer using an immediate threat of physical force.

Police seized Vietti's cell phone when arresting him and obtained a warrant to search the phone's contents. Vietti's phone was

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

passcode protected and law enforcement was unable to access the phone's contents for approximately ten months. Vietti moved to suppress the evidence recovered from the cell phone under the Fourth Amendment, arguing that the State had executed the search in violation of NRS 179.075(1); however, the district court denied his motion.

Prior to trial, Vietti noticed Dr. Suzanne Best as an expert witness to testify that Vietti's behavior and podcasts were consistent with combat PTSD. Vietti informed the district court that Dr. Best's opinion was based on the C&P Exams and the podcasts, but that she had not personally interviewed Vietti.[2] Vietti also advised the court that his PTSD went to an element of the offense, namely his specific intent "to mean his words to be true threats."

In response, the State moved the district court to compel Vietti to submit to a psychological examination with its expert pursuant to *Mitchell v. State*, 124 Nev. 807, 192 P.3d 721 (2008). The State argued that it was entitled to the examination under *Mitchell* because Vietti had placed

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[2]Vietti's counsel advised the district court that Dr. Best could not personally examine Vietti or opine on whether he had PTSD at the time of the podcasts because she was not medically licensed in Nevada. Vietti's counsel also advised the district court that they could not, despite diligent efforts, find a viable Nevada PTSD expert.

During oral argument before this court, Vietti claimed that he had asked the district court to qualify Dr. Best so that she could personally examine him; however, the district court denied the request. The State disagreed with this claim and devoted several minutes of oral argument time to correcting the record. Although the State requested supplemental briefing to further clarify this issue, our review of the record confirms that Vietti's statement at oral argument was incorrect and that Vietti did not make such a request of the district court. Therefore, supplemental briefing is unnecessary.

his mental state in issue and because Dr. Best had relied on personal interviews, via the C&P Exams, to form her expert opinion. The district court agreed and granted the motion. Thereafter, the State's expert, Dr. Herbert Coard, personally examined Vietti over the course of two days.

The matter proceeded to a five-day jury trial that included expert testimony by Dr. Best and Dr. Coard. Vietti also testified in his defense. The jury found Vietti guilty on both counts, and the district court imposed an aggregate sentence of 4-10 years in prison. Vietti timely appealed.

On appeal, Vietti argues that his Fourth Amendment rights were violated because the search of his phone took more than ten days to complete, and thus the search was per se invalid under NRS 179.075(1). He also argues that the jury was improperly instructed as to his subjective intent to communicate a threat, and that his Fifth Amendment rights were violated when the district court compelled him to undergo a psychological examination with a State expert.

The district court properly denied Vietti's motion to suppress

On July 6, 2022, the State obtained a warrant to search the contents of Vietti's cell phone. Although detectives immediately undertook efforts to search the phone, they were unable to access the contents because the phone was passcode protected. On July 14, while still attempting to gain access to the phone, detectives submitted a warrant return that listed Vietti's cell phone as the property seized.

Initially, detectives attempted to access Vietti's phone by using a software program that would randomly guess passcodes every 15 minutes, and this program ran continuously for several months. Eventually, while preparing for trial, a detective reviewed a video that depicted Vietti in a police vehicle manually entering his phone's passcode. The detective

discontinued the software program and successfully accessed the phone's contents on April 1, 2023. The results of the search were provided to Vietti in discovery on April 6—275 days after the warrant was first issued.

Vietti moved to suppress the results of the search under the Fourth Amendment based on NRS 179.075(1), which provides, in pertinent part, that "a warrant may be executed and returned only within 10 days after its date." The district court denied the motion. On appeal, Vietti contends that the district court erred because the ten-day period in which a warrant must be "executed" in NRS 179.075(1) required the search of his cell phone to be *completed* within ten days.

The Fourth Amendment grants citizens the right to protection against unreasonable search and seizures, *see* U.S. Const. amend. IV; Nev. Const. art. 1, § 18, and it is well-settled that, even where a cell phone has already been properly seized, a search of the cell phone's contents requires a proper warrant, *see Riley v. California*, 573 U.S. 373, 403 (2014). "Suppression issues present mixed questions of law and fact." *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013) (internal quotation marks omitted). Findings of fact are reviewed "for clear error, but the legal consequences of those facts involve questions of law that [are] review de novo." *Id.* at 486, 305 P.3d at 916. Questions of statutory interpretation are also reviewed de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

Nevada courts have not previously addressed whether NRS 179.075(1) requires a search to be completed within ten days after the relevant warrant's issue date. "Execute" is not defined in NRS Chapter 179, and no Nevada cases directly address the constitutionality of a digital examination that extends beyond the ten-day period specified in NRS

179.075(1). However, multiple jurisdictions faced with the same question have determined that a search of electronic data begins when the device containing that data is seized, and the search need not be completed within the statutory timeframe to "execute" a warrant. *See, e.g., Commonwealth v. Bowens*, 265 A.3d 730, 751 (Pa. Super. Ct. 2021) ("Deeming a warrant for the search of a phone to have been executed, at the latest, upon seizure of the phone, appears to be the prevailing view in other jurisdictions in the context of a warrant to conduct a search upon an item that had already been seized by the police."). Further, if the device is already in law enforcement's possession when the warrant to search electronic data is issued, then the warrant is necessarily "executed" at the time of issuance. *Id.* at 755. (concluding that police "executed" a "warrant authorizing the search of Appellant's phone, already in their possession, at the time the warrant was issued").

In *State v. Sanchez*, the Supreme Court of New Mexico observed that requiring law enforcement to complete a search of electronic data within its statutory ten-day period to "execute" a warrant "does not account for the practical realities of searching electronic devices. The extraction of data from an electronic device may be reasonably delayed by months for many reasons, including encryption on the device and backlogs at computer forensics labs." 476 P.3d 889, 893 (N.M. 2020). Moreover, requiring a search to be completed within ten days "would require law enforcement to obtain a new warrant every time the extraction takes longer than ten days, potentially many times over the course of an investigation. Such a requirement is not necessary or reasonable." *Id.* Thus, the New Mexico court concluded that when "a device already in the lawful possession of the police is seized before police obtain a warrant to search it, the lawfully

seized device and its contents are in the custody of police within the ten days following the issuance of the warrant," and therefore, "the warrant may be deemed executed within those ten days." *Id.* at 894; *see also Commonwealth v. Kaupp*, 899 N.E.2d 809, 820 (Mass. 2009) (recognizing the general consensus that "police do not need to complete forensic analysis of a seized computer and other electronic storage devices within the prescribed period for executing a warrant"); *State v. Monger*, 472 P.3d 270, 275 (Or. Ct. App. 2020) ("[T]he legislature did not intend for 'execute' to mean a fully completed search.").

The federal analogs to NRS 179.075(1), which requires that law enforcement "execute" a warrant within a specific number of days, are applied similarly. Fed. R. Crim. P. 41(e)(2)(A)(i). The federal rule addressing warrants authorizing the search of electronic data explicitly states that "[t]he time for executing the warrant . . . refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review." Fed. R. Crim. P. 41(e)(2)(B). Therefore, a federal warrant for electronic data is executed when either the information or the device is seized, not when the search is completed. *See id.* As explained in the committee commentary, "[a] substantial amount of time can be involved in the forensic imaging and review of information. This is due to the sheer size of the storage capacity of media, difficulties created by encryption and booby traps, and the workload of the computer labs." Fed. R. Crim. P. 41 advisory committee's note to 2009 amendment to subdivision (e)(2); *see also Sanchez*, 476 P.3d at 894 (discussing the similarities between federal and state rules requiring that a warrant must be executed within a specified number of days); *Bowens*, 265 A.3d at 752 ("The many state courts which have considered the issue . . . have consistently interpreted the time of

execution in accordance with the federal view." (citing *State v. Nadeau*, 1 A.3d 445 (Me. 2010) and *People v. Ruffin*, 115 N.Y.S.3d 310 (App. Div. 2019))).

Consistent with the foregoing authorities, we reject Vietti's interpretation that NRS 179.075(1) required law enforcement to complete the search of his phone contents within ten days of issuing the warrant. Rather, we interpret the statute in line with other jurisdictions that hold a warrant is executed when the device containing electronic data is seized. *See Bowens*, 265 A.3d at 752-53. Accordingly, when the device is already in police custody at the time a warrant is issued to search its electronic data, the warrant is executed upon issuance. *Id.*

In this case, police seized Vietti's cell phone during his June 4 arrest, and so it was already in police custody when the warrant to search the phone's contents was issued on July 6. As a result, the warrant was effectively executed when it was issued, and the return prepared on July 14—eight days later—was well within NRS 179.075(1)'s ten-day period. Therefore, we conclude that the district court did not err in denying Vietti's motion to suppress.

The jury was properly instructed on Vietti's intent

When the parties settled jury instructions, Vietti proposed Instruction 26, which stated, "To find the Defendant made a threat or used words of intimidation, you must find the Defendant meant to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual." Vietti argued that in true threats cases, the First Amendment required that the jury find "that he intended that the threats be taken as threats," and that this instruction reflected the required specific intent. The district court agreed and gave the instruction over the State's objection. In addition, the district court provided Instruction 27, which

stated, in relevant part, "In considering whether a threat of physical force is immediate, the inquiry must focus on the viewpoint of a reasonable person who receives the threat."

Three weeks after Vietti's judgment of conviction was entered, the United States Supreme Court issued a decision in *Counterman v. Colorado*, 600 U.S. 66 (2023), which addressed the necessary mens rea in true threats cases. The Supreme Court reasoned that consideration of the defendant's subjective mental state was necessary to prevent criminalization of protected speech under the First Amendment. *Id.* at 77-78. The Supreme Court further determined that recklessness was the appropriate mens rea in true threats cases, *id.* at 79-80, and recklessness requires the State to prove "that a speaker is aware that others could regard his statements as threatening violence and delivers them anyway," *id.* at 79 (internal quotation marks omitted).

On appeal, Vietti contends that Instruction 27 (and the State's closing argument that referenced that instruction) improperly directed the jury to apply a reasonable person standard in contravention of *Counterman*. Vietti also argues that Instruction 26 failed to instruct the jury that he had to have a subjective understanding that his statements were threatening, as required by *Counterman*. The State responds that Instruction 27 applied the reasonable person standard only to the immediacy element of the offense, and that Instruction 26 required the jury to find purposeful conduct, which is a higher standard than the recklessness required by *Counterman*. We agree with the State.

Because district courts have "broad discretion" in settling jury instructions, this court reviews a district court's decision regarding jury instructions for abuse of discretion. *Crawford v. State*, 121 Nev. 744, 748,

121 P.3d 582, 585 (2005). However, this court reviews the accuracy of a proposed jury instruction de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

In this case, Instruction 27 only applied the "reasonable person" standard to the threat's immediacy element. *See* NRS 199.300(3)(a) (setting forth the penalties when "physical force or the immediate threat of physical force is used in the course of the intimidation or in the making of the threat"). Because Instruction 27 accurately informed the jury that it needed to evaluate the immediacy of a threat using a reasonable person standard, the district court did not abuse its discretion in giving the instruction, and the State's closing argument referencing the instruction was not in error. *See Santana v. State*, 122 Nev. 1458, 1464, 148 P.3d 741, 745 (2006) (concluding "that in determining whether there has been an immediate threat of physical force[,] . . . a reasonable person's viewpoint should be the focus of the inquiry"); *Deshler v. State*, 106 Nev. 253, 254-56, 790 P.2d 1001, 1002-03 (1990).

We also conclude that Instruction 26 sufficiently instructed the jury on the subjective mental state required by *Counterman*. Instruction 26 was based on the legal definition of "true threats" that are unprotected under the First Amendment. *See Virginia v. Black*, 538 U.S. 343, 359 (2003) ("True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." (internal quotation marks omitted)). Though Instruction 26 did not specifically mention recklessness, it required the jury to find that Vietti "meant to communicate a serious expression of an intent to commit an act of unlawful violence." This would necessarily require a finding that Vietti "had some

understanding of his statements' threatening character." *Counterman*, 600 U.S. at 73. And as the State points out, Vietti benefited from this instruction which required the jury to find that he acted with purpose, as opposed to mere recklessness. Therefore, we conclude that the district court did not err by giving Vietti the very instruction he requested in this case.

The district court did not abuse its discretion by ordering a compelled psychological examination pursuant to Mitchell

Vietti argues that the district court misapplied *Mitchell v. State*, 124 Nev. 807, 192 P.3d 721 (2008), when it compelled him to undergo a psychological examination with the State's expert in violation of his Fifth Amendment right against self-incrimination.[3]

In *Mitchell*, the defendant was charged with murder and subsequently examined by psychiatrists who diagnosed him with several mental disorders, including PTSD. *Id.* at 810, 192 P.3d at 723. When Mitchell stated his intent to call those psychiatrists as expert witnesses to support his claim of self-defense, the State moved to have him examined by a State psychiatric expert, which the district court granted. *Id.* The Nevada Supreme Court found no abuse of discretion because Mitchell had placed his mental state at issue by arguing self-defense. *Id.* at 811-12, 192 P.3d at 724. It also reasoned that without a compelled examination, Mitchell would "enjoy the unfair asymmetry of being able to introduce defense expert

[3]We decline to address Vietti's related argument that the district court erred in permitting him to be examined by the State's expert without his counsel present because he did not provide any legal authority or analysis in support of this assertion. *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.").

witness testimony based upon personal interviews while denying State expert witnesses the same access." *Id.* at 809-10, 192 P.3d at 723.

Vietti contends that the district court misapplied *Mitchell* on two separate grounds. First, he claims *Mitchell* does not apply because he did not rely on his PTSD to legally justify or excuse his conduct. Second, he argues that *Mitchell* does not apply because his testifying expert did not personally examine him, as did the expert in *Mitchell*. A district court's decision to compel the defendant to undergo a reciprocal psychological examination is reviewed for an abuse of discretion. *Id.* at 811-12, 192 P.3d at 724.

Vietti's first contention, that he did not place his mental state at issue under *Mitchell*, is unpersuasive. Although Vietti did not raise a defense of legal justification or insanity in connection with his PTSD, he still placed his mental state at issue when he informed the district court that he intended to argue that PTSD precluded him from forming the intent necessary to commit the charged crimes. *See, e.g., United States v. Halbert*, 712 F.2d 388, 389-90 (9th Cir. 1983) (recognizing that the defendant placed his mental state at issue by raising a diminished capacity defense); *Commonwealth v. Diaz*, 730 N.E.2d 845, 852 (Mass. 2000) (observing that the policy justifying reciprocal discovery when a defendant places their statements and mental state at issue applies to the alleged inability to premeditate or form the specific intent to kill and to a lack of criminal responsibility defense). Because a defendant can rely on experts to place their mental state at issue in ways that do not require raising an insanity defense or arguing legal justification, we decline Vietti's invitation to limit *Mitchell* only to cases involving insanity or justification. *See Mitchell*, 124 Nev. at 815, 192 P.3d at 726-27 ("[N]one of the cases that we find persuasive

either directly, or in dictum, concluded that a district court has the inherent authority to order a defendant to undergo a psychiatric evaluation only when he or she asserts an insanity defense." (emphasis omitted)).

As to Vietti's second contention, we acknowledge that the facts of *Mitchell* differ from those of the instant case. In *Mitchell* and the cases relied on therein, the defendants each submitted to personal interviews by experts after the crimes were charged, and they did so for the purpose of establishing a legal defense. Here, by contrast, the VA interviewed Vietti to evaluate the extent of his disability and corresponding benefits, years before he was ever charged with any crime. Vietti's compelled examination allowed the State's testifying expert to have access to Vietti in a manner that exceeded that of Vietti's own testifying expert and, as a result, potentially placed the State in a superior position at trial. Given the distinctions between Dr. Best's review of Vietti's C&P Exams and Dr. Coard's lengthy personal examination of Vietti, the district court's decision in this case arguably does not comport with *Mitchell*'s aim of preventing "unfair asymmetry" between the parties. *Id.* at 809, 192 P.3d at 723.

Nevertheless, despite these factual differences, other language in *Mitchell* appears to permit a compelled psychological examination whenever a defendant places his mental state at issue through expert testimony: "We conclude that Mitchell's Fifth Amendment rights were not violated *because he placed his mental state directly at issue*." *Id.* (emphasis added). The concept that waiver of Fifth Amendment rights might occur simply by placing one's mental state at issue finds support in other jurisdictions, including some of those relied on in *Mitchell*. *See Pawlyk v. Wood*, 248 F.3d 815, 825 (9th Cir. 2001) (recognizing that "a defendant who asserts a mental status defense lacks a Fifth Amendment right to remain

silent regarding the mental status that he has placed at issue"); *United States v. Phelps*, 955 F.2d 1258, 1263 (9th Cir. 1992) (stating that "a person who places his or her insanity at issue can be compelled to submit to psychiatric examinations"); *cf. Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir. 1981) ("But the [Fifth Amendment] waiver doctrine is inapplicable, as here, when the defendant does not introduce the testimony of a mental health expert on the issue of a mental state relevant to the offense or a defense raised by the evidence in the case.").

Vietti's briefing fails to address this language in *Mitchell* or the notion that a waiver of Fifth Amendment rights could occur through the introduction of expert testimony regarding a mental state relevant to the offense. Absent any such argument by Vietti, we cannot conclude that the district court abused its discretion by applying *Mitchell*. Accordingly, we

ORDER the judgment of conviction AFFIRMED.[4]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

[4]Vietti also claims that the prosecutor committed misconduct during closing arguments. However, Vietti did not object, and we conclude that he fails to demonstrate plain error that affected his substantial rights. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). To the extent that Vietti raises other arguments that are not specifically addressed in this order, we conclude that they do not present a basis for relief.

cc: Hon. Kathleen M. Drakulich, District Judge
Washoe County Public Defender
Attorney General/Carson City
Carson City District Attorney
Washoe County District Attorney
Washoe District Court Clerk