IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSE VILLANUEVA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81836-COA

FILED
NOV 17 2021
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Jose Villanueva appeals under NRAP 4(c) from a judgment of conviction entered pursuant to a jury verdict of one count of conspiracy to commit murder, one count of conspiracy to commit kidnapping, one count of first degree kidnapping with use of a deadly weapon resulting in substantial bodily harm, one count of attempt murder with use of a deadly weapon, one count of conspiracy to commit robbery, and one count of robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

At some point, Yoandy Fernandez-Morales induced the victim, Osvaldo Perez-Palacio, to buy a life insurance policy and designate him as the beneficiary.[1] Not long after, Fernandez-Morales also told Perez-Palacio that if Perez-Palacio wanted a new job (and he did), Fernandez-Morales would pick him up and take him to Fernandez-Morales's employer at an off-site laundry facility in the middle of the night. But Fernandez-Morales cautioned Perez-Palacio not to tell anyone about it and to bring his important legal documents with him.

When Fernandez-Morales came to pick up Perez-Palacio, he did so with another man, Jose Juarez-Hernandez. Fernandez-Morales told

[1]We recount the facts only as necessary for this disposition.

Perez-Palacio that he could not drive him because his car was full of laundry, but Juarez-Hernandez would wait with Perez-Palacio until Fernandez-Morales's other friends arrived. Not long after, those friends, Waldin Saenz-Villalta and appellant Jose Villanueva, arrived in a two-door sports car, and the four men piled into the car. At some point, the driver, Saenz-Villalta, stopped the car. While Perez-Palacio remained in the car, the others obtained firearms and agreed, at the very least, to do a drug deal and rob Perez-Palacio. After further driving, Saenz-Villalta eventually stopped the car in a desert area off a dark, dirt road and everyone but Perez-Palacio exited the car.

Juarez-Hernandez opened Perez-Palacio's door and ordered him out of the car at gunpoint. Villanueva and Saenz-Villalta stood next to Juarez-Hernandez. Juarez-Hernandez then ordered Perez-Palacio to hand over his documents, wallet, and phone. Somehow, Perez-Palacio placed most of the items on top of the handgun Juarez-Hernandez was brandishing, and then started running. Four-to-five shots rang out in total, but only one of them hit Perez-Palacio. Villanueva acknowledged that he fired at least once at Perez-Palacio. At least one of the men went searching for Perez-Palacio, but after about 20-30 minutes, they gave up and left. Perez-Palacio then walked for approximately five hours through the desert until he came to a factory where he could call the police. An ambulance rushed him to Sunrise Hospital with a gunshot wound to his lower abdomen.

After interviewing Perez-Palacio, detectives were able to track the phones of the individuals involved and eventually apprehend Saenz-Villalta and Villanueva. Perez-Palacio identified both men in a photo

lineup, and detectives discovered other incriminating evidence that tied them to the crimes, none of which is at issue in this case.

Villanueva was convicted of all charged offenses and sentenced to an aggregate term of 21.5 years to life in prison. Villanueva now raises various issues on direct appeal stemming from alleged errors in his trial, each of which we address now in turn.

The district court did not abuse its discretion in canvassing Villanueva and finding his conflict waiver valid

Villanueva and his co-defendant Saenz-Villalta both retained the same lawyer to represent them. Villanueva argues that the district court abused its discretion by failing to make an adequate inquiry into the propriety of one lawyer representing two defendants and in finding that he had waived an actual conflict. Villanueva filed with the court a signed form in English that "waive[d] any conflict of interest which may now exist or may arise in the future in connection with the representation by THE LAW OFFICES OF CARL E.G. ARNOLD of any other parties in this matter." The waiver also authorized that firm to use any information for the benefit of either party, and acknowledged that the attorney advised Villanueva to seek independent counsel regarding the waiver.

At calendar call, the district court canvassed both defendants and orally reviewed the waiver with the assistance of a court-certified Spanish interpreter. First, the court warned Villanueva that there were risks in sharing counsel with a codefendant: his attorney may be ethically constrained in pursuing strategies that might otherwise benefit Villanueva and Villanueva would lose the ability to claim certain issues on appeal. Second, the court asked if Villanueva understood the rights he was giving up and if he had any questions about what he was giving up. Third, the court firmly reminded Villanueva that if he had questions "now is the time

because you can't change your mind in the middle of trial." After these warnings, the court asked him if "this is what you wish to do? You wish to have Mr. Arnold represent you, give up your right to claim of conflict, and also have him represent your co-[d]efendant?" Villanueva responded, "Yes, that's why I hired him."

Finally, the district court asked Villanueva if he had the waiver form read or translated for him in Spanish to which he responded, "I don't remember." The court then had the following exchange with Villanueva regarding the waiver he signed:

> THE COURT: Do you remember something to the [e]ffect of I, Jose Villanueva, hereby retain the Law Offices of Carl Arnold with the knowledge that the Law Offices of Carl Arnold will also be representing other parties regarding kidnapping, attempt –
>
> DEFENDANT VILLANUEVA: Yes, yes
>
> THE COURT: Okay. So you're cutting me off.
>
> DEFENDANT VILLANUEVA: I remember that.
>
> THE COURT: Okay. And it basically says that he's going to use any information and/or investigation or material or anything else in this case for the mutual benefit of both of you, not just you?
>
> DEFENDANT VILLANUEVA: Yes.
>
> THE COURT: And that basically you're giving up the right to challenge any conflict later. That doesn't say that here but I've asked you that.
>
> DEFENDANT VILLANUEVA: Yes.
>
> THE COURT: He also told you that you could talk to an independent lawyer about this waiver and if you wanted me to give you one for free I would.
>
> DEFENDANT VILLANUEVA: No, I'm fine with the attorney I have.

The court then performed a separate canvass for Saenz-Villalta and subsequently approved Villanueva's waiver allowing the dual representation.

Now on appeal, Villanueva argues that the district court abused its discretion by failing to make an adequate inquiry into the propriety of the dual representation and in finding that he had waived an actual conflict. Villanueva argues that he did not make a knowing and intelligent waiver because the district court never determined that the waiver had been translated into Spanish for him nor had he been given independent counsel to advise him regarding the waiver and risks of the dual representation.

This court reviews a district court's decision to allow a defendant to waive his right to conflict-free counsel for an abuse of discretion. *See Hooks v. State*, 124 Nev. 48, 55, 176 P.3d 1081, 1085 (2008) ("We give deference to the district court's decision to allow the defendant to waive his right to counsel."); *see also Wheat v. United States*, 486 U.S. 153, 163 (1988) ("[T]he district court must be allowed substantial latitude in refusing waivers of conflicts . . . ."). Criminal defendants have a constitutional right to conflict-free representation. *Harvey v. State*, 96 Nev. 850, 852, 619 P.2d 1214, 1215 (1980). But non-indigent defendants also have a qualified right to choose their own counsel. *Patterson v. State*, 129 Nev. 168, 175, 298 P.3d 433, 438 (2013). At times, the "right to choose one's own counsel may clash with the right to conflict-free representation, and the presumption in favor of the right to choose one's counsel 'may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict.'" *Ryan v. Eighth Judicial Dist. Court*, 123 Nev. 419, 426, 168 P.3d 703, 708 (2007) (quoting *Wheat*, 486 U.S. at 164). Further, even though a district court has "broad discretion in making

conflict determinations, . . . there is a strong presumption in favor of a non-indigent criminal defendant's right to counsel of [his] own choosing . . . [that] should rarely yield to the imposition of involuntary conflict-free representation." *Id.* at 426, 428, 168 P.3d at 708-09. Accordingly, in all "trials involving joint representation[,] the trial court should address each defendant personally, explain the dangers of joint representation, and inquire as to facts which might reveal conflicts." *Harvey*, 96 Nev. at 854, 619 P.2d at 1217.

Thus, even when retained counsel faces a conflict of interest, the defendant may continue to be represented by that attorney if he makes a voluntary, knowing, and understanding waiver of conflict-free representation. *Kabase v. Eighth Judicial Dist. Court*, 96 Nev. 471, 473, 611 P.2d 194, 195 (1980). When a conflict is identified and the defendant seeks to waive it, the district judge "should fully explain . . . the nature of the conflict, the disabilities which it may place on [counsel] in [his] conduct of [the] defense, and the nature of the potential claims which appellants will be waiving." *Id.* at 473, 611 P.2d at 195-96 (alterations in original) (quoting *United States v. Armedo-Sarmiento*, 524 F.2d 591, 593 (2d Cir. 1975)).

Here, Villanueva waived any conflict, actual or potential, when he signed and filed the waiver of conflict form and then repeatedly told the district court during its extensive canvass that he consented to the dual representation. Under *Kabase* and *Ryan*, the court had an obligation to perform a canvass when Villanueva sought to retain the same counsel representing his co-defendant Saenz-Villalta. The court properly performed a thorough canvass. The court repeatedly explained to Villanueva individually that dual representation can create problems, explained the specific types of problems that may occur, and warned him that proceeding

with such a dual representation would foreclose certain claims on appeal. Throughout the canvass, Villanueva, with the use of a Spanish-language interpreter, responded that he understood and that he consented nonetheless.

The district court, however, continued to canvass further. The court specifically asked Villanueva if someone had given him a Spanish version of the waiver form he had signed or if someone had translated it for him. When Villanueva stated that he did not remember, the court started reading the first paragraph of the waiver to him. But Villanueva interjected and said he remembered. The court nonetheless again asked him if he knew that his signing the waiver form meant that information he shared could be used to his detriment and that he was waiving any conflict in the future. To each inquiry, Villanueva responded that he understood. And when asked if he knew he could talk to an independent lawyer and the court would provide one for him regarding the matter, he responded, "No, I'm fine with the attorney I have." Therefore, the district court thoroughly and properly canvassed Villanueva, and Villanueva repeatedly and clearly acknowledged that he both understood the risks and consented to them.

Thus, the district court did not abuse its discretion in holding that Villanueva knowingly, voluntarily, and intelligently waived any conflict that existed at the canvass and any that occurred thereafter.

Villanueva has waived his ineffective assistance of counsel claim

Villanueva next argues that because his trial counsel had an actual conflict in representing both him and Saenz-Villalta at trial, his counsel provided ineffective assistance. According to Villanueva, his trial counsel knew before trial that Villanueva's and Saenz-Villata's interests did not align. Therefore, because an actual conflict existed, he did not need to

show prejudice in his ineffective assistance of counsel claim because the law presumes prejudice in such cases. *See, e.g., Clark v. State*, 108 Nev. 324, 326, 831 P.2d 1374, 1376 (1992). However, where a defendant waives his right to conflict-free representation, "the waiver is binding on the defendant throughout trial, on appeal, and in habeas proceedings . . . and [he] 'cannot . . . complain that the conflict he waived resulted in ineffective assistance of counsel.'" *Ryan*, 123 Nev. at 429, 168 P.3d at 710 (quoting *Gomez v. Ahitow*, 29 F.3d 1128, 1135 (7th Cir. 1994)). Furthermore, we will not review ineffective-assistance-of-counsel claims on direct appeal "unless the district court has held an evidentiary hearing on the matter or an evidentiary hearing would be needless." *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1021 (2006); *see also Pellegrini v. State*, 117 Nev. 860, 883, 34 P.3d 519, 534-35 (2001), *abrogated on other grounds by Rippo v. State*, 134 Nev. 411, 423 n.12, 423 P.3d 1094, 1097 n.12 (2018).

Here, as discussed above, the district court did not abuse its discretion in finding that Villanueva knowingly, voluntarily, and intelligently waived his right to conflict-free representation. Accordingly, he has waived his ineffective assistance of counsel claim arising out of the alleged actual conflicts that existed both at the time of the canvass and at trial.[2]

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[2]We address Villanueva's freestanding dual representation claim in this case only because Villanueva's "claims are conclusively refuted by the record, making [an evidentiary] hearing needless and inefficient." *Saenz-Villalta v. State*, No. 80730, 2021 WL 2154779 *2 (Nev. Ct. App. May 26, 2021) (Order of Affirmance); *see also Ryan*, 123 Nev. at 429, 168 P.3d at 710.

The district court did not abuse its discretion by failing to sua sponte order a mistrial

At trial, the State called Detective Daniel Hawkins to testify. He testified that he works for the Las Vegas Metropolitan Police Department on the "Major Violators Unit with the Criminal Apprehension Team." When the State asked what that meant, Detective Hawkins explained that he helps catch "repeat offenders," that he is "tasked with finding and arresting the worst of the worst," and that they are "called when they know who the bad guy is, basically, they're considered armed and dangerous, and for us to go find them and arrest them." Villanueva did not object. However, the district court immediately called a sidebar, released the jury for a recess, admonished Detective Hawkins to give a "clinical version of what you do and less of an adjective-ingested version," and developed a cautionary jury instruction with both counsel. The court then gave the following instruction to the jury:

> Ladies and Gentlemen . . . , you've heard testimony from Detective Daniel Hawkins that he belongs to a unit which investigates major violators and repeat offenders. You are instructed that this testimony relates only to his experience and prior work assignments with the Las Vegas Metropolitan Police Department. Those references . . . are not specific to these [d]efendants and should not be considered by you in determining whether they are guilty or not guilty of the charges in this case.
>
> In fact, the [d]efendants have no criminal history, and the CAT Team was called out only because of the allegations of kidnapping with use of a deadly weapon and attempted murder with use of a deadly weapon.
>
> You are also instructed that not every person who is arrested has a warrant issued for them, or

> otherwise has an encounter with an officer, is guilty of a crime or a person of bad character.

Villanueva never objected to the comments, never objected to the instruction, never moved for a mistrial, and consented to the specific wording of the cautionary jury instruction.

On appeal, Villanueva argues that the district court abused its discretion by not sua sponte ordering a mistrial. According to Villanueva, Detective Hawkins's comments were irrelevant and amounted to prior bad act evidence only there to prove propensity: that he was a "bad guy" and the "worst of the worst." In light of such prejudice, Villanueva argues that the district court should have sua sponte granted a mistrial even though trial counsel never objected.

Because Villanueva failed to object at trial, he has forfeited review of this issue. *See Leonard v. State*, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001). We can still review forfeited errors; however, Villanueva failed to argue plain error on appeal and we consequently decline review on this issue. *Jeremias v. State*, 134 Nev. 46, 50, 52, 412 P.3d 43, 48-49 (2018). Even reviewing for plain error, Villanueva's claim fails. Villanueva must show that "(1) there was an 'error'; (2) the error is 'plain,' meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected [his] substantial rights." *Id.* at 50, 412 P.3d at 48. "[A] plain error affects [a defendant's] substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

Villanueva has not shown that the district court erred because he has provided no authority showing district courts have a sua sponte duty to order a mistrial under any circumstance, let alone this one. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (explaining that this court

need not consider an appellant's argument that lacks the support of relevant authority). Nor has he demonstrated that the alleged error was clear under current law from a casual inspection of the record or that the district court's failure to sua sponte order a mistrial caused him actual prejudice.

Indeed, there was little prejudice if any. First, the witness described his current law enforcement assignment and not necessarily his assignment when Villanueva was arrested. Second, the court sua sponte reprimanded the witness, asking him to give a clinical version of his job description rather than an adjective-filled one. And then the court spent time collaborating with counsel to develop an appropriate, curative jury instruction that Villanueva's counsel consented to, which it then delivered immediately to the jury. That instruction comprehensively addressed the potential issues stemming from the witness's alleged improper comments and directed the jury to disregard them for the improper purpose. And, at the end of trial, the district court gave the jurors another instruction, reminding them that they "must disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court." Thus, even if there was prejudice, these jury instructions cured it. *See Rose v. State*, 123 Nev. 194, 207, 163 P.3d 408, 417 (2007) ("[A] witness's spontaneous or inadvertent references to inadmissible material, not solicited by the prosecution, can be cured by an immediate admonishment directing the jury to disregard the statement." (internal quotations and citations omitted)); *Leonard*, 117 Nev. at 66, 17 P.3d at 405 (holding that reviewing courts presume juries follow jury instructions).

For the same reason, we are persuaded that even if the district court had erred or plainly erred in not sua sponte ordering a mistrial, the

State has shown the error would have been harmless. *See* NRS 178.598; *Randolph v. State*, 136 Nev., Adv. Op. 78, 477 P.3d 342, 351 (2020) (placing the burden on the State to prove harmless error). And we deem Villanueva's failure to respond either in a reply brief or anticipatorily in his opening brief to the State's argument that the error would have been harmless as Villanueva's concession that the State's argument has merit. *See Colton v. Murphy*, 71 Nev. 71, 72, 279 P.2d 1036, 1036 (1955).

Therefore, Villanueva has failed to demonstrate that the district court abused its discretion in failing to sua sponte order a mistrial.

There was no cumulative error

Villanueva finally argues that cumulative error warrants reversal. Even if every error below fails to provide grounds for reversal alone, the cumulative effect of those errors may provide such grounds. *Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). An appellant must prove not just one error, but multiple errors. *Burnside v. State*, 131 Nev. 371, 407, 352 P.3d 627, 651 (2015) (noting cumulative error claims require "multiple errors to cumulate"); *Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035 n.16 (2006) (noting reviewing courts need not perform cumulative review at all if appellant shows nothing more than "insignificant or nonexistent" errors). Because we hold no error occurred below, Villanueva's cumulative error claim also fails. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons

_____, J.
Tao

_____, J.
Bulla

cc: Chief Judge, Eighth Judicial District Court
Eighth Judicial District Court, Department 18
Hon. Mary Kay Holthus, District Judge
Nguyen & Lay
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk