

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JASON KALEIALOHA SIMPSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 73200

FILED

JUN 22 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

ORDER OF AFFIRMANCE

Jason Kaleialoha Simpson appeals from a judgment of conviction, pursuant to a jury verdict, of one count of possession of a stolen vehicle value over \$3,500. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Police detectives surveilled the Silver Sevens Hotel & Casino in Las Vegas in an attempt to arrest Simpson on a parole warrant.¹ From hotel surveillance video, detectives observed Simpson entering the hotel parking lot in a white SUV and determined that he was staying in a particular room. Detectives noted that the SUV was bearing a false license plate ("cold plated"), and the dashboard Vehicle Identification Number was obscured. Detectives then pretended to be hotel employees looking for a gas leak in order to enter the hotel room where Simpson was staying. Detectives handcuffed Simpson and informed him that he was being taken to jail. They then conducted an extensive search of the room, during which Simpson made a verbal statement admitting to having taken a vehicle. In anticipation of transport, Simpson asked detectives to retrieve his shoes from under the bed. The detectives found a car key inside one of the shoes. One of the detectives asked him what the key was

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

for, and Simpson stated that it was for "the white SUV downstairs," which they determined to be the cold-plated vehicle parked outside the hotel that, after later investigation, proved to be stolen. At trial, the jury found Simpson guilty and the district court sentenced him to four to ten years in prison.

On appeal, Simpson argues that: (1) the police violated his constitutional rights by using a ruse to gain entry and search the hotel room, and question him without giving *Miranda*² warnings; (2) the evidence presented by the State was insufficient to support his conviction; (3) the district court abused its discretion in denying his motion for a mistrial; (4) the district court abused its discretion by denying his proposed jury instruction; (5) the district court abused its discretion by denying his motion to dismiss counsel; and (6) cumulative error warrants reversal.

We first consider whether Simpson's constitutional rights under *Miranda* were violated.³ Below, Simpson moved to suppress his

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

³Simpson also argues that police violated his constitutional rights by using a ruse to gain entry and search the hotel room. Simpson does not dispute that the police had a warrant to take him into custody on a parole violation. Also, he admits that he did not challenge the search of the hotel room at trial. "Although failure to object at trial generally precludes appellate review, this court has the discretion to review constitutional or plain error." *Somee v. State*, 124 Nev. 434, 443, 187 P.3d 152, 159 (2008); *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (noting that the defendant must demonstrate the error is both plain from the record and caused "actual prejudice or a miscarriage of justice"). Here, Simpson demonstrates no plain error because detectives entered the hotel room to serve a parole warrant, hence the subsequent search was permissible. NRS 213.151(1) (authorizing arrest of a parolee on a warrant issued by the

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verbal statements, which he claims resulted from custodial interrogation that warranted *Miranda* warnings. The district court denied this motion. “[A] trial court’s custody and voluntariness determinations present mixed questions of law and fact subject to this court’s de novo review.” *Rosky v. State*, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005).

“The Fifth Amendment privilege against self-incrimination provides that a suspect’s statements made during custodial interrogation are inadmissible at trial unless the police first provide a *Miranda* warning.” *Id.* at 191, 111 P.3d at 695 (quoting *State v. Taylor*, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998)). Under *Miranda*, an interrogation “refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Archanian v. State*, 122 Nev. 1019, 1038, 145 P.3d 1008, 1022 (2006) (quoting *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980) (footnote omitted)). However, the *Miranda* court made clear that “[g]eneral on-the-scene questioning as to facts surrounding a crime . . . is not affected by our holding.” 384 U.S. at 477.

Because he was arrested, Simpson was in custody for *Miranda* purposes. Regarding interrogation, Simpson argues that the detective’s

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State Board of Parole Commissioners); see *People v. Johnson*, 32 N.Y.S.3d 772, 773 (App. Div. 2016) (holding that a parole warrant justifies entry and arrest and that subsequent search was permissible). In addition, Simpson provides no authority to support his contention that employing a ruse to enter the room violated his constitutional rights. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (stating that issues not supported by relevant authority and cogent argument need not be addressed by this court).

question about the key found in his shoe constitutes interrogation requiring that he be given the *Miranda* warning. Simpson further argues that the conversation among the detectives and the statements they made about the SUV while they searched the hotel room was the "functional equivalent," of express questioning, namely "words or actions . . . reasonably likely to elicit an incriminating response." *Innis*, 446 U.S. at 301. Testimony shows that the detectives discussed the white SUV in Simpson's presence during the search. However, Simpson made his verbal statement voluntarily without questioning by detectives. Further, Simpson's assertion that the detectives' conversations about the vehicle were reasonably likely to elicit an incriminating response from Simpson is unpersuasive.

The detective's question of "where the key belonged to" after finding it in Simpson's shoe presents a closer call. However, even if that question constituted interrogation for *Miranda* purposes, any error in admitting his statements was harmless. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Detectives observed Simpson arriving at the hotel in the SUV. Due to his arrest, they impounded it, and the subsequent inventory search revealed that it was stolen. Thus, under the inevitable discovery rule, error, if any, was harmless. *Carlisle v. State*, 98 Nev. 128, 129-30, 642 P.2d 596, 597-98 (1982) ("[E]vidence obtained as a result of information derived from an unlawful search or other illegal police conduct is not inadmissible where the normal course of police investigation would, in any case, even absent the illicit conduct, have inevitably led to such evidence.").

Next, we consider whether the State presented sufficient evidence to support Simpson's criminal conviction. Simpson argues that the State failed to meet its burden to prove beyond a reasonable doubt all elements of the charged crime. Reviewing a challenge to the sufficiency of evidence supporting a criminal conviction, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (internal quotation marks omitted). The jury weighs the evidence and the credibility of the witnesses and determines whether these are sufficient to meet the elements of the crime, and we will not disturb a verdict that is supported by substantial evidence. *Id.*

Simpson was convicted of possession of a stolen vehicle value over \$3,500. NRS 205.273(1)(b) defines possession of a stolen vehicle as "ha[ving] in [one's] possession a motor vehicle which the person knows or has reason to believe has been stolen." Hotel surveillance video showed Simpson arriving in a white SUV and backing it into a parking spot. Detectives then ascertained that the license plate did not match the vehicle. And later, the detectives determined that the key found in Simpson's shoe matched the cold-plated SUV. Further, the SUV's California license plates had been replaced with Nevada plates, its VIN covered, and Simpson had backed up tightly to the building so that detectives had to get up against the wall to see the license plate—all common suggestions of auto theft. Finally, the SUV was a 2014 Chevrolet Traverse, less than two years old at the time it was stolen, for which its owner had paid \$37,000 in 2015. When recovered, the vehicle showed no visible signs of damage. Viewing the evidence in the light most favorable

to the prosecution, we conclude that a rational jury could have determined that Simpson had the Chevy Traverse in his possession, that he knew or had reason to believe it was stolen, and that it had a fair market value of greater than \$3,500 at the time it was stolen. NRS 205.0831 (defining "value"). Therefore, we conclude that sufficient evidence supported Simpson's conviction.

Next, we consider whether the district court abused its discretion by denying Simpson's motion for a mistrial. Simpson argues that the district court abused its discretion by denying his motion after a witness identified himself as "a detective with the Major Violator's Unit," violating a pretrial order, and identifying another officer as a "P and P [o]fficer" when a pretrial order precluded such statements. He further argues that this testimony, along with witnesses' repeated use of the word "warrant," took away the presumption of innocence.

This court will not disturb a district court's determination on whether a mistrial is warranted absent a clear abuse of discretion. *Geiger v. State*, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996), *overruled on other grounds by Barber v. State*, 131 Nev. 1065, 363 P.3d 459 (2015). Generally, a reference to criminal history violates an individual's right to due process because it affects the presumption of innocence. *Rice v. State*, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992). "The test for determining whether a statement is a reference to criminal history is whether the jury could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." *Id.* at 44, 824 P.2d at 281.

Here, error, if any, was harmless. *Rosky*, 121 Nev. at 198, 111 P.3d at 699 (holding that "[e]rrors in the admission of [propensity character] evidence . . . are subject to a harmless error review.") It is

unlikely that a jury would know that “P and P” stands for “Parole and Probation.” The witness’ reference to “Major Violators Unit” is more problematic, but still it is unlikely that a jury would understand the significance of an “MVU” detective’s being present to serve Simpson’s warrant. Further, it is unreasonable to presume that a jury would infer that just because a defendant had an outstanding warrant that he had necessarily engaged in criminal activity. Additionally, the district court instructed the jury on the presumption of innocence on several occasions. Moreover, although there was an order in limine precluding some of the statements at issue, when appropriate, “[a] pretrial order granting a motion in limine may be modified or reversed at trial.” *Rice v. State*, 113 Nev. 1300, 1311, 949 P.2d 262, 269 (1997), *abrogated on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006), *abrogated on other grounds by Alotaibi v. State*, 133 Nev. ___, 404 P.3d 761 (2017). Thus, any error was harmless because a jury could not reasonably infer from the facts presented that Simpson had engaged in prior criminal conduct.

Next, we consider whether the district court abused its discretion in denying Simpson’s proffered jury instruction, often referred to as a *Crane* instruction.⁴ District courts have “broad discretion to settle

⁴*Crane v. State*, 88 Nev. 684, 687 n.4, 504 P.2d 12, 14 n.4 (1972). Specifically, Simpson argues that the district court should have given the following instruction in part:

[B]efore you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty.

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jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). A defendant is entitled to an "instruction on the theory of his case" but not "the absolute right to have his own instruction given, particularly when the law encompassed in that instruction is fully covered by another instruction." *Milton v. State*, 111 Nev. 1487, 1492, 908 P.2d 684, 687 (1995) (internal quotation marks omitted).

Here, the district court did not abuse its discretion in denying Simpson's proffered *Crane* instruction. The supreme court has repeatedly held that such an instruction is not required if the jury is properly instructed on the reasonable doubt standard. *See, e.g., Hooper v. State*, 95 Nev. 924, 927 & n.3, 604 P.2d 115, 117 & n.3 (1979); *Bails v. State*, 92 Nev. 95, 97-98, 545 P.2d 1155, 1156 (1976). Indeed, the district court provided appropriate jury instructions on all the issues in Simpson's proffered order: presumption of innocence, burden of proof, reasonable doubt, and circumstantial evidence. Thus, it did not abuse its discretion.

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If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence. However, when considering circumstantial evidence, you must accept only reasonable conclusions and reject any that are unreasonable.

Last, we consider whether the district court abused its discretion by denying Simpson's motion to dismiss counsel and appoint new counsel. Simpson argues that his constitutional rights were violated because the district court failed to conduct a meaningful three-part inquiry as articulated in *Young v. State*, 120 Nev. 963, 102 P.3d 572 (2004). We disagree.

"We review the denial of a motion for substitution of counsel for abuse of discretion." *Id.* at 968, 102 P.3d at 576. The Sixth Amendment "right to counsel extends to any critical stage of the criminal proceeding." *Brinkley v. State*, 101 Nev. 676, 678, 708 P.2d 1026, 1028 (1985) (emphasis omitted). But the right to choose one's counsel is not absolute. *Patterson v. State*, 129 Nev. 168, 175, 298 P.3d 433, 438 (2013) (internal quotation marks omitted). And, "the right to counsel of choice does not extend to defendants who require counsel to be appointed for them." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151 (2006).

We conclude that the district court did not abuse its discretion in denying Simpson's motion to dismiss and appoint new counsel. The record contains no evidence that Simpson himself voiced concerns about his counsel prior to trial. Further, even after the court noted on the record during trial that it had received a voicemail message expressing that Simpson was dissatisfied with his counsel, Simpson's counsel made no objection, and Simpson himself was present in court but remained silent. And, although Simpson filed a pro se motion to dismiss counsel and appoint alternate counsel, alleging a lack of communication with his current counsel, it was dated October 16th (between the two days of trial), the court received it on October 26th (nine days after the trial concluded), and it was filed on November 2nd. Thus, the district court had no

meaningful notice that Simpson harbored concerns about his counsel until well after the trial was complete. Therefore, it properly exercised its discretion to "balance[e] the right to counsel of choice against the needs of fairness . . . and against the demands of its calendar." *Patterson*, 129 Nev. at 175, 298 P.3d at 438.⁵

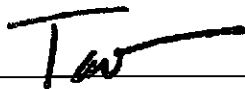
Accordingly, we

ORDER the judgment of conviction AFFIRMED.




, C.J.

Silver



, J.

Tao



, J.

Gibbons

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

⁵Simpson also argues cumulative error warrants reversal. In reviewing a claim of cumulative error, 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." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (internal quotation marks omitted). Here, we conclude the district court did not err. But even if it erred, the *Valdez* factors weigh against Simpson because although the crime charged carried a heavy penalty, the issue of Simpson's guilt was not close in light of the previously discussed testimony at trial, particularly the detectives' testimony regarding Simpson's voluntary statement and video evidence of Simpson driving what appears to be the stolen SUV into the hotel parking lot.

