

IN THE SUPREME COURT OF THE STATE OF NEVADA

STANLEY ZANE SIMS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52640

FILED

JUN 23 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of five counts of embezzlement. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

A grand jury indicted appellant Stanley Sims on five counts of embezzlement. Sims, an auto broker, did not pay several Arizona automobile dealerships for the vehicles they delivered to his customers. The district court denied Sims' motions to dismiss the indictment for insufficient evidence and prosecutorial misconduct and to disqualify the prosecutor's office. The district court also denied Sims' pretrial motion to dismiss for lack of notice and his motion to determine an essential jury instruction, and granted the State's motion to amend the indictment. Sims entered a conditional guilty plea, received a sentence of probation and an order to pay restitution, and retained his right to appeal.

The parties are familiar with the facts and we do not recount them further except as necessary for our disposition.

DISCUSSION

The challenges that Sims raises on appeal arise from two contentions: that the prosecutor committed misconduct when he removed the exhibits and documents that he presented to the grand jury after the conclusion of those proceedings, and that the amendment of the grand

jury's indictment by the district court was improper. Regarding the exhibits, Sims argues that: (1) the district court erred by refusing to dismiss the indictment due to prosecutorial misconduct, (2) the alleged lack of a complete record prevented the prosecutor from justifying the indictment, (3) the alleged lack of a complete record violated Sims' Sixth Amendment rights, (4) the alleged lack of a complete record undermined the grand jury's legal basis for indictment, and (5) the district court erred by refusing to disqualify the prosecutor. Regarding the indictment, Sims argues that: (1) the district court erred by denying his motion to dismiss for insufficient evidence, (2) the district court erred in amending the indictment, and (3) the amended indictment failed to provide sufficient notice. We conclude these arguments are without merit and affirm the decision of the district court.¹

Standard of review

This court reviews a district court's decision to grant or deny a motion to dismiss an indictment for abuse of discretion. Hill v. State, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008). An appellant must show actual prejudice for a grand jury indictment to be dismissed on appeal. Id.

I. Prosecutor's retention of grand jury exhibits and documents

¹Sims also argues that: (1) the district court's ruling on his motion to determine an essential jury instruction should be reversed, (2) cumulative error warrants reversal, and (3) the definition of embezzlement under NRS 205.300 is unconstitutionally vague and overbroad. We determine that: (1) the district court acted within its authority to amend the indictment, and as such, the district court properly ruled regarding the essential elements of embezzlement; (2) the cumulative error argument is without merit because no errors occurred; and (3) Sims' vagueness and overbreadth challenge is without merit.

A. Prosecutorial misconduct

Sims contends that the prosecutor committed misconduct by retaining exhibits and documents considered by the grand jury. Dismissal of an indictment based upon misconduct is an extreme sanction. Sheriff v. Keeney, 106 Nev. 213, 216, 791 P.2d 55, 57 (1990). A defendant must demonstrate substantial prejudice before a court will interfere in the proceedings of a grand jury. Id. A defendant demonstrates prejudice by showing that there is a reasonable probability that the outcome would have been different but for the misconduct. Lay v. State, 110 Nev. 1189, 1198, 886 P.2d 448, 454 (1994). We conclude that no misconduct occurred here.

1. Exhibits

Throughout the testimony of witnesses before the grand jury, the prosecutor referred to various documents and exhibits, and retained possession of these exhibits at the close of proceedings. Sims contends that this violated NRS 172.225, because when the transcript is filed, any related physical evidence becomes a matter of public record, and therefore, the exhibits should have been deposited with the court clerk. We disagree.

The primary purpose of NRS 172.225 is to provide a defendant with a copy of the grand jury transcript in order to test probable cause holding him for trial. Bonnenfant v. State, 86 Nev. 393, 395, 469 P.2d 401, 402 (1970). Sims received a copy of the transcript and the prosecutor delivered the referenced exhibits to him. We agree with the district court that the statute does not specify that the exhibits or evidence become certified by the court stenographer, filed with the clerk, and then attached to the transcript. The statute merely states that any related physical evidence become a matter of public record, which the transcript provides.

Moreover, the prosecutor's actions did not prejudice Sims. The transcript contains a summary of the evidence from the exhibits by the prosecutor, as well as testimony from the witnesses who verified the referenced exhibits. Sims received the documents and exhibits and a copy of the transcript. Even if the prosecutor had committed misconduct by retaining the exhibits, the testimony of the witnesses established probable cause.

2. Obligation to present exculpatory evidence

Sims argues that the prosecutor also committed misconduct by failing to present evidence that would explain away the charge. This evidence consisted of letters from Sims' counsel that attempted to explain that the dealers themselves had violated the law, and witnesses, including Sims' business attorney, who were ready to be subpoenaed before the grand jury. Under NRS 172.145(1), if the grand jury has reason to believe that other evidence will explain away the charge, it may subpoena the evidence or a witness. The district attorney has the obligation to submit evidence to the grand jury if he is aware of any evidence that will explain away the charge. NRS 172.145(2). "The determination of whether particular evidence is exculpatory is generally left to the discretion of the district court." Ostman v. District Court, 107 Nev. 563, 564, 816 P.2d 458, 459 (1991).

The letters sent by Sims' counsel to the prosecutor, urging the prosecutor to call Sims' business attorney to testify regarding Uniform Commercial Code provisions concerning title, do not constitute exculpatory evidence. In cases where this court determined exculpatory evidence did exist, such evidence included a daughter making prior false accusations of sexual assault at the same time she accused her father, and a defendant's statement to police that the alleged events that occurred were voluntary.

Sheriff v. Frank, 103 Nev. 160, 164-65, 734 P.2d 1241, 1244 (1987); Ostman, 107 Nev. at 564-65, 816 P.2d at 459.

Here, the prosecutor discussed the contents of the letter sent by Sims' counsel before the grand jury. He also repeatedly asked witnesses whether they took any action themselves to obtain title to the vehicles. Although we conclude that the letters were not exculpatory, we also conclude that the prosecutor fulfilled any obligation he had to the defendant by presenting the letters to the grand jury.

B. Justification of the indictment

Sims argues that the indictment cannot be justified because the retained exhibits undermine the determination of probable cause. We disagree. The State has the burden of establishing facts that lead to the reasonable inference that the defendant committed the crime. State v. von Brincken, 86 Nev. 769, 773, 476 P.2d 733, 735 (1970). An indictment can be sustained if there has been the slightest sufficient legal evidence presented to the grand jury, even if inadmissible evidence may also have been presented. Dettloff v. State, 120 Nev. 588, 595, 97 P.3d 586, 590-91 (2004). "[P]robable cause or the lack of it will be disclosed by the transcript." Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

The transcript establishes probable cause because it includes ample witness testimony regarding the charges from Sims' former customers and employees.

C. Sixth Amendment

Sims argues that the absence of the exhibits from the record would have made it impossible for him to cross-examine the grand jury witnesses at trial regarding their testimony that referred to these materials. This argument lacks merit. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to

confront the witnesses against him. U.S. Const. amend. VI. Confrontation of a witness means the right of cross-examination. Davis v. Alaska, 415 U.S. 308, 315 (1974). Despite the fact that the prosecutor retained the exhibits after the close of the grand jury, Sims would still have had an opportunity to cross-examine those witnesses at trial. Those witnesses at trial could have authenticated the exhibits and documents, just as they did for the grand jury, and accordingly, Sims' confrontation right was not violated.

D. Grand jury's legal basis for indictment

During the grand jury proceedings, the prosecutor distributed packets to the grand jury containing statutes and applicable law. The prosecutor then retained these packets, along with the other exhibits. Sims argues that the absence of the prosecutor's packets casts doubt on the grand jury's legal basis for determining whether probable cause existed. A prosecutor is authorized to recite and explain the law to the grand jury. Franklin v. State, 89 Nev. 382, 386, 513 P.2d 1252, 1255 (1973). According to the official transcript, the prosecutor mentioned the packets of law and then read the embezzlement and other applicable statutes contained in the packets. Again, the testimony of the witnesses alone was sufficient to establish probable cause that Sims committed embezzlement. An indictment "will be sustained if there has been presented to the grand jury the slightest sufficient legal evidence . . . even though inadmissible evidence may also have been adduced." Id. at 387, 513 P.2d at 1256. Here, the grand jury transcript demonstrates the grand jury's legal basis for the indictment.

E. Disqualification of the prosecutor

Sims also contends that the prosecutor violated DCR 11 and RPC 3.7, and thus, that the district court erred by refusing to disqualify

the prosecutor. A decision to disqualify the prosecutor is left within the discretion of the district court. Collier v. Legakes, 98 Nev. 307, 309, 646 P.2d 1219, 1220 (1982). We conclude that the prosecutor did not violate DCR 11 or RPC 3.7. DCR 11 is a district court rule pertaining to district court proceedings. DCR 11 creates a procedure for parties to remove items in evidence from the clerk's office, and allows the parties that introduced evidence to reclaim it after a judgment is final. However, this rule does not require a prosecutor to deposit papers or exhibits with the clerk's office during a grand jury proceeding. RPC 3.7 does not require disqualification of an attorney if the attorney would likely be a necessary witness at trial, but prohibits the attorney from appearing as trial counsel. DiMartino v. Dist. Ct., 119 Nev. 119, 121, 66 P.3d 945, 946 (2003) (considering SCR 178, which "is derived from, and virtually identical to, [RPC] 3.7."). Disqualification of an attorney before trial "generally is not necessary." Id. at 122, 66 P.3d at 947. As we reasoned similarly in DiMartino, this case never went to trial, and other evidence, such as testimony of grand jury witnesses and the exhibits themselves, would have been available in place of the prosecutor's testimony. Id. The district court did not abuse its discretion in refusing to disqualify the prosecutor.

II. The indictment

A. Sufficient evidence to establish probable cause

The evidence presented to the grand jury "need not be sufficient to support a conviction." Kinsey, 87 Nev. at 363, 487 P.2d at 341. The grand jury finds an indictment when all the evidence before it, taken together, establishes probable cause to believe that the defendant has committed the offense. NRS 172.155(1).

The State established through many witnesses that customers gave Sims their money, and that he deposited the money into an account

from which he paid bills and other personal expenses. He did not pay the dealers for the vehicles and his customers never received a title. Under the standard to establish probable cause, the State presented sufficient evidence to the grand jury to sustain an indictment, and the district court properly dismissed Sims' petition.

B. Amendment to the indictment

The indictment charged Sims with violating NRS 205.300 and charged him with being a bailee who used the money in a manner or for a purpose other than that for which it was entrusted "with the intent to defraud." However, NRS 205.300 has two prongs. The first prong involves a bailee who must have the intent to defraud. Walsh v. State, 110 Nev. 1385, 1387, 887 P.2d 1239, 1240 (1994). The second prong refers to an agent, who does not need an intent to defraud in order to commit embezzlement. Id.

When Sims moved the district court to determine an essential jury instruction, he sought to clarify the embezzlement statute and asked the court to describe the elements that the jury must find beyond a reasonable doubt. Sims argued that he was charged under both prongs of the statute, and that his conversion of the money should be considered under the bailee prong, requiring an intent to defraud, not the lower threshold prong of an agent. The State then moved to strike the terms "bailee" and "with the intent to defraud" from the indictment, effectively amending it to charge Sims as an agent, who does not require an intent to defraud.

The district court heard argument from counsel and granted the State's motion. A district court can amend an indictment as long as the amendment does not charge the defendant with an additional or different offense. NRS 173.095(1). By striking this language, the district

court did not charge Sims with an additional or different offense. Sims' indictment under the second prong of NRS 205.300 does not create a possible basis for conviction not contained in the original indictment. U.S. v. Leichtnam, 948 F.2d 370, 377 (7th Cir. 1991). The change made by the district court conforms to the transcript and witness testimony before the grand jury that Sims was actually an agent of his customers, and not a bailee.

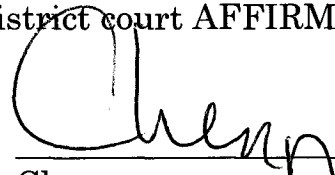
Again, Sims' rights were not prejudiced by this change because he had notice of the State's theory of prosecution. Viray v. State, 121 Nev. 159, 162-63, 111 P.3d 1079, 1082 (2005). The amended indictment did not expand the charge against Sims, leaving him unsure of what he was being charged with. See Benitez v. State, 111 Nev. 1363, 1365, 904 P.2d 1036, 1038 (1995) (holding that an amended indictment charging a lesser included offense does not expand the charge). Sims had notice of facts that would support a charge of embezzlement under the lower threshold prong, and was aware that the State sought to prove that he was part of a trust relationship with his customers, who expected a vehicle and title in the course of business with him.

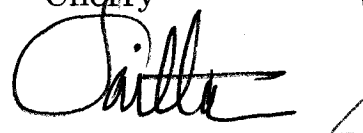
C. Sufficient notice

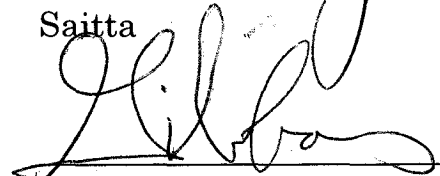
To determine whether an indictment provides adequate notice of the charge to enable an accused to defend, the reviewing court considers the pleading and transcript of the grand jury session together. Logan v. Warden, 86 Nev. 511, 513, 471 P.2d 249, 251 (1970). While the language of the indictment does not specifically state the intended use or manner for which the funds were given to Sims, nor what Sims did with the funds that differed from his customers' intentions, the pleading and transcript provide sufficient notice for Sims to defend against the charge. Sims' former customers testified that they thought Sims would use their money

to pay the dealerships for their vehicles, and that the dealer would deliver the title through the Nevada Department of Motor Vehicles. We conclude this testimony in conjunction with the indictment provides sufficient notice to Sims for him to prepare his defense.

We determine that the district court did not abuse its discretion in denying Sims' motion to dismiss the indictment. Accordingly, we ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Jerome Polaha, District Judge
Martin H. Wiener
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk