IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO MICHAEL BREAKMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44246

FILED

MAY 19 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Antonio Michael Breakman to serve two consecutive prison terms of 32-144 months and ordered him to pay $20,000.00 in restitution.

First, Breakman contends that the State failed to serve the defense with the charging document and witness list, and therefore, should have been precluded from calling witnesses at trial. During the trial, Breakman repeatedly objected when the State called forward a witness. Each time, the district court noted the inclusion of the witness' name on the witness list, and overruled the objection. Defense counsel stated that he was not challenging the content of the information or any of the names on the witness list – he was merely arguing that there was no proof of service of the criminal information as required by NRS 174.234. NRS 174.234 states in relevant part:

> 1. Except as otherwise provided in this section, not less than 5 judicial days before trial or at such other time as the court directs:

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> (a) If the defendant will be tried for one or more offenses that are punishable as a gross misdemeanor or felony:
>
> . . .
>
> (2) The prosecuting attorney shall file and serve upon the defendant a written notice containing the names and last known addresses of all witnesses the prosecuting attorney intends to call during the case in chief of the State.

Breakman claims that the district court "should have considered sanctions against the State for its failure to follow NRS 174.234." We disagree with Breakman's contention.

This court has stated that the "resolution of discovery issues is normally within the district court's discretion."[1] In the instant case, an amended information, charging Breakman with one count of attempted murder with the use of a deadly weapon, was electronically filed in the district court on May 28, 2004. The amended information included a list of fourteen potential State witnesses. Breakman, present with the assistance of counsel, was arraigned in the district court on June 8, 2004, and the following exchange took place:

> THE COURT: Do you understand what you're being charged with?
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> THE DEFENDANT: Yes, Your Honor.
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> THE COURT: Do you waive a formal reading of the charges?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Are you prepared to enter a plea?
>
> THE DEFENDANT: Yes, Your Honor.

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[1]Floyd v. State, 118 Nev. 156, 167, 42 P.3d 249, 257 (2002), cert. denied 537 U.S. 1196 (2003).

THE COURT: What is your plea?

THE DEFENDANT: Not guilty.

The trial did not start until September 1, 2004. Outside the presence of the jury, the district court addressed defense counsel's repeated objections to the State's witnesses based on the alleged violation of NRS 174.234. The district court stated:

> I can't imagine that Judge McGroarty would take a plea from someone who hasn't been advised of what they're charged with . . . . I can't envision that a judge would set a case for trial without knowing what the charges are either.

And then, after reviewing the transcript of Breakman's arraignment before Judge McGroarty, the district court stated, "For him [Breakman] to understand what he's being charged with he would have had to have had the opportunity to review the charging document." The district court found that the State did not violate NRS 174.234(1)(a)(2), and again overruled Breakman's objection. Based on all of the above, we conclude that the district court did not abuse its discretion in overruling Breakman's objections, thereby allowing the State to call its witnesses. We further conclude that even if the State had inadvertently violated the notice provision in NRS 174.234(1)(a)(2), Breakman nevertheless fails to demonstrate that the State "acted in bad faith or that the [alleged] nondisclosure caused substantial prejudice."[2]

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[2]Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001); see also Jones v. State, 113 Nev. 454, 471, 937 P.2d 55, 66 (1997). Additionally, NRS 174.295(2) provides that:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with the provisions of NRS 174.234 to 174.295, inclusive, the court may

continued on next page . . .

Second, Breakman contends that the district court erred by admitting evidence of uncharged bad acts at trial, specifically, that he had been involved in a fight on the same day as the instant offense. Breakman argues that "allowing the jury to hear evidence of this alleged prior fight may have given the jury the inference that [he] has a propensity for conflict or violence, and its admission is prejudicial error." We disagree with Breakman's contention.

Evidence of other wrongs cannot be admitted at trial solely for the purpose of proving that a defendant has a certain character trait and acted in conformity with that trait on the particular occasion in question.[3] NRS 48.045(2) states that evidence of other bad acts may be admissible for other purposes, such as "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Nevertheless, the admission of uncharged bad acts evidence is heavily disfavored.[4] Prior to admitting such evidence, the district court must determine during a hearing whether the evidence is relevant to the charged offense, is proven by clear and convincing evidence, and whether the probative value is

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. . . *continued*

> order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances.

[3]NRS 48.045(1).

[4]Braunstein v. State, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002).

substantially outweighed by the danger of unfair prejudice.[5] Further, "[t]he decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."[6]

We conclude that the district court did not commit manifest error in admitting evidence of Breakman's earlier fight on the day of the instant offense, and therefore, did not abuse its discretion in denying his subsequent motion for a mistrial.[7] The record reveals that the prosecutor did not intentionally elicit the information from the witness. The district court conducted a hearing outside the presence of the jury, considered the factors required by Tinch v. State,[8] and found that evidence of the fight was admissible because Breakman had filed a notice of alibi. The district court stated:

> The issue of identity is at issue here and the testimony is relevant to that issue and outweighs any prejudice.

We conclude that the evidence was properly admitted.

We also conclude, however, that the district court erred in failing to give a limiting instruction to the jury prior to the admission of

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[5]See, e.g., Qualls v. State, 114 Nev. 900, 902, 961 P.2d 765, 766 (1998); see also Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[6]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

[7]McKenna v. State, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998) (holding that the "[d]enial of a motion for a mistrial is within the sound discretion of the district court, and that ruling will not be reversed absent a clear showing of abuse of discretion").

[8]113 Nev. at 1176, 946 P.2d at 1064-65.

the testimony.[9] As this court held in Tavares v. State, "to maximize the effectiveness of the instructions, . . . the trial court should give the jury a specific instruction explaining the purposes for which the evidence is admitted immediately prior to its admission and should give a general instruction at the end of trial."[10] The reason for instructing the jury prior to the admission of the evidence is so the limiting instruction "can take effect before the jury has been accustomed to thinking of it in terms of the inadmissible purpose."[11]

In the instant case, the prosecutor suggested to the court that the court may admit evidence of the fight and give a limiting instruction to the jury. The district court, however, did not instruct the jury about the purposes for which the evidence was admitted. Nevertheless, this court recently stated that "under Tavares we consider the failure to give such a limiting instruction to be harmless if the error did not have a substantial and injurious effect or influence the jury's verdict."[12] Because of the substantial evidence of Breakman's guilt, we conclude that the failure of the district court to provide a limiting instruction prior to the testimony in question did not influence the jury, and therefore, was harmless error.[13]

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[9]Although Breakman fails to raise this issue in his direct appeal, we, nevertheless, elect to address it sua sponte.

[10]117 Nev. 725, 733, 30 P.3d. 1128, 1133 (2001).

[11]Id. (quoting 21 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5066 (1977 & Supp. 2001)).

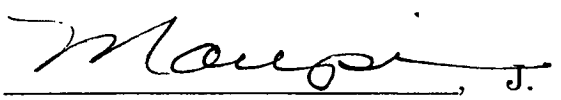
[12]Rhymes v. State, 121 Nev. ___, ___, 107 P.3d 1278, 1282 (2005) (citing Tavares, 117 Nev. at 732, 30 P.3d at 1132).

[13]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); see also

continued on next page . . .

Having considered Breakman's contentions and concluded that they are without merit, we affirm the judgment of conviction. Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction incorrectly states that Breakman was convicted pursuant to a guilty plea. The judgment of conviction should have stated that Breakman was convicted pursuant to a jury verdict. We therefore conclude that this matter should be remanded to the district court for the correction of the judgment of conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.



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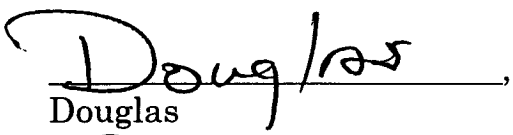
Maupin



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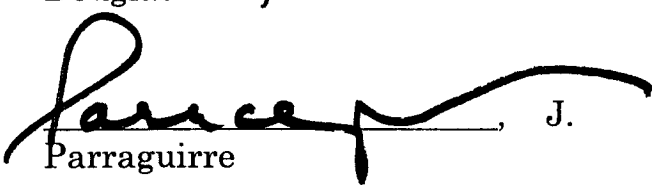

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cc: Hon. Valorie Vega, District Judge
Mueller & Associates
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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U.S. v. Vgeri, 51 F.3d 876, 882 (9th Cir. 1995) (holding that the State must show "that the error more probably than not was harmless").