IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

CASE NO: 61631

FAST TRACK RESPONSE

1. Name of party filing this fast track response: The State of Nevada

2. Name, law firm, address, and telephone number of attorney submitting this fast track response:

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3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

Same as (2) above.

4. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of which you are aware, which raise the same issues raised in this appeal: None

5. Procedural history.

An Amended Information was filed on February 10, 2009, charging Brian Kerry O'Keefe ("Appellant") with one count of Murder with Use of a Deadly Weapon (Open Murder) (Felony – NRS 200.010, 200.030, 193.165). 1 AA 1-3.

A jury trial commenced on March 16, 2009. 1 AA 4-5. On March 20, 2009, the jury returned a verdict finding Appellant guilty of Second Degree Murder With

Use of a Deadly Weapon. 1 AA 4-5. On May 5, 2009, Appellant was adjudged guilty of Second Degree Murder and sentenced to imprisonment in the Nevada Department of Corrections for a maximum of twenty-five (25) years, minimum of ten (10) years, plus a consecutive term of maximum two hundred forty (240) months, minimum ninety-six (96) months for use of a deadly weapon, with one hundred eighty-one (181) days credit for time served. A Judgment of Conviction was filed on May 8, 2009. 1 AA 4-5

Appellant filed a Notice of Appeal on May 21, 2009. 1 AA 6-7. On April 7, 2010, the Nevada Supreme Court issued an Order reversing Appellant's conviction and remanding the matter for a new trial. 1 AA 24-25. Remittitur issued on May 3, 2010. 1 AA 26-27.

On August 19, 2010, a Second Amended Information was filed charging Appellant with one count of Murder of the Second Degree with Use of a Deadly Weapon (Felony – NRS 200.010, 200.030, 193.165). 1 AA 29-31.

A second trial commenced on August 25, 2010. 1 AA 32-34. On September 2, 2010, the court declared a mistrial on the grounds the jury was hopelessly deadlocked. 1 AA 34.

On May 10, 2011, this Court issued an Order Denying Appellant's Petition for Writ of Mandamus in which he argued a different Double Jeopardy issue than that which he has presently raised. O'Keefe v. 8th Judicial District Court, Docket No. 58109 (Order Denying Petition, May 10, 2011). Notice in Lieu of Remittitur issued on June 6, 2011.

On October 3, 2011, Appellant filed a Pro Se Motion to Dismiss Appointed Counsel and for Faretta Hearing. 1 AA 36-37. After a proper Faretta Canvass, the district court determined that Appellant was competent to represent himself during the third trial. 1 AA 38-60.

On March 16, 2012, Appellant filed a Motion to Dismiss Based Upon Double Jeopardy. 1 AA 88-113. On March 21, 2012, the State filed its Opposition

to Appellant's Motion to Dismiss. 1 AA 124. On March 29, 2012, Appellant's Motion to Dismiss was Denied. 1 AA 124.

On June 1, 2012, Appellant filed a Motion to Continue Trial. 1 AA 125-130. On June 5, 2012, Appellant's Motion to Continue Trial was Denied. 1 AA 147.

A third trial commenced on June 11, 2012. 1 AA 148. On June 15, 2012, the jury returned a verdict finding Appellant guilty of Murder of the Second Degree with Use of a Deadly Weapon. 3 AA 495. On August 28, 2012, O'Keefe was adjudged guilty of the offense contained in the Second Amended Information and sentenced to imprisonment in the Nevada Department of Corrections for a maximum of three hundred (300) months, minimum of one hundred twenty (120) months, plus a consecutive term of a maximum of twenty (20) years, minimum of eight (8) years for use of a deadly weapon, with one thousand three hundred ninety-four (1,394) days credit for time served. 9 AA 1236-1237. A Judgment of Conviction was filed on September 5, 2012. 9 AA 1236-1237.

Appellant filed a Notice of Appeal on August 31, 2012. Appellant filed a second Notice of Appeal on September 13, 2012. Appellant's Fast Track Statement was filed on November 2, 2012. The State's Fast Track Response follows.

6. Statement of Facts.

December 16, 2011, Faretta Canvass Facts:

Appellant was canvassed at-length by the court regarding his understanding of the nature of the proceedings and charges against him, the consequences of his decision to proceed without counsel, and the complexities and disadvantages of self-representation. 1 AA 38-59. Appellant confirmed that he had been "studying the law for over two years" on issues specific to his own case. 1 AA 41. Appellant further confirmed his knowledge of the difference between an opening and closing statement and correctly identified the appropriate time period for filing a Notice of Appeal. 1 AA 43-44. Despite being advised multiple times by the court that self-

representation was not in his best interest and unwise, Appellant confirmed his unwavering decision to represent himself. 1 AA 42, 44, 45, 51.

June 5, 2012, Hearing on Defendant's Pre-Trial Motion to Continue Trial Facts:

Appellant sought a continuance of the June 11, 2012, trial date. 1 AA 132. Appellant's only arguments were that he wished to see the outcome of his Federal Habeas proceedings before proceeding with his state court trial and that he was unprepared for trial as a result of his own willful neglect. 1 AA 132-135. Appellant noted, "Your honor, with all due respect I understand that you've warned me and told me to be prepared. I'm not going to lie. I'm not really prepared, but that's not your problem, Your Honor." 1 AA 132-133; 134; 135.

The district court denied Appellant' motion, noting, "This matter has been pending long before March '09. He's [Appellant] known that this trial's been set at least since December 16, 2011, and so any oral request to continue the trial is --- is denied. I long ago said this was going forward. I'm setting aside two weeks on my calendar and if the 9th Circuit issues a stay on Friday, then so be it and then the matter is stayed. If they don't issue a stay, then we'll proceed to trial on Monday morning." 1 AA 143.

Trial Facts:

At trial it was determined that on November 5, 2008, Appellant murdered Victoria Whitmarsh by stabbing her in the right side of her chest. 7 AA 878-879. The knife he used to kill Victoria sliced through vital organs. 7 AA 878. It was also apparent that the much-larger Appellant had badly beaten Victoria. 6 AA 856. Weighing seventy pounds less than him, her body was badly bruised at autopsy. 6 AA 856-868.

7. Issue(s) on appeal.

A. WHETHER THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO PRECLUDE A THIRD TRIAL ON DOUBLE JEOPARDY GROUNDS.

B. WHETHER THE DISTRICT COURT PROPERLY GRANTED APPELLANT'S MOTION TO REPRESENT HIMSELF AT THE THIRD TRIAL.

C. WHETHER THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO STAY.

D. WHETHER THE DISTRICT COURT COMMITTED PLAIN ERROR BY ALLOWING A SUBSTITUTE JUDGE TO PRESIDE OVER APPELLANT'S THIRD TRIAL.

E. WHETHER THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY.

8. Legal Argument, including authorities:

A. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO PRECLUDE A THIRD TRIAL ON DOUBLE JEOPARDY GROUNDS.

Appellant erroneously claims that his constitutional rights were violated when the district court denied his Motion to Preclude a Third Trial on Double Jeopardy grounds. Amended Fast Track Statement ("AFTS") 6. This claim is without merit.

The Double Jeopardy Clause can prevent a subsequent prosecution when a conviction is reversed on appeal for insufficient evidence. Burks v. United States, 437 U.S. 1, 16-17, 98 S. Ct. 2141, 2149-50 (1978). However, retrial is not barred if a conviction is reversed for any other reason. United States v. Scott, 437 U.S. 82, 90-91, 98 S. Ct. 2187, 2193-94 (1978). For example, if a reviewing court finds the charging document was legally insufficient or the jury was improperly instructed on a theory of the case, the double jeopardy clause does not prevent retrial under a different statute or theory. Montana v. Hall, 481 U.S. 400, 403-04, 107 S. Ct. 1825, 1826-27 (1987); Burks, 437 U.S. at 15, 98 S. Ct. at 2149. See also, United States v. Lanzotti, 90 F.3d 1217, 1223-24 (7th Cir. 1996) (citing cases and holding that reversals of conviction on legally deficient theories does not preclude retrial); Parker v. Norris, 64 F.3d 1178, 1180-82 (8th Cir. 1995) (finding retrial allowed under deliberate killing theory when prior conviction under felony murder theory reversed as legally deficient); United States v. Todd, 964 F.2d 925, 929 (9th Cir.

1992) (finding retrial under different statute allowed when prior conviction was reversed because facts found by jury could not constitute crime as charged). Determining whether a conviction was overturned because there was insufficient evidence requires an examination of whether the reviewing court's reversal "actually represents a resolution in the defendant's favor, correct or not, of some or all of the factual elements of the offense charged." Scott, 437 U.S. at 97, 98 S. Ct. at 2197 (quoting United States v. Martin Linen Supply, 430 U.S. 564, 571, 97 S. Ct. 1349, 1355 (1977)).

It is quite clear that the Appellant misapprehends the implication of this Court's reversal on his earlier conviction. When the Appellant was first tried for this offense, a jury convicted him of Murder of the Second Degree. The jury in that trial was instructed on a theory of felony Second-Degree Murder based upon NRS 200.700 which was not alleged in the information. Contrary to Appellant's frivolous assertion, this Court's reversal of Appellant's first conviction was not on the grounds of insufficient evidence. In the Order of Reversal and Remand, this Court found:

> The district court abused its discretion when it instructed the jury that second-degree murder includes involuntary killings that occur in the commission of an unlawful act because the State's charging document did not allege that Appellant killed the victim while he was committing an unlawful act and the evidence presented at trial did not support this theory of second-degree murder.

1 AA 24-25. This Court consequently reversed Appellant's conviction and remanded for a new trial. 1 AA 25. Thus, the reversal of Appellant's first conviction was on the grounds of instructional error, not insufficiency of the evidence. An examination of the substance of the reversal reveals: 1) Appellant claimed instructional error, not insufficient evidence; 2) Appellant's claim was examined under case authority relating to instructional error, not insufficient evidence; 3) The case was remanded for a new trial instead of merely reversed on

the grounds of insufficient evidence. Thus, the substance of the reversal demonstrates that it was not based on insufficient evidence and double jeopardy does not apply.

Noting that "no evidence supported" a theory of felony murder is not a finding of insufficient evidence. Nevada law has long held that "some evidence" relevant to a jury instruction must exist in order for the instruction to be given. NRS 175.161(3) ("If the court thinks [a proposed jury instruction] correct and pertinent, it must be given; if not, it must be refused."); Singleton v. State, 90 Nev. 216, 220, 522 P.2d 1221, 1223 (1974) ("An instruction need not be given when there is no proof in the record to support it."). Here, the Court merely found that there was no evidence presented to support the giving of the felony-murder instruction, not that there was insufficient evidence to support a conviction of Murder under any theory or that the State was precluded from amending the charging instrument and presenting evidence sufficient to support a jury instruction on felony Murder.

Appellant has unsuccessfully attempted to analogize the present case to United States v. Smith, 82 F.3d 1564 (10th Cir. 1996); Saylor v. Cornelius, 845 F.2d 1401 (6th Cir. 1988); and Shute v. State of Texas, 117 F.3d 233 (5th Cir. 1997). However, Appellant has failed to note that these cases are from federal courts not encompassing Nevada, and are not controlling in the instant matter. Notwithstanding, Appellant's case differs substantially from the aforementioned cases. In each of the cases cited by Appellant, subsequent prosecution was barred by the Double Jeopardy Clause *as a result of the appellate court's finding that there was insufficient evidence adduced at trial to support a conviction*. Here, this Court never concluded that there was insufficient evidence adduced at Appellant's first trial to support his conviction. In fact, Appellant did not even make a sufficiency of the evidence claim in his direct appeal. This Court merely concluded that there was no evidence presented to support the giving of the felony Murder

instruction, not that there was insufficient evidence to support a conviction of Murder under any theory.

The original Information in this case, filed with the district court on December 19, 2008, alleges "open murder." An Information charging Murder without specifying the degree is sufficient to charge Murder in the first and second degree. Howard v. Sheriff, 83 Nev. 150, 153, 425 P.2d 596, 597 (1967). "It is permissible to simply charge murder and leave the degree to be stated by the jury." Id. The resulting murder of the second degree is an unlawful killing with malice aforethought without premeditation and deliberation (i.e. "malice murder").

This type of "malice murder" was alleged in the Second Amended Information filed with the district court on August 19, 2010. This Court reversed the Appellant's conviction based upon the district court instructing the jury on a theory of Murder of the Second Degree based upon NRS 200.070. That theory was not contained in the Second Amended Information, not provided to the jury in the present trial and not argued to the jury in the present trial. Furthermore, there was nothing contained in this Court's Order of Reversal and Remand which precluded the State from proceeding on a theory of "malice murder" in the present case.

Even if this Court finds that the reversal of Appellant's first conviction was a finding of insufficient evidence to support a felony-murder theory, such a finding does not prevent the State from retrying Appellant under an alternative theory. See Lanzotti, 90 F.3d at 1223-24; Parker, 64 F.3d at 1180-82. Even the federal circuits relied on by Appellant permit retrial in such circumstances. See United States v. Miller, 952 F.2d 866, 870-74 (5th Cir. 1992); United States v. Davis, 879 F.2d 900, 903-07 (6th Cir. 1989). In fact, this Court's remanding for a new trial implies that alternative theories could be pursued in the subsequent trial.

Thus, Appellant has failed to prove that his constitutional rights against Double Jeopardy were violated and his claim should therefore be denied.

B. THE DISTRICT COURT PROPERLY GRANTED APPELLANT'S MOTION TO REPRESENT HIMSELF AT THE THIRD TRIAL.

Appellant claims that the district court erred in allowing him to represent himself despite the Court's thorough and proper Faretta canvass. AFTS 12. This claim is belied by the record and without merit.

This Court reviews a district court's decision to allow a defendant to represent himself for an abuse of discretion. Hymon v. State, 121 Nev. 200, 213, 111 P.3d 1092, 1101 (2005). A valid self-representation requires a knowing and intelligent waiver of the benefits associated with being represented by counsel. Faretta v. California, 422 U.S. 806, 835, 95 S. Ct. 2525, 2541 (1975). Nevada Supreme Court Rule 253 provides that, "where a defendant appearing in district court chooses self-representation, the court should make … [an] inquiry to determine whether the defendant understands the consequences of his or her decision to proceed without counsel." The rule further states "[t]he district court's observation of the defendant should reveal that the defendant appears to understand the nature of the proceedings, and is voluntarily exercising his or her informed free will." NSCR 253. However, even the omission of a Faretta canvass is not reversible error if it appears from the whole record that the defendant knew his rights and insisted upon representing himself. Id. "[T]he test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case. Arajakis v. State, 108 Nev. 976, 980, 843 P.2d 800, 802-03 (1992) (quoting People v. Bloom, 774 P.2d 698, 716 (Cal. 1989)). Although self-representation may ultimately disadvantage a defendant, the knowing and intelligent waiver of the right to counsel must be honored. Faretta, 422 U.S. at 834, 95 S. Ct. at 2541. This Court will "give deference" to the decisions of the trial court concerning self-representation because "a cold record is a poor substitute for

demeanor observation." Graves v. State, 112 Nev. 118, 124, 912 P.2d at 234, 238 (1996).

Prior to properly granting Appellant's request to represent himself, the district court conducted a comprehensive and exhaustive canvass of the Appellant regarding his decision to forego counsel. 1 AA 38-59. Appellant was canvassed at-length by the court regarding his understanding of the nature of the proceedings and charges against him, the consequences of his decision to proceed without counsel, and the complexities and disadvantages of self-representation. 1 AA 38-59. Appellant confirmed that he had been "studying the law for over two years" on issues specific to his own case. 1 AA 41. Appellant further demonstrated the competency to represent himself by confirming his knowledge of the difference between and opening and closing statement and correctly identifying the appropriate time limitation for filing a Notice of Appeal. 1 AA 43-44. Despite being advised multiple times by the court that self-representation was not in his best interest and unwise, Appellant confirmed his unwavering decision to represent himself. 1 AA 42, 44, 45, 51. Thus, the court did not abuse its discretion in properly allowing the Appellant to represent himself because the Faretta canvass clearly demonstrated that Appellant understood the nature of the proceedings, disadvantages of self-representation, and the risks and complexities of the his case.

Appellant now claims that his waiver of his right to counsel was entered unintelligently and unknowingly. AFTS 13. As evidence of such, Appellant has cited his performance at trial and decision not to admit evidence or call witnesses. AFTS 13. However, Appellant has not cited any caselaw which would require a court to re-conduct a Faretta canvass solely because a defendant's self-representation in hindsight could be arguably deficient. Furthermore, this argument is without merit considering Appellant's ability to question witnesses, object to testimony, and point out inconsistencies in witness statements at trial. Therefore,

Appellant has failed to demonstrate how the district court abused its discretion in allowing him to represent himself.

C. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S MOTION TO STAY.

Motions to stay, like other continuances, rest with the sound discretion of the court, and will not be disturbed absent a showing of clear abuse. Doyle v. State, 104 Nev. 729, 731, 765 P.2d 1156, 1157 (1988); Adler v. State, 93 Nev. 521, 522-23, 569 P.2d 403, 404 (1977). "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." Jackson v. State, 117 Nev. 116, 17 P.3d 998, 1000 (2001). Generally, a defendant must show that he sought the continuance in good faith and not for the purposes of delay, that fault for the delay did not lie with the defendant, and that the district court's denial of the motion prejudiced the defendant. See Mulder v. State, 116 Nev. 1, 9-10, 992 P.2d 845, 850 (2000).

Here, Appellant cannot show that he sought the continuance for a purpose other than his own admission that he had not sufficiently prepared for trial. During the hearing on Appellant's Motion to Stay, Appellant repeatedly admitted he wished to delay the trial because he disobediently refused to prepare for trial, "Your honor, with all due respect I understand that you've warned me and told me to be prepared. I'm not going to lie. I'm not really prepared, but that's not your problem, Your Honor." 1 AA 132-133; 134; 135.

Appellant has also failed to show that he was prejudiced by the court's denial of his Motion for Stay. First, the 9th Circuit had the power to stay the state court proceedings and it too declined to do so. AFTS 13. Second, the district court's denial of his Motion to Stay did not affect the outcome of his federal petition which could, although highly unlikely, provide a remedy.[1] Third, Appellant knew many months in advance that his trial was approaching and he still

[1] Appellant's claim is still pending in the 9th Circuit Court of Appeals.

willfully refused to prepare. Lastly, Appellant has never asserted that he was prejudiced in any manner relating to his representation or his ability to procure necessary witnesses on his behalf.

D. SUBSTITUTION OF JUDGE AT APPELLANT'S THIRD TRIAL DID NOT CONSTITUTE PLAIN ERROR

Although he did not object at trial, Appellant now erroneously claims that his due process and fair trial rights were violated when the district court allowed a substitute judge to preside over his trial. AFTS 14. Appellant has failed to cite any caselaw in support of this argument. Furthermore, this claim is without merit.

As a general rule, a defendant must object to an error or misconduct below and give the district court an opportunity to correct the error or admonish the jury in order to preserve an issue for appellate review. Pascua v. State, 122 Nev. 1001, 1007, 145 P.2d 1031, 1034 (2006); Garner v. State, 78 Nev. 366, 372-73, 374 P.2d 525, 529 (1962). Therefore, the proper standard of review here is plain error. Rose v. State, 123 Nev. 194, 208-09, 163 P.3d 408, 418 (2007).

The judiciary has broad inherent powers to administrate its own procedures and manage its own affairs. Halverson v. Hardcastle, 123 Nev. 245, 261-62, 163 P.3d 428, 439-41 (2007). A defendant does not have an absolute right to have the same judge preside over all pretrial, trial, and sentencing proceedings. Dieudonne v. State, 127 Nev. ___, 245 P.3d 1202, 1207 (2011). In order to demonstrate an expectation that the defendant appear before the same judge, there must be some evidence of an expectation that the same judge would preside over subsequent proceedings and the defendant was thereby prejudiced by the substitution. Id.

Here, Appellant has not even put forth any evidence or argument that he was prejudiced by a substitute judge presiding over his trial. Appellant has only made the non-meritorious and unsupported blanket claim that his rights were violated. Thus, Appellant's claim must be denied pursuant to Dieudonne.

E. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY.

Appellant erroneously claims that the district court erred in declining to give his proffered instruction regarding the definition of malice. FTS 14-15. This claim is without merit.

Here, appellate review is precluded because Appellant failed to include his proposed instruction in the appeal record. Turpen v. State, 94 Nev. 576, 578, 583 P.2d 1083, 1084 (1978); Anderson v. State, 81 Nev. 477, 406 P.2d 532 (1965).

However, even if this Court were to entertain Appellant's claim in absence of an appropriate record, Appellant has failed to demonstrate that the district court abused its discretion in denying his proposed jury instruction. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "Words used in an instruction in their ordinary sense and which are commonly understood require no further defining instructions." Dawes v. State, 110 Nev. 1141, 1146, 881 P.2d 670, 673 (1994).

As indicated in the limited record supplied by Appellant, the district court properly instructed the jury on the issue of malice as "malice may be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." 9 AA 1151. The language used by the court in properly instructing the jury on malice was taken directly from this Court's ruling in Byford v. State, 116 Nev. 215, 248, 994 P.2d 700, 722 (2000). Thus, the jury was properly and correctly instructed on the issue of malice and no additional instructions were necessary.

Furthermore, the district court noted that it was refusing to give Appellant's proposed instruction because it deviated substantially from the stock instructions consistently given by the court and thus the court felt that Appellant's proposed instruction was substantially covered by the instructions given. 9 AA 1151. It is well-established that "[w]here the district court refuses a jury instruction on defendant's theory of the case that is substantially covered by other instructions, it

does not commit reversible error." Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). Thus, Appellant has failed to show how the district court abused its discretion by declining Appellant's proposed instruction that he has failed to include in the record.

9. Preservation of the Issues.

Appellant properly preserved his claims raised in headings A, B, C, and E. Appellant did not properly preserve his claim raised in heading D; thus, this claim is subject to plain error review.

VERIFICATION

1. I hereby certify that this fast track response complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track response has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in 14 point and Times New Roman style.
2. I further certify that this fast track response complies with the page or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more and contains no more than 4,667 words or does not exceed 10 pages.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, or failing to cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track response is true and complete to the best of my knowledge, information and belief.

Dated this 26th day of November, 2012.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Steven S. Owens*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on November 26, 2012. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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