IN THE SUPREME COURT OF THE STATE OF NEVADA

BRYAN CRAWLEY, A/K/A BRYAN WAYNE CRAWLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53393

FILED

SEP 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury trial, of conspiracy to commit burglary and/or home invasion, two counts of conspiracy to commit robbery, first-degree murder with the use of a deadly weapon of a person over 60 years of age, two counts of burglary while in possession of a firearm, home invasion while in possession of a firearm, robbery with the use of a deadly weapon of a person over 60 years of age, conspiracy to commit battery, two counts of battery with the use of a deadly weapon, two counts of robbery with the use of a deadly weapon, battery with intent to commit a crime, burglary, assault with a deadly weapon, failure to stop on signal of a police officer, child abuse and neglect, conspiracy to commit murder, three counts of solicitation to commit murder, conspiracy to commit an act for the perversion or corruption of public justice or due administration of the law, and bribing or intimidating a witness to influence testimony. Eighth Judicial District Court, Clark County; Jackie Glass, Judge.

The district court sentenced appellant Bryan Crawley to life without parole. Crawley appeals his conviction on multiple grounds, arguing that the district court erred by (1) denying his motion to sever charges, (2) allowing hearsay testimony, (3) admitting evidence of prior

bad acts, (4) denying his motion to suppress a jailhouse recording, (5) precluding Crawley from examining a witness regarding the witness's psychological diagnosis, (6) instructing the jury improperly, and (7) denying his motion in limine to suppress evidence obtained from a search warrant he claims was invalid. Crawley also argues that cumulative error warrants reversal in this case. We conclude that any error in this case does not warrant relief, and we affirm the judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Refusal to sever charges

Crawley argues that the district court erred by refusing to sever the various charges in his case. We review a district court's decision regarding joinder for an abuse of discretion. Zana v. State, 125 Nev. 541, 548, 216 P.3d 244, 249 (2009). "Error resulting from misjoinder of charges is harmless unless the improperly joined charges had a substantial and injurious effect on the jury's verdict." Weber v. State, 121 Nev. 554, 570-71, 119 P.3d 107, 119 (2005).

Joinder of charges is permissible when the charges are "connected together or constitut[e] parts of a common scheme or plan." NRS 173.115(2). Here, Crawley contends that the charges were not sufficiently "connected together" to allow joinder, and that the error substantially affected the jury's verdict. We disagree.

Our review of the record reflects that the police were initially investigating Crawley for murder and robbery. While the police were conducting their murder and robbery investigation, Crawley was involved in a fight with a man outside of a bar during which Crawley stabbed the man and stole his gun. As the police were staking out Crawley's vehicle in furtherance of their murder and robbery investigation, Crawley had

traveled elsewhere in his mother's car and used the stolen gun to commit another robbery with the help of his girlfriend, Allison Kiel. When he returned to the location where his vehicle was parked following this robbery, the police attempted to apprehend Crawley, but he led police on a high-speed chase in his mother's car with Kiel's daughter as a passenger; however, Crawley was eventually able to evade police. When Crawley was later apprehended, the police found on him and in the vehicle he was driving evidence connecting him to the murder, the stabbing, and one of the robberies. While in jail, Crawley solicited his cellmate to kill certain witnesses to the murder and robberies. Thus, we conclude that the charges were sufficiently connected together, justifying joinder, and the district court did not abuse its discretion in denying Crawley's motion to sever the charges.[1]

Hearsay testimony

Crawley next argues that the district court improperly allowed hearsay testimony from three witnesses—Kiel, Nick Herda, and Las Vegas Metropolitan Police Department Detective Jason Darr—in violation of the Confrontation Clause.

The Confrontation Clause of the Sixth Amendment to the United States Constitution bars "'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify,

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[1]Although we conclude that the district court did not err, any error in joining the charges would have been harmless based on the overwhelming evidence of Crawley's guilt. See Brown v. State, 114 Nev. 1118, 1124-25, 967 P.2d 1126, 1130-31 (1998) (concluding that overwhelming evidence of guilt, along with other factors, supported joinder).

and the defendant had had a prior opportunity for cross-examination.'" Davis v. Washington, 547 U.S. 813, 821 (2006) (quoting Crawford v. Washington, 541 U.S. 36, 53-54 (2004)). "[A] statement is testimonial if it "'would lead an objective witness'" to reasonably believe "'that the statement would be available for use at a later trial.'"'"[2] Medina v. State, 122 Nev. 346, 354, 143 P.3d 471, 476 (2006) (quoting Flores v. State, 121 Nev. 706, 719, 120 P.3d 1170, 1178-79 (2005) (quoting Crawford, 541 U.S. at 52)). However, reversal is not warranted "if the State can "'show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'"" Polk v. State, 126 Nev. ___, ___, 233 P.3d 357, 359 (2010) (quoting Medina, 122 Nev. at 355, 143 P.3d at 477 (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)) (further internal quotations omitted)). Additionally, a district court's decision on whether to admit evidence, and its determination of whether a statement satisfies a hearsay exception, is reviewed for abuse of discretion. Harkins v. State, 122 Nev. 974, 980, 143 P.3d 706, 709 (2006); Means v. State, 120 Nev.

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[2]We have previously enumerated several factors to assist courts in evaluating whether a statement is testimonial, including

> (1) to whom the statement was made, a government agent or an acquaintance; (2) whether the statement was spontaneous, or made in response to a question . . . ; (3) whether the inquiry eliciting the statement was for the purpose of gathering evidence for possible use at a later trial, or whether it was to provide assistance in an emergency; and (4) whether the statement was made while an emergency was ongoing, or whether it was a recount of past events.

Harkins v. State, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006).

1001, 1007-08, 103 P.3d 25, 29 (2004). An out-of-court statement offered at trial to prove the truth of the matter asserted is hearsay and is inadmissible, unless it falls within one of the recognized exceptions to the hearsay rule. NRS 51.035; NRS 51.065.

Kiel's testimony regarding statements from a coconspirator

Crawley asserts that despite his hearsay objections the district court allowed the State to elicit testimony from Kiel regarding Crawley's coconspirator's statements related to the murder. Kiel testified that Crawley's coconspirator in the murder said that "he [the coconspirator] was being solid," "he wasn't not going to say anything," and that he "wished it didn't have to go down like that and he didn't have to see that." These statements fall under the coconspirator exception to the hearsay rule, which makes admissible "statement[s made] by a coconspirator of a party during the course and in furtherance of the conspiracy." NRS 51.035(3)(e). We conclude that the coconspirator's statements in this case were not testimonial because an objective witness would not reasonably believe that those statements would be used later at trial. See Medina, 122 Nev. at 354, 143 P.3d at 476; Harkins, 122 Nev. at 987, 143 P.3d at 714. We further conclude that the statements qualified as a statutorily recognized exception to the hearsay rule because they were made "by a coconspirator of a party during the course and in furtherance of the conspiracy." NRS 51.035(3)(e); see also Crew v. State, 100 Nev. 38, 46, 675 P.2d 986, 991 (1984) (noting that "the duration of the conspiracy is not limited to the commission of the principle crime, but extends to affirmative acts of concealment"). Thus, there was no Confrontation Clause violation and the district court did not err in allowing the statements into evidence through Kiel's testimony.

The murder victim's son's testimony regarding statements from an acquaintance of Crawley's

The murder victim's son, Nick Herda, testified that he was contacted by Max Guittierez, who was Crawley's mother's boyfriend.[3] Herda testified on cross-examination that after Guittierez contacted Herda with information about Herda's father's murder, Herda began to give money to Guittierez. On re-direct, Herda testified as to why he gave Guittierez money, which elicited statements about what Guittierez had told Herda about his father's murder. Crawley objected, but the district court overruled his objection after determining that Crawley had "opened the door" to such hearsay statements under NRS 51.069. We agree with the district court's determination. Crawley first elicited the hearsay testimony from Herda on cross-examination in the following exchange:

> Q And Mr. Guittierez called you and he said, I'm a witness in the Bryan Crawley case and –
>
> A No. He didn't call and say that. I'm sorry.
>
> . . . .
>
> Q Okay. Did he ask you for money?
>
> A Yes. When he called me – how he called me and what he said, he said – he introduced himself and he said, I don't know if you remember, but I used to work[ ] [at] Botany's. He was a bartender there. And as he said to me, he goes,

[3]Evidence adduced at trial reflects that Guittierez took Crawley to Mexico after the murder to have a bullet removed because the murder victim shot Crawley during the incident, and Crawley did not want a doctor in the United States reporting the shooting.

You were always good to us there, and he feels that he was obligated to tell us this –

Q Okay.

A -- what he told us.

Q Okay. As a result of Max Guittierez calling you, do you give him money?

A Yes, I did help him out.

Because the statements were made to an acquaintance and Guittierez prompted the conversation, rather than Herda eliciting the statements from him, see Harkins, 122 Nev. at 987, 143 P.3d at 714, we conclude that the statements were not testimonial and there was no Confrontation Clause violation. Further, NRS 51.069(1) provides that "[w]hen a hearsay statement has been admitted in evidence, the credibility of the declarant [Guittierez] may be attacked or supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness." In this case, Crawley was the first to elicit a hearsay statement from Herda regarding what Guittierez said to Herda to make him give Guittierez money. Therefore, the State had the right to question Herda on those statements, and the district court did not err in allowing those statements into evidence through Herda's testimony.

Detective Darr's testimony regarding Kiel's daughter

In response to a question from the jury, Detective Darr testified that Kiel's daughter told him that "she was scared when she was being chased by the police." Although we determine that this statement was hearsay and testimonial in nature, any error in its admission was harmless because, based on the overwhelming evidence of Crawley's guilt on the crimes charged, the State has shown beyond a reasonable doubt that the error did not contribute to the jury's verdict. See Polk, 126 Nev. at ___, 233 P.3d at 359.

Prior bad acts evidence

Crawley asserts that the district court erred in two instances when it allowed the State to introduce prior bad acts evidence. First, Crawley argues that a letter he wrote to Kiel was improperly introduced into evidence because in it he stated that he was in jail and in isolation. The State argues that because Crawley failed to object when the letter was entered into evidence or when Kiel testified about the letter, his claim of error should not be considered by this court. However, this court may consider an unobjected-to claim of error "for plain error that affected the defendant's substantial rights." Mitchell v. State, 124 Nev. 807, 817, 192 P.3d 721, 727 (2008). But, because Crawley has failed to show prejudice or how the error affected his substantial rights, we conclude that the error does not rise to the level of plain error. See id. at 817, 192 P.3d at 727-28 ("To show that an error affected substantial rights, the defendant generally must demonstrate prejudice.").

Second, Crawley argues that the State elicited improper prior bad act testimony during its direct examination of a police detective:

> Q What information did you have that would help you look for [Crawley]?
>
> A The information – well, we had dealt with him before on prior occasions and we knew who he was from pictures, from other cases –
>
> Crawley objected to this testimony, which the district court sustained. The district court also instructed the jury that it could not consider prior bad acts evidence.

To determine whether a witness's inadvertent reference to a defendant's prior criminal history is so prejudicial it cannot be cured by a jury instruction, this court considers the following factors: "(1) whether the remark was solicited by the prosecution;" (2) if the jury was immediately

admonished; "(3) whether the statement was clearly and enduringly prejudicial;" and (4) whether there was overwhelming evidence of guilt. Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995-96 (1996). After applying the Geiger factors to this case, we conclude that the district court's instruction to the jury was adequate to cure any prejudice the detective's remark may have caused as there was overwhelming evidence of Crawley's guilt.

Refusal to suppress the recording made by Crawley's cellmate

Crawley argues that the district court should have suppressed the clandestine jailhouse recording made by Crawley's cellmate, Kenneth Haywood. In the recording, Crawley can be heard asking Haywood to kill witnesses and manufacture evidence. Crawley claims that the recording violates his Fifth Amendment right against self-incrimination, and violates his Fifth and Sixth Amendment rights to counsel. Decisions "regarding the admissibility of evidence that implicate constitutional rights [are] mixed questions of law and fact subject to de novo review." Hernandez v. State, 124 Nev. 639, 646, 188 P.3d 1126, 1131 (2008).

Fifth Amendment right against self-incrimination

Crawley claims that his Fifth Amendment right against self-incrimination was violated because he was not given a warning, pursuant to Miranda v. Arizona, 384 U.S. 436 (1966), before he was interrogated by Haywood, who he contends was an agent of the police. The State in turn argues that no Miranda warning was needed because the recording was evidence of a future crime. We agree. "Miranda affects the admissibility of statements made during 'in-custody interrogation'" relating to crimes that have allegedly already been committed. Hernandez v. State, 124 Nev. 978, 988, 194 P.3d 1235, 1242 (2008) (quoting Miranda 384 U.S. at 445). The statements elicited from Crawley concerned crimes Crawley

was committing as his conversation with Haywood was being recorded—solicitation, conspiracy to commit murder, conspiracy to commit an act for the perversion or corruption of public justice or due administration of the law, and bribing or intimidating a witness to influence testimony—and not the crimes he had already been charged with. Thus, we conclude that no Miranda warning was necessary and no violation of Crawley's Fifth Amendment right occurred.

Fifth Amendment right to counsel

Crawley further argues that under Boehm v. State, 113 Nev. 910, 944 P.2d 269 (1997), a right to counsel can attach even if a person has not been charged with a specific crime.

> [T]he Miranda decision does provide a suspect with a right to counsel as a means to protect and secure the Fifth Amendment privilege against compulsory self-incrimination. . . . A request for counsel must be, at minimum, "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney."

Dewey v. State, 123 Nev. 483, 488-89, 169 P.3d 1149, 1152 (2007) (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)). This right to counsel is not offense-specific, and "[o]nce a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present." Boehm, 113 Nev. at 914, 944 P.2d at 272 (quotations omitted). However, further communication is allowed after a suspect invokes his or her right to counsel, so long as the suspect is the one to initiate it. Id. at 915, 944 P.2d at 272. Here, we conclude that Crawley's Fifth Amendment right to counsel was not violated. Even assuming Crawley had previously invoked his right to counsel, Crawley was the one who initiated his communication

with Haywood when he solicited Haywood to murder witnesses connected to Crawley's charged crimes, and by asking Haywood to manufacture and manipulate evidence.

Sixth Amendment right to counsel

Crawley also briefly argues that the district court's refusal to suppress the recording further violated his Sixth Amendment right to counsel, however we conclude that this argument is without merit. The Sixth Amendment right to counsel is offense-specific and the right does not attach until criminal proceedings commence regarding the specific charge the defendant's statements support. Kaczmarek v. State, 120 Nev. 314, 326-27, 91 P.3d 16, 24-25 (2004). Therefore, Crawley's Sixth Amendment right to counsel had not yet attached and could not be violated because he had not yet been charged with any of the crimes resulting from his recorded conversation with Haywood.

Refusal to allow Crawley to cross-examine Haywood regarding Haywood's psychological diagnosis

During cross-examination, Haywood admitted to having psychological issues and Crawley argues that he was improperly restricted from questioning Haywood about his psychological diagnosis. To support his argument, Crawley cites to Lobato v. State, 120 Nev. 512, 520, 96 P.3d 765, 771 (2004) (stating that the district court's discretion to control cross-examination is narrowed when counsel is attempting to show the bias or motive of the witness). "[T]he district court's decision to admit or exclude evidence is reviewed for an abuse of discretion." Baltazar-Monterrosa v. State, 122 Nev. 606, 619, 137 P.3d 1137, 1145 (2006).

If a lay witness is giving testimony regarding opinions or inferences, his or her testimony "is limited to those opinions or inferences which are . . . [r]ationally based on the perception of the witness; and . . .

[h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. In contrast, witnesses qualified as experts can testify regarding "scientific, technical or other specialized knowledge [that] will assist the trier of fact to understand the evidence or to determine a fact in issue." NRS 50.275. Because a medical diagnosis is not an "opinion or inference" that Haywood could testify to based on his perception, we conclude that the district court did not abuse its discretion when it restricted Crawley's cross-examination of Haywood.[4] See Nguyen v. Chater, 100 F.3d 1462, 1467 (9th Cir. 1996) ("Lay testimony as to a claimant's symptoms is competent evidence . . . [however] medical diagnoses are beyond the competence of lay witnesses and therefore [lay witness testimony regarding medical diagnoses] do[es] not constitute competent evidence.").

Jury Instructions

Crawley next challenges four jury instructions as improper: instruction no. 7 (implied malice), instruction no. 8 (premeditation and deliberation), instruction no. 55 (reasonable doubt), and instruction no. 74 (equal and exact justice). However, Crawley failed to object to any of these instructions in the district court.

This court reviews challenges to jury instructions under a harmless error standard. Barnier v. State, 119 Nev. 129, 132, 67 P.3d 320, 322 (2003). "Failure to object . . . to . . . an instruction precludes appellate review, unless the error is patently prejudicial and requires the court to act sua sponte to protect a defendant's right to a fair trial." Flanagan v.

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[4]Crawley was allowed to question Haywood extensively about the symptoms he experienced due to his mental health problems.

State, 112 Nev. 1409, 1423, 930 P.2d 691, 700 (1996). Here, not only did Crawley fail to object, but he admits that this court has already considered and dismissed the arguments he raises concerning the jury instructions. See Leonard v. State, 117 Nev. 53, 78-79, 17 P.3d 397, 413 (2001) (approving of implied malice instruction); Byford v. State, 116 Nev. 215, 236-37, 994 P.2d 700, 714 (2000) (approving of premeditation and deliberation instruction); Mason v. State, 118 Nev. 554, 558, 51 P.3d 521, 523-24 (2002) (approving of reasonable doubt instruction); Thomas v. State, 120 Nev. 37, 46, 83 P.3d 818, 824-25 (2004) (approving of equal and exact justice instruction). Therefore, we conclude that no patently prejudicial error occurred since we have repeatedly approved the instructions given by the district court and that Crawley's contentions are without merit.

Denial of Crawley's motion in limine

Crawley argues that the district court erred in denying his motion in limine to suppress evidence obtained from an allegedly improper search warrant, which he contends was predicated on a false statement from a detective. Crawley argues that the search warrant claimed Crawley confessed to one of the robberies, but when testifying before the grand jury, the detective stated that Crawley did not confess to him. This court will only overturn a district court's decision to admit or exclude evidence if there was manifest error. Vega v. State, 126 Nev. ___, ___, 236 P.3d 632, 638 (2010).

The affidavit that formed the basis of the search warrant contained a statement that "during a subsequent, in custody interview with Detective [Curtis] Weske, Crawley admitted his participation in the robbery." While this affidavit was signed by a detective other than Detective Weske, when the signing detective appeared before the grand

jury, he truthfully testified that Crawley confessed to Detective Weske and not to him. Detective Weske also testified before the grand jury and repeated the information contained in the affidavit—that Crawley confessed to him about participating in the robbery. Therefore, we conclude that Crawley's argument is without merit, and the district court did not manifestly err in denying Crawley's motion in limine.[5]

Cumulative error

Lastly, Crawley argues that cumulative error warrants reversal in this case. This court will not reverse a conviction unless a defendant's constitutional right to a fair trial was violated by the cumulative effect of errors, even if the individual errors are harmless. Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007). In examining whether cumulative error warrants a reversal, this court considers: "'(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.'" Id. (quoting Mulder v. State, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)).

Despite the serious nature of the crimes charged, the State presented ample evidence of Crawley's guilt, and any errors were harmless. As a result, we conclude that Crawley's cumulative error challenge is unavailing.

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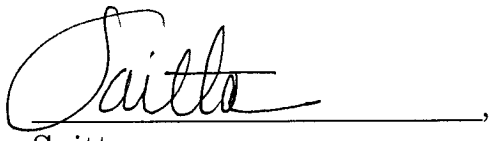
[5]Because Crawley does not assert a probable cause argument as to the search warrant, we do not address that issue.

Having considered Crawley's contentions and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Saitta

_____, J.
Hardesty

_____, J.
Parraguirre

cc: Hon. Jackie Glass, District Judge
Christopher R. Oram
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk