IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DAVID MARK MURPHY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 72103

ORDER OF AFFIRMANCE

David Mark Murphy appeals from a judgment of conviction entered pursuant to a jury verdict finding him guilty of conspiracy to commit robbery, burglary while in possession of a deadly weapon, home invasion while in possession of a deadly weapon, two counts of attempt robbery with use of a deadly weapon, second degree murder with use of a deadly weapon, and attempt murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Murphy was convicted for his involvement in an attempted home robbery and fatal shooting. At trial, the State presented testimony from two accomplices and Murphy's cellular telephone location records during the relevant period. The jury convicted Murphy following a 19-day trial.[1]

On appeal, Murphy argues that reversal is warranted because (1) the State presented insufficient evidence to corroborate accomplice testimony; the district court erred by (2) denying his motion to exclude accomplice Summer Larsen as a witness due to the State's untimely notice, (3) denying his motions for severance, (4) admitting Murphy's cellular

[1]We do not recount the facts except as necessary to our disposition.

18-900351

telephone records, and (5) disclosing accomplice Robert Figueroa's unredacted agreement to testify; and (6) that cumulative error warrants reversal. We disagree.

We first address Murphy's argument that there is insufficient evidence independently corroborating the accomplice testimony. Under NRS 175.291(1), a conviction based on accomplice testimony will not stand unless the accomplice's testimony is corroborated by other evidence that independently connects the defendant to the crime. *See also Evans v. State*, 113 Nev. 885, 892, 944 P.2d 253, 257 (1997) (addressing the corroborative evidence requirement).

At trial, the cellular telephone records independently connected Murphy to the crimes, showing that Murphy was in constant association with his accomplices throughout that day; the records also place Murphy's phone at the crime scene. *See Cheatham v. State*, 104 Nev. 500, 505, 761 P.2d 419, 422 (1988) (holding that accomplice testimony was sufficiently corroborated where evidence showed the accomplices' constant association throughout the day of the offense). In addition, the cellular telephone records corroborated the accomplice's account of the crime's progression. Therefore, sufficient corroborating evidence exists to sustain Murphy's convictions.

Murphy next contends that the State failed to provide timely notice of its intent to present accomplice Summer Larsen as a witness. We review a district court's decision to admit testimony for an abuse of discretion. *See Brant v. State*, 130 Nev. 980, 984, 340 P.3d 576, 579 (2014) (reviewing the admission of expert testimony for abuse of discretion). Upon a finding that the district court abused its discretion, this court conducts

harmless-error review. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

NRS 174.234(1)(a)(2) requires the State to file and serve written notice of all witnesses it intends to call during its case-in-chief "not less than 5 judicial days before trial." Failure to notice a witness will be error, but will not warrant reversal unless the error prejudiced the defendant or the State acted in bad faith. *See* NRS 174.234(3); *Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008).

The district court likely abused its discretion by allowing Ms. Larsen's testimony when the State gave notice of Ms. Larsen as a witness only three judicial days before trial, but Murphy fails to establish that the State acted in bad faith or the error caused prejudice. We conclude that in light of the record as a whole, any error by allowing the testimony was ultimately harmless. Ms. Larsen did not testify until September 19, 2016, providing Murphy with eleven total days to prepare for her testimony. Moreover, Ms. Larsen's testimony was harmless in light of the overwhelming evidence against Murphy. Accordingly, the district court did not abuse its discretion by denying Murphy's motion to exclude Ms. Larsen's testimony. *See Mitchell*, 124 Nev. at 819, 192 P.3d at 729 (concluding the district court did not abuse of discretion by allowing testimony of an undisclosed witness where record showed no bad faith and the appellant failed to show prejudice).

Murphy next argues that the district court abused its discretion by denying both his pre-trial and trial motions for severance because his and co-defendant Jorge Mendoza's defenses were antagonistic and mutually exclusive. We review a district court's decision to sever a trial for abuse of discretion. *Chartier v. State*, 124 Nev. 760, 764, 191 P.3d 1182, 1185 (2008).

"[I]t is well settled that where persons have been jointly indicted they should be tried jointly, absent compelling reasons to the contrary." *Jones v. State*, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995). "A defendant seeking severance must show that the codefendants have conflicting and irreconcilable defenses and there is danger that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Marshall v. State*, 118 Nev. 642, 646, 56 P.3d 376, 378 (2002) (internal quotation omitted). However, "mutually antagonistic defenses are not prejudicial per se"; a defendant must also demonstrate that the joint trial "prevented the jury from making a reliable judgment regarding guilt or innocence," or compromised a specific trial right. *Id.* at 646-48, 56 P.3d at 379-80 (internal quotation omitted).

Prior to trial, Murphy did not present to the district court anything beyond speculation that he and Mendoza would present mutually-exclusive defenses, and thus, the district court did not abuse its discretion by denying Murphy's pre-trial motion to sever. While Mendoza's testimony during trial implicated Murphy, and was therefore antagonistic to Murphy's defense that he was not involved, it was not so antagonistic to render the defenses mutually exclusive. *See United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991) ("Mutually exclusive defenses are said to exist when acquittal of one codefendant would necessarily call for the conviction of the other."). Moreover, Mendoza's testimony did not amount to a second prosecution of Murphy, and any prejudice was properly addressed through jury instructions. *See Zafiro v. United States*, 506 U.S. 534, 540-41 (1993) (recognizing the risk of prejudice due to antagonistic defenses can be cured with proper instructions); *cf. Tootick*, 952 F.2d at 1082-85 (holding that counsel's repeated accusations against the other codefendant amounted to

a second prosecution, and the lack of curative jury instructions resulted in manifest prejudice and reversible error).

Further, Murphy fails on appeal to show that joinder compromised a specific trial right or prevented the jury from reliably determining guilt or innocence. *Cf. Chartier*, 124 Nev. at 766-67, 191 P.3d at 1186-87 (concluding that the cumulative effect of the mutually exclusive defenses and the defendant's inability to fully present his theory of defense warranted severance); *Ducksworth v. State*, 113 Nev. 780, 794, 942 P.2d 157, 166 (1997) (concluding severance was warranted where joinder violated defendant's right to confrontation). In addition, the State presented accomplice testimony and cellular telephone records that were sufficient to support Murphy's conviction absent Mendoza's testimony. *See Marshall*, 118 Nev. at 648, 56 P.3d at 380 (concluding that an antagonistic defense was inadequate to support severance where the State presented overwhelming evidence against both defendants and the State's case was not dependent on either defendant's testimony). Therefore, the district court did not abuse its discretion by denying Murphy's motions to sever the trial.

We next address Murphy's assertion that the district court erred by admitting Murphy's cellular telephone records and the State's expert testimony regarding those records. We review the district court's decision for an abuse of discretion, and will not reverse unless that decision was manifestly wrong. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008); *Colon v. State*, 113 Nev. 484, 491, 938 P.2d 714, 719 (1997). NRS 174.234(2) requires the State to disclose expert witnesses 21 days prior to trial and to provide a brief statement on the subject matter and substance of the testimony. After complying with this duty, NRS 174.234(3)(b)

imposes upon the State a continuing obligation to notify the defendant of any information relating to an expert "as soon as practicable after the [State] obtains that information." In addition, NRS 174.235(1)(c) requires the State to exercise due diligence in anticipating which documents it intends to introduce in its case-in-chief and to provide copies of those documents at the defendant's request. If a party violates these provisions, the district court may grant a continuance or exclude the evidence. NRS 174.295(2).

Our review of the record shows that the State timely filed its notice of expert witnesses. In addition, the record shows the State disclosed Murphy's cellular telephone records as soon as the State obtained them. While the appellate record is unclear as to whether the State met its duty to exercise due diligence in discovering and disclosing these records, we note the district court allowed Murphy's requested continuance of two days to prepare to cross-examine the witnesses utilizing the records.[2] Based on the record, the district court did not abuse its discretion by admitting Murphy's cellular telephone records.

Finally, Murphy contends that the district court erred by admitting accomplice Robert Figueroa's plea agreement without excising its truthfulness provision. Under NRS 175.282, the district court must allow the jury to inspect a plea agreement of a testifying codefendant. Additionally, the district court should excise the truthfulness provision from the document provided to the jury "unless [that provision is] admitted in

---

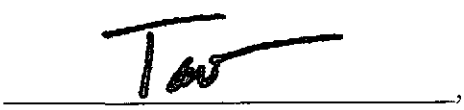
[2]Murphy's assertion that the State did not comply with the continuance is belied by the record. The expert, Officer Gandy, did not testify regarding the record's incriminating substance until after the continuance, which granted Murphy his requested time to prepare for cross-examination.

response to attacks on the witness's credibility attributed to the plea agreement." *Sessions v. State*, 111 Nev. 328, 334, 890 P.2d 792, 796 (1995).

At trial, Murphy's counsel attacked Figueroa's credibility by insinuating that Figueroa was allowed to plead guilty to lesser charges and sought a reduced sentence in exchange for testifying for the State against the defendants. After Figueroa's testimony, the district court correctly determined that Murphy attacked Figueroa's credibility and declined to redact the plea agreement. We disagree that the district court abused its discretion by admitting the plea agreement on the record before us.[3] Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Silver



_____, J.
Tao

_____, J.
Gibbons

[3]We hold that in light of our conclusion that one error exists but was harmless, cumulative error does not apply. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) ("One error is not cumulative error."); *Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006).

cc: Hon. Carolyn Ellsworth, District Judge
Casey A. Landis
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk