

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD S. HADDAD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 55260

FILED

MAR 31 2011

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 jury verdict, of detention, concealment, or removal of a child from a person having lawful custody. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

FACTUAL BACKGROUND

A family court awarded Appellant Richard S. Haddad and his former girlfriend joint custody of their daughter. Subsequently, Haddad repeatedly, yet unsuccessfully sought to obtain sole custody of his daughter by asserting that his ex-girlfriend was neglecting their daughter's health and welfare. Unknown to his ex-girlfriend, Haddad forged her signature on a passport application for their daughter and travelled with their daughter to Calgary, Canada where he rented an apartment and began seeking work.

Acting on an immigration warrant, Canadian law enforcement apprehended Haddad in Calgary. The Canadian authorities sent Haddad and his daughter back to Las Vegas. After a police investigation, Nevada authorities charged Haddad with detention, concealment, or removal of a child from a person having lawful custody. A jury unanimously convicted Haddad, who argued that taking his daughter to Canada was necessary

because his ex-girlfriend's abuse and neglect threatened their daughter's health and welfare.

After his conviction, Haddad requested his attorney to file motions that his attorney refused to file. Because his attorney refused to file the motions, Haddad requested the district court to terminate his counsel and allow him to represent himself. The district court informed Haddad it was not in his best interest to represent himself for sentencing because he had a prior felony conviction, his attorneys were competent, and attorneys cannot file frivolous motions. Haddad again told the district court he wanted to represent himself and the court granted his request. The district court sentenced Haddad to a maximum of forty-eight months with a minimum parole eligibility of eighteen months.

Haddad appeals his conviction on the grounds that (1) the state failed to negate his affirmative defense of necessity, and therefore, the state failed to meet the requirements of proving each and every element of NRS 200.359, and (2) the district court judge failed to adhere to the mandates of Faretta v. California, 422 U.S. 806 (1975), and therefore, his sentence should be set aside and he should be resentenced. We disagree with Haddad's contentions and affirm the judgment of conviction.¹

¹Haddad's argument regarding suppression of admissions he made to Canadian authorities upon his arrest in Canada based on the issuance of an improper warrant in Nevada was waived because he failed to preserve this issue below and, absent plain error, this court declines to consider this issue on appeal. See Dieudonne v. State, 127 Nev. ___, ___; ___ P.3d ___, ___ (Adv. Op. No. 1, January 27, 2011). It is also without merit because NRS 200.359 plainly does not require express judicial

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The parties are familiar with the facts and procedural history of this case, and therefore, we do not recount them except as is necessary for our disposition.

The state did not fail to negate Haddad's affirmative defense of necessity

Haddad argues that the state failed to negate his affirmative defense of necessity and thus failed to prove each and every element of the crime charged under NRS 200.359(1) as required by In re Winship, 397 U.S. 358 (1970). We disagree.

Statutes are interpreted based on their plain meaning and to reflect legislative intent. Sanders v. State, 119 Nev. 135, 140, 67 P.3d 323, 327 (2003). NRS 200.359(1) states that a person with a limited custody right is guilty if the person "willfully detains, conceals or removes the child from a parent, guardian or other person having lawful custody or a right of visitation of the child" or "removes the child from the jurisdiction of the court without the consent of either the court or all persons who have the right to custody or visitation." NRS 200.359(8) states that:

This section does not apply to a person who detains, conceals or removes a child to protect the child from the imminent danger of abuse or neglect or to protect himself or herself from imminent physical harm, and reported the detention, concealment or removal to a law enforcement agency or an agency which provides child welfare services within 24 hours after

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findings of fact to accompany the arrest warrant, and Haddad was lawfully arrested in Canada on a Canadian warrant.

detaining, concealing or removing the child, or as soon as the circumstances allowed.

Haddad argues that although he neglected to request a jury instruction on the issue, NRS 200.359(8) required the state to disprove his necessity defense. He sets forth that intent is paramount to NRS 200.359 and that a custodial parent may remove a child provided notice is given to the relevant authorities. He contends that willfulness is implied by NRS 200.359. He argues that although the record does not show that he contacted authorities, because he neglected to subpoena the telephone records of child protective services, his necessity defense negated the implied willfulness element of the statute.

An affirmative defense does not negate any facts that the prosecution is required to prove under the statute and is a “separate issue on which the defendant is required to carry the burden of persuasion.” Patterson v. New York, 432 U.S. 197, 207 (1977). An affirmative defense must be proven by a preponderance of evidence. See Ybarra v. State, 100 Nev. 167, 172, 679 P.2d 797, 800 (1984). But if the defense negates an element of the charged offense, the prosecution must disprove the defense because of the reasonable doubt standard. Jorgensen v. State, 100 Nev. 541, 543, 68 P.2d 308, 309 (1984).

Despite Haddad’s contentions, NRS 200.359(8) is plainly an affirmative defense with facts separate from those necessary to prove the commission of the crime under NRS 200.359(1). Also, as noted by the California Supreme Court in interpreting its own child-abduction statute, a statutory exception is an affirmative defense where the statute first defines an offense in unconditional terms and then specifies an exception to its operation. People v. Neidinger, 146 P.3d 502, 507 (Cal. 2006). The state further points out that the mens rea of NRS 200.359(1) is simply

that the detention, concealment, or removal in violation of the relevant court decree is willful. NRS 200.359(1) does not contain a malice element, absence-of-good cause element, or any negative element for the state to prove.

Haddad's case is essentially identical to Jorgensen v. State, where the defendant admitted to the crime but claimed a common law necessity defense that did not negate any element of the offense. 100 Nev. at 544-45, 68 P.2d at 310 (holding that a necessity defense did not negate the mental state of the crime of prison escape). We conclude that the plain meaning of NRS 200.359 supports an interpretation whereby NRS 200.359(8) is an affirmative defense to NRS 200.359(1), and that this necessity defense does not negate any elements of NRS 200.359(1). See Jorgensen, 100 Nev. at 544, 688 P.2d at 310. Haddad was required to affirmatively prove the defense by a preponderance of the evidence, and his argument that it is the state's burden to disprove the defense lacks merit. We hold that the district court did not err by failing to require the state to disprove Haddad's necessity defense.

The district court did not commit reversible error by failing to give a full Fareta canvass at sentencing

Haddad contends that the district court erred by failing to adhere to the mandates of Faretta v. California, 422 U.S. 806 (1975), and violated SCR 253 at sentencing, which together denied Haddad his Sixth Amendment right to counsel. He argues that he waived his right to counsel solely to have motions filed that his attorney refused to file for him, and that the district court's scant warning constituted an insufficient Faretta canvass. Finally, Haddad submits that Gallego v. State, 117 Nev. 348, 23 P.3d 227 (2001), requires his case to be remanded for a new sentencing hearing. We disagree.

The entire record demonstrates that Haddad voluntarily and intelligently waived his right to representation

A defendant is guaranteed a right to self-representation under both the United States and Nevada Constitutions. Hymon v. State, 121 Nev. 200, 212, 111 P.3d 1092, 1101 (2005) (noting that denial of this right is per se reversible error). If a defendant seeks to waive the right to counsel, a district court must conduct a "Faretta canvass" to determine that the defendant's waiver is intelligent and voluntary, meaning the defendant is fully aware "of the nature of the charged crime so that the defendant's decision is made with a clear comprehension of the attendant risks." Id. (internal quotations omitted); see also Faretta v. California, 422 U.S. 806, 835 (1975). But a mechanical performance of a Faretta canvass is not required and its omission is not reversible error if the entire record demonstrates that the defendant knew his or her rights and insisted upon self-representation. Hymon, 121 Nev. at 212-13, 111 P.3d at 1101 (noting that the constitution does not require specific inquiries when the record reveals a defendant's awareness of the dangers and disadvantages of self-representation). Deference is given to a district court's decision to allow a defendant to waive the right to counsel, because district courts are significantly more competent to judge a defendant's understanding of the waiver. Id. at 213, 111 P.3d 1101.

Haddad argues that he received an inadequate Faretta canvass in which the district court merely told him that it was not in his best interest to waive his right to counsel and that his lawyers were intelligent and capable. Haddad also argues that there was no finding that his waiver was knowingly and intelligently made. Haddad suggests that these deficiencies, combined with his overwhelming desire to have his

motions filed, which his attorney refused to file, demonstrate that his waiver was not knowingly and intelligently made.

Yet the record as a whole demonstrates that Haddad's waiver of counsel at sentencing was knowing and intelligent even if the district court's Faretta canvass was insufficient. Haddad's handwritten proper person motions show his knowledge of the relevant facts, relevant law, proper filing procedures, and knowledge of his case. These motions detailed the custody dispute, argued complex legal issues, and were supported by specific citations to diverse legal authority. Haddad was clearly literate, competent, and understanding of the sentencing process he confronted. Haddad's involvement and conduct during the trial also demonstrate that his waiver of counsel was knowingly and voluntarily made: (1) Haddad testified in his own defense, (2) Haddad testified he attended Creighton University, (3) Haddad sat through the entire trial and exhibited intimate familiarity with the charges, (4) Haddad's two-year child-custody dispute made him familiar with court processes and the underlying facts of the child custody dispute formed his defense, (5) Haddad had already been convicted of a prior felony, and (6) Haddad was warned that self-representation was a bad idea. Thus, we conclude that Haddad's waiver of this right to counsel at sentencing was knowingly and intelligently made.

Gallego v. State is not applicable to Haddad's waiver

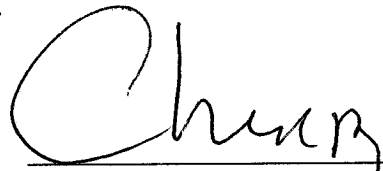
Haddad submits that Gallego v. State, 117 Nev. 348, 23 P.3d 227 (2001), compels a decision in his favor, because Haddad did not want his counsel to withdraw but rather to have his motions filed. Haddad argues that because the only reason he requested self-representation was to have his motions filed, his claim is consistent with Gallego, in that his request for self-representation was conditional. But unlike the defendant


in Gallego, Haddad never sought to substitute counsel at his hearing to dismiss the public defender. Haddad unequivocally chose to proceed without representation after being asked about it directly by the district court, and the district court granted his request for self-representation. See Gallego, 117 Nev. at 358-60, 23 P.3d at 234-36.


Haddad argues that his desire to file his motions led him to proceed without representation at his sentencing. But the record demonstrates that Haddad's waiver was voluntarily and intelligently made and Gallego does not compel a different conclusion simply because Haddad was motivated by a desire to file motions that his previous attorneys refused to file. Even assuming that the district court erred by not conducting a full Faretta canvass at sentencing, Haddad's waiver was voluntarily and intelligently made. We conclude that the district court did not commit reversible error at sentencing by failing to conduct a full Faretta canvass as argued by Haddad.

Accordingly, we affirm Haddad's judgment of conviction.

IT IS SO ORDERED.


Cherry, J.


Gibbons, J.


Pickering, J.

cc: Hon. Doug Smith, District Judge
Michael H. Schwarz
Attorney General/Carson City
Attorney General/Las Vegas
Eighth District Court Clerk