

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
MICHAEL VILLANI, DISTRICT  
JUDGE,

Respondents,

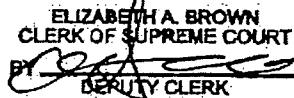
and

THE STATE OF NEVADA,  
Real Party in Interest.

No. 89604

**FILED**

DEC 03 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

***ORDER DENYING CERTIORARI PETITION***

This is an original pro se petition for a writ of certiorari challenging the validity of petitioner's judgment of conviction.

Petitioner was convicted in 2012 after a five-day jury trial of second-degree murder with the use of a deadly weapon and sentenced to serve consecutive prison terms totaling 18-45 years in the aggregate. In this original petition, petitioner claims that the district court lacked jurisdiction over his case and erred by denying his motion for a stay of the trial.

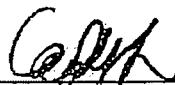
Having considered the petition and the single document submitted by petitioner, we are not convinced that our extraordinary and discretionary intervention is warranted at this time. *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004) (observing that the party seeking writ relief bears the burden of showing that such relief is warranted); *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (recognizing that writ relief is an extraordinary remedy and that

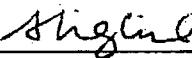
"APPENDIX C"

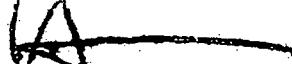
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this court has sole discretion in determining whether to entertain a writ petition). As petitioner has failed to demonstrate that our intervention by extraordinary writ is warranted, we decline to exercise our original jurisdiction in this matter. *See* NRAP 21(b). Accordingly, we

ORDER the petition DENIED.

  
\_\_\_\_\_, C.J.  
Cadish

  
\_\_\_\_\_, J.  
Stiglich

  
\_\_\_\_\_, J.  
Herndon

cc: Hon. Michael Villani, District Judge  
Brian Kerry O'Keefe  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

BRIAN KERRY O'KEEFE,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
MICHAEL VILLANI, DISTRICT  
JUDGE,

Respondents;

and

THE STATE OF NEVADA,  
Real Party in Interest.

No. 89604

**FILED**

DEC 24 2024

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY *[Signature]* DEPUTY CLERK

**ORDER DENYING REHEARING**

Rehearing denied. NRAP 40(a),(h).

It is so ORDERED.

*Cadish*, C.J.  
Cadish

*Stiglich*, J.  
Stiglich

*Herndon*, J.  
Herndon

cc: Hon. Michael Villani, District Judge  
Brian Kerry O'Keefe  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

"APPENDIX D"

IN THE SUPREME COURT OF THE STATE OF NEVADA.

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

No. 53859

**FILED**

APR 07 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Brian Kerry O'Keefe contends that the district court erred by giving the State's proposed instruction on second-degree murder because it set forth an alternative theory of second-degree murder, the charging document did not allege this alternate theory, and no evidence supported this theory. We agree. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error. 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." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (internal quotation marks and footnote omitted). Here, 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 O'Keefe 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. Cf. Jennings v. State, 116 Nev. 488, 490, 998 P.2d 557, 559 (2000) (adding an additional theory of murder at the close of the case violates the Sixth Amendment and NRS 173.075(1)). The district court's error in giving this instruction was not harmless because it is not clear beyond a reasonable doubt that a rational juror would have found O'Keefe guilty of second-degree murder absent the error. See Neder v. United States, 527 U.S. 1, 18-19 (1999); Wegner v. State, 116 Nev. 1149, 1155-56, 14 P.3d 25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). Because we conclude that the judgment of conviction must be reversed and the case remanded for a new trial, we need not reach O'Keefe's remaining contentions. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.  
Cherry

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

cc: Hon. Michael Villani, District Judge  
Special Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

IN THE SUPREME COURT OF THE STATE OF NEVADA

C 250636

No. 58109

BRIAN KERRY O'KEEFE,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
MICHAEL VILLANI, DISTRICT  
JUDGE,

Respondents,

and

THE STATE OF NEVADA,  
Real Party in Interest.

**FILED**

MAY 10 2011

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *D. Muop*  
DEPUTY CLERK

ORDER DENYING PETITION

This original petition for a writ of prohibition or mandamus challenges an order of the district court denying petitioner Brian O'Keefe's motion to dismiss a criminal charge on double jeopardy grounds. O'Keefe is facing his third trial on charges of murdering his girlfriend. O'Keefe's first trial resulted in a conviction that was reversed by this court because of prejudicial jury instruction error. O'Keefe v. State, Docket No. 53859 (Order of Reversal and Remand, April 7, 2010). His second trial ended in a mistrial after the jury deadlocked on a verdict. O'Keefe claims that pervasive prosecutorial misconduct in the second trial and the State's efforts to call different witnesses in his upcoming trial operate as an exception to the well-settled proposition that double jeopardy poses no obstacle to a retrial following a hung jury. See Arizona v. Washington, 434 U.S. 497, 509 (1978). We disagree. First, the district court, in resolving O'Keefe's motion to dismiss, concluded that there was no

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"APPENDIX G"

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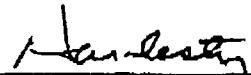
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prejudicial misconduct by the State in the last trial. Moreover, the fact that the district court declared a mistrial because the jury was hopelessly deadlocked remains dispositive. See United States v. Perez, 22 U.S. 579, 580 (1824). We therefore conclude that double jeopardy poses no bar to O'Keefe's retrial and decline to intervene in this matter.<sup>1</sup>

Accordingly, we

ORDER the petition DENIED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Parraguirre

cc: Hon. Michael Villani, District Judge  
Palm Law Firm, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk ✓

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<sup>1</sup>In his petition, O'Keefe also argues that: (1) his speedy trial and due process rights have been violated; (2) the State should not be permitted to call an expert witness to testify about the effects of domestic violence; and (3) the district court erred in refusing his jury instruction on involuntary manslaughter. Because O'Keefe has an adequate remedy at law by way of direct appeal should he be convicted, we decline to consider these claims. See NRS 34.330.

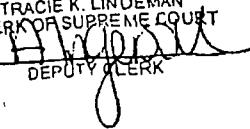
IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 61631

FILED

APR 10 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

First, appellant Brian O'Keefe argues that his conviction violates double jeopardy because this court reversed his prior conviction for the same offense after concluding that insufficient evidence was presented at trial. O'Keefe is mistaken. This court reversed his prior conviction because the jury was erroneously instructed regarding a theory that the killing occurred during the commission of an unlawful act, which was not alleged in the charging document and was not supported by the evidence. O'Keefe v. State, Docket No. 53859 (Order of Reversal and Remand, April 7, 2010). Double jeopardy does not preclude O'Keefe's instant conviction under an alternate theory of second-degree murder which was presented at his first trial and alleged in the charging document. See Parker v. Norris, 64 F.3d 1178, 1180-82 (8th Cir. 1995) (finding no double jeopardy violation where defendant's conviction for felony murder was reversed due to error and defendant was convicted at a second trial under an alternative theory of murder); see also Stephans v.

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OF  
NEVADA  
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"APPENDIX H"

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State, 127 Nev. \_\_\_, \_\_\_, 262 P.3d 727, 734 (2011) (the remedy for errors unrelated to sufficiency of the evidence is reversal and remand for a new trial, not an acquittal).

Second, O'Keefe argues that the district court abused its discretion by allowing him to represent himself at trial because his decision to do so was not knowing, voluntary, and intelligent. Before granting O'Keefe's request, the district court conducted an appropriate canvass pursuant to Faretta v. California, 422 U.S. 806 (1975), during which O'Keefe stated that he spent several years studying the law and understood the nature of the charges against him, the potential penalties he faced, and the dangers of self-representation. Although O'Keefe asserts that his poor performance at trial demonstrates his decision was unknowing, "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation," Vanisi v. State, 117 Nev. 330, 341, 22 P.3d 1164, 1172 (2001) (quoting Godinez v. Moran, 509 U.S. 389, 400 (1993)), and the record reflects that O'Keefe voluntarily chose to represent himself despite full knowledge of the risks. We conclude that the district court did not abuse its discretion by granting O'Keefe's request for self-representation. See Hooks v. State, 124 Nev. 48, 55, 176 P.3d 1081, 1085 (2008) (reviewing the record as a whole and giving deference to a district court's decision to allow a defendant to waive his right to counsel).

Third, O'Keefe argues that the district court abused its discretion by denying his request to stay or continue trial for approximately nine months because he had pending proceedings in federal court and was unprepared for trial. The district court rejected O'Keefe's assertion that his federal proceedings in any way limited his ability to

prepare for trial and noted that O'Keefe asked to represent himself and was given ample time to do so effectively. We conclude that the district court did not abuse its discretion by denying O'Keefe's request for an extended continuance where the delay was his fault. See Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007).

Fourth, O'Keefe argues that the district court erred by allowing a substitute judge to preside over his trial because the original judge was more familiar with the case and its complex procedural posture. O'Keefe does not demonstrate how he was prejudiced by the substitution of a different judge. See generally United States v. Lane, 708 F.2d 1394, 1398 (9th Cir. 1983) (error involving substitution of judges is harmless if the defendant has not been prejudiced). We conclude that O'Keefe fails to demonstrate that the district court erred.

— Fifth, O'Keefe argues that the district court abused its discretion by rejecting his proposed instructions and by giving instructions over his objection. "The district court has broad discretion to settle 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). Because O'Keefe has not provided this court with the instructions given at trial, he fails to demonstrate that the district court abused its discretion by rejecting his proposed instruction. See generally Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002) (noting that a district court does not err by refusing an accurate instruction related to the defendant's theory of the case if it is substantially covered by other instructions); see also Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant."). O'Keefe also does not identify which

instructions he contends were erroneously given. We conclude that he fails to demonstrate that the district court abused its discretion.

Having considered O'Keefe's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.<sup>1</sup>

J. Hardesty, J.  
Hardesty

Parraguirre, J.  
Parraguirre

Cherry, J.  
Cherry

cc: Hon. Michael Villani, District Judge  
Bellon & Maningo, Ltd.  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk

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<sup>1</sup>O'Keefe's fast track statement does not comply with NRAP 3C(h)(1) and 32(a)(4) because it does not have 1-inch margins on all four sides. We caution counsel that future failure to comply with formatting requirements when filing briefs with this court may result in the imposition of sanctions. NRAP 3C(n).

We deny O'Keefe's request for full briefing because it does not comply with NRAP 3C(k)(2), as it was not filed separate from the fast track statement. Further, although O'Keefe explains that full briefing is requested so that each issue may be adequately set forth and appropriate legal authority cited, we note that he did not file a motion for excess pages. See NRAP 3C(k)(2)(C).