IN THE SUPREME COURT OF THE STATE OF NEVADA

REYNALDO GARDNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86735

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary while in possession of a firearm; robbery of a person 60 years of age or older with the use of a deadly weapon; and battery of a person 60 years of age or older with the use of a deadly weapon.[1] Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge. Appellant Reynaldo Gardner raises seven contentions on appeal.

First, Gardner contends that the district court abused its discretion by not sua sponte holding a competency hearing. *See Olivares v. State*, 124 Nev. 1142, 1148, 195 P.3d 864, 868 (2008) (reviewing a district court's decision to hold a competency hearing for an abuse of discretion). We disagree. Neither Gardner nor his counsel raised the issue of competency at trial or at sentencing. Although Gardner had a previous mental health diagnosis, a mental health diagnosis alone does not indicate incompetence, *Ybarra v. State*, 103 Nev. 8, 13, 731 P.2d 353, 356-57 (1987), and Gardner does not explain how the diagnosis rendered him unable to consult with his attorneys or understand the proceedings against him. Rather, Gardner was found competent to stand trial each time he was

[1]Gardner also pleaded guilty to ownership or possession of a firearm by a prohibited person.

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evaluated, and Gardner's counsel represented to the district court the month before trial began that Gardner had been evaluated and found competent. The record shows that Gardner behaved appropriately at trial and sentencing, and when Gardner decided to testify at trial, the district court repeatedly canvassed Gardner as to his right to testify. *See Fergusen v. State*, 124 Nev. 795, 802–03, 192 P.3d 712, 718 (2008) ("[A] trial judge is the only adjudicator who can, among other things, assess firsthand a defendant's *present* ability to consult with his or her lawyer and determine whether a defendant's *present* behavior and demeanor during trial demonstrate that he or she is not competent to stand trial."). Gardner responded appropriately and ultimately decided to testify in his defense with an understanding of his rights. We therefore conclude that Gardner failed to show that the district court abused its discretion in this regard. *See Jones v. State*, 107 Nev. 632, 638, 817 P.2d 1179, 1182 (1991) ("[I]n the absence of reasonable doubt as to a defendant's competence, the district judge is not required to order a competency examination.").

Second, Gardner argues that the district court erred in denying his motion to substitute counsel. When considering whether the district court abused its discretion in denying a motion to substitute counsel, this court reviews "(1) the extent of the conflict; (2) the adequacy of the inquiry; and (3) the timeliness of the motion." *Anderson v. State*, 135 Nev. 417, 424, 453 P.3d 380, 386 (2019) (internal quotation marks omitted); *Gallego v. State*, 117 Nev. 348, 363, 23 P.3d 227, 237 (2001) ("An indigent defendant has a right to substitution only upon establishing good cause, such as a conflict of interest, a complete breakdown of communication, or an irreconcilable conflict which could lead . . . to an apparently unjust verdict." (internal quotations and alterations omitted)), *overruled on other grounds*

by Nunnery v. State, 127 Nev. 749, 263 P.3d 235 (2011). The record shows that the conflict between appointed counsel and Gardner primarily stemmed from a disagreement about specific defense strategies and Gardner's belief that counsel lied to him. But a disagreement over tactical decisions does not give rise to an irreconcilable conflict, given the general rule that counsel alone is entrusted with tactical decisions concerning the day-to-day conduct of the defense. *See Rhyne v. State*, 118 Nev. 1, 8, 38 P.3d 163, 167-68 (2002); *see also Gallego*, 117 Nev. at 363, 23 P.3d at 237 ("Good cause is not determined solely according to the subjective standard of what the defendant perceives." (internal quotations omitted)). Similarly, merely losing confidence in defense counsel does not create an actual conflict unless the defendant provides "the court with legitimate reasons for the lack of confidence," *Gallego*, 117 Nev. at 363, 23 P.3d at 237, which Gardner does not. Finally, the record does not demonstrate "a complete breakdown of communication." *Id.* We therefore agree with the district court's assessment that Gardner's allegations did not reflect a legitimate conflict. The record also shows that the district court adequately inquired into Gardner's request when it conducted a hearing and provided Gardner and appointed counsel with an opportunity to explain the nature and extent of the conflict. Accordingly, we conclude the district court did not abuse its discretion in declining to substitute counsel.

Third, Gardner asserts that the district court erred by denying the fair-cross-section challenge to the venire. We disagree, as Gardner has not demonstrated that any alleged underrepresentation of African Americans or any other distinctive group was due to systematic exclusion in the selection process. *See Williams v. State*, 121 Nev. 934, 939-40, 125 P.3d 627, 631 (2005) (requiring a showing of systematic exclusion of a

distinctive group in the jury-selection process to establish a prima facie violation of the fair-cross-section requirement). Indeed, a representative of the jury commissioner testified that the jury lists are randomly drawn from records of registered voters, the Nevada Department of Motor Vehicles, NV Energy, and the Employment Security Division of the Department of Employment, Training and Rehabilitation, without regard to ethnicity or race. Gardner failed to controvert that testimony.

Fourth, Gardner asserts that the district court improperly limited cross-examination of the victim, violating Gardner's Confrontation Clause rights. Gardner repeatedly asked the victim the same question about the location of the gun, and the victim repeatedly answered. The trial court acted within its authority to restrict further cross-examination on the subject. *See Farmer v. State*, 133 Nev. 693, 702-03, 405 P.3d 114, 123 (2017) (noting that judges may limit repetitive questions on cross-examination). Thus, we discern no abuse of discretion or violation of Gardner's constitutional rights. *See Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (reviewing evidentiary rulings for an abuse of discretion and the question of whether a defendant's confrontation rights were violated de novo). To the extent Gardner argues that the district court's sidebars with defense counsel during cross-examination improperly influenced the jury, the record reflects that the district court acted properly and within its authority to control courtroom proceedings. *See Dean v. Narvaiza*, 138 Nev. 10, 14, 502 P.3d 177, 181 (2022) (explaining that district courts have a duty to maintain reasonable control and decorum in proceedings); NRS 50.115(1) ("The judge shall exercise reasonable control over the mode and order of interrogating witnesses.").

Fifth, Gardner argues that the district court erred in denying a mistrial based on juror misconduct. However, the record indicates that the district court conducted an adequate inquiry into the alleged misconduct. *See Viray v. State*, 121 Nev. 159, 163, 111 P.3d 1079, 1082 (2005) (explaining that "a district court must conduct a hearing to determine if [a juror's] violation of the admonishment occurred and whether the misconduct is prejudicial to the defendant"). The district court heard testimony from Gardner's mother, who overheard several jurors joking about Gardner repeatedly using the word "assume" in his testimony.[2] The district court then canvassed each juror, and ultimately excused the juror who appeared to be the instigator. Even assuming that what occurred rose to the level of juror misconduct, Gardner has not demonstrated prejudice. *See Valdez v. State*, 124 Nev. 1172, 1186-87, 196 P.3d 465, 475 (2008) (noting that to demonstrate prejudice, the defendant must prove "that there is a reasonable possibility that the misconduct affected the verdict."). As noted by the district court, any alleged comments were brief and did not involve substantive issues, the other jurors involved stated that they could remain fair and impartial, and there was nothing to indicate any of the jurors had engaged in premature deliberations or had prematurely made up their minds. *See Viray*, 121 Nev. at 163-64, 111 P.3d at 1082 ("Prejudice requires an evaluation of the quality and character of the misconduct, whether other jurors have been influenced by the discussion, and the extent to which a juror who has committed misconduct can withhold any opinion until deliberation."); *Meyer v. State*, 119 Nev 554, 561, 80 P.3d 447, 453 (2003) ("Absent clear error, the district court's findings of fact will not be

[2]A marshal, who reviewed surveillance footage, also testified they were unable to determine what happened.

disturbed."). Therefore, we conclude that the district court did not abuse its discretion in determining that the situation did not warrant a mistrial. *See Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (explaining that this court reviews a denial of a motion for a mistrial for an abuse of discretion).

Sixth, Gardner contends that the district court abused its discretion by rejecting three proposed jury instructions. *See Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) ("The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error."). Gardner proposed instructions on (1) reasonable doubt and subjective certitude, (2) circumstantial evidence, and (3) two reasonable interpretations of the evidence. We conclude that the district court did not abuse its discretion regarding those jury instructions. *See Garcia v. State*, 121 Nev. 327, 340, 113 P.3d 836, 844 (2005) ("[I]n Nevada, the definition of reasonable doubt is specified by statute and, under NRS 175.211(2), no other jury instruction on reasonable doubt is permitted."), *modified on other grounds by Mendoza v. State*, 122 Nev. 267, 130 P.3d 176 (2006); *Bails v. State*, 92 Nev. 95, 96-98, 545 P.2d 1155, 1155-56 (1976) (concluding that the district court did not err in rejecting proposed jury instructions on circumstantial evidence and two reasonable interpretations if the jury is properly instructed on the standard of reasonable doubt).

Finally, Gardner argues cumulative error requires reversal. *See Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000) (stating the

relevant factors to consider for a claim of cumulative error). As we have found no errors, there is nothing to cumulate. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Stiglich, J.
Stiglich

Pickering, J.
Pickering

Parraguirre, J.
Parraguirre

cc: Hon. Joseph Hardy, Jr., District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk