

IN THE SUPREME COURT OF THE STATE OF NEVADA

FRANK MILFORD PECK,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 54168

FILED

MAY 07 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *A. Ingerson*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. Appellant Frank Milford Peck challenges his conviction on ten grounds, none of which warrant relief.

First, Peck argues that insufficient evidence supports his conviction. The evidence shows that although the victim could not identify Peck as her assailant, she provided a general physical description matching Peck's appearance. And Peck's DNA was found on matter collected from the victim during a medical examination performed after the sexual assault. Despite Peck's challenge to the DNA evidence as confusing and suspect, the inability of the victim to identify him, and the lack of other physical evidence, considering all the evidence in the light most favorable to the prosecution, we conclude that a rational jury could find him guilty of the charged offense beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Second, Peck contends that unreasonable governmental delay in arresting and prosecuting him violated his Fifth Amendment and

speedy trial rights. As to the pre-indictment delay, we conclude that he failed to show with adequate specificity any prejudice from the delay or that the State intentionally delayed filing a complaint to gain a tactical advantage. See Wyman v. State, 125 Nev. \_\_\_, \_\_\_, 217 P.3d 572, 577-78 (2009). As to the speedy trial claim, we conclude that it similarly lacks merit. Peck was indicted on November 8, 2006, and shortly thereafter waived his right to a speedy trial. Trial commenced on May 6, 2009. During that period, several defense-related delays occurred, including a five-month continuance, withdrawal of counsel, Peck's removal of another counsel and motion to represent himself, and a motion to recuse the trial judge. Based on the record, we conclude that Peck failed to demonstrate a violation of his speedy trial rights. See Barker v. Wingo, 407 U.S. 514, 515 (1972); NRS 178.556; Furbay v. State, 116 Nev. 481, 485, 998 P.2d 553, 555-56 (2000).

Third, Peck asserts that the application of NRS 171.083, extending the statute of limitations for sexual assault, violated the Ex Post Facto Clause. "Before the statute of limitations for a criminal offense expires, a legislature may amend the statute and extend the limitations period without violating the ex post facto clause." Murphy v. State, 110 Nev. 194, 199, 871 P.2d 916, 919 (1994), overruled on other grounds by State v. District Court, 114 Nev. 739, 964 P.2d 48 (1998); State v. Merolla, 100 Nev. 461, 464, 686 P.2d 244, 246 (1984). Here, the sexual assault occurred on August 9, 1994. NRS 171.083 became effective on July 1, 1997, well before the statute of limitations expired for the charged

offense.<sup>1</sup> See 1997 Nev. Stat., ch. 248, § 1, at 890; *id.* § 5, at 891. Accordingly, Peck's prosecution was not constitutionally infirm.

Fourth, Peck argues that the district court should have considered his proper person petition for a writ of habeas corpus because of his strained relationship with counsel. We discern no error.

Fifth, Peck complains that his waiver of his right to counsel under Faretta v. California, 422 U.S. 806 (1975), was not unequivocal as he was compelled to forgo that right due to his strained relationship with counsel. The record shows, however, that the district court conducted a commendably thorough canvass, including exploring the nature of Peck's displeasure with counsel, and appointed counsel to advise Peck during trial. See O'Neill v. State, 123 Nev. 9, 17, 153 P.3d 38, 43-44 (2007); Graves v. State, 112 Nev. 118, 124, 912 P.3d 234, 237-38 (1996). Moreover, despite Peck's displeasure with counsel, he allowed stand-by counsel to examine most of the witnesses and present opening statement and closing argument. Therefore, we conclude that this claim lacks merit.

Sixth, Peck argues that his motion to recuse the trial judge based on bias was erroneously denied because the trial judge had presided over the murder trial of Peck's brother, who testified at Peck's trial. Having reviewed the record, we conclude that Peck failed to show that the trial judge should have been removed or any indication of bias. See NRS 1.230(2)(c).

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<sup>1</sup>An indictment for sexual assault "must be found, or an information or complaint filed within 4 years after the commission of the offense." NRS 171.085.

Seventh, Peck contends that the State failed to collect and preserve exculpatory evidence—the victim’s pubic hairs and fingerprints and a boot print found at the crime scene. Other than asserting a general claim of prejudice, Peck fails to show that the challenged evidence was material or that the State acted in such a manner as to warrant reversal of his conviction. See Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001); Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998).

Eighth, Peck asserts that the victim’s pretrial voice identification of him was unduly suggestive because the State requested her attendance at a pretrial hearing where she heard Peck speak and then testified at trial that she recognized his voice, despite the 15 years that had elapsed since the offense. Even assuming error, see generally Wright v. State, 106 Nev. 647, 650, 799 P.2d 548, 550 (1990) (providing that exclusion of pretrial identification evidence (police lineup) is warranted if procedures are unnecessarily suggestive such that identification is unreliable), we discern no prejudice considering the evidence establishing Peck’s guilt.

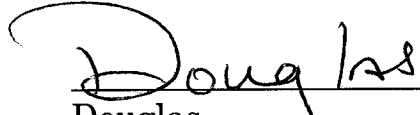
Ninth, Peck contends that the prosecutor committed misconduct by: (1) advising the jury during voir dire that the State did not have to prove Peck’s guilt beyond any doubt or to an absolute certainty, (2) arguing that Peck’s alibi defense “failed miserably,” and (3) expressing a personal opinion about the evidence. Because Peck failed to object to any of the challenged comments, we review for plain error affecting his substantial rights. Valdez v. State, 124 Nev. \_\_\_, \_\_\_, 196 P.3d 465, 477 (2008). Because none of the challenged comments were improper, Peck failed to show plain error.


Tenth, we reject Peck's argument that cumulative error warrants reversal of his conviction. See Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007).

Having considered Peck's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

 J.  
Hardesty

 J.  
Douglas

 J.  
Pickering

cc: Hon. Brent T. Adams, District Judge  
Karla K. Butko  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk