

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARIO LATREVIOUS JOHNSTON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45280

**FILED**

FEB 17 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. E. [Signature]*  
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 each of conspiracy to sell a controlled substance and sale of a controlled substance. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced Johnston to serve a prison term of, 12 to 32 months for the conspiracy count and a concurrent term of 12 to 48 months for the count of sale of a controlled substance, but the entire sentence consecutive to Johnston's other criminal case C205494.

First, Johnston contends that the evidence at trial did not prove Johnston guilty beyond a reasonable doubt of conspiracy to sell a controlled substance and sale of a controlled substance. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>1</sup>

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<sup>1</sup>See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

In particular, we note there are a variety of ways the jury could have reasonably concluded that all the elements of the crimes occurred. Testimony was received indicating that Johnston possessed the cocaine. Further testimony indicated that the co-conspirator walked to Johnston's position in the alley and a hand-to-hand transaction between Johnston and his co-conspirator took place. Testimony revealed this occurred shortly after the statement that Mr. Johnston possessed the cocaine. Additional testimony expressed that the co-conspirator "immediately walked back over" to the officers and displayed the cocaine to them. There was also testimony that Johnston fled from the police. Jurors are allowed to use their common sense while deliberating and evaluating evidence.<sup>2</sup>

The jury could reasonably infer from the evidence presented that Johnston was involved in the selling and conspiracy to sell a controlled substance. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.<sup>3</sup> Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.<sup>4</sup>

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<sup>2</sup>Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003).

<sup>3</sup>See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

<sup>4</sup>See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Second, Johnston contends the district court's refusal to allow Johnston to impeach his co-conspirator and co-defendant with his prior conviction violated Johnston's right to a fair trial and due process. "[T]he decision whether to admit a prior conviction for impeachment purposes 'rests within the sound discretion of the trial court, and will not be reversed absent a clear showing of abuse.'"<sup>5</sup> NRS 50.095(2) states that "evidence of a conviction is inadmissible if a period of 10 years or more has elapsed since (a) the date of release of the witness from confinement or (b) the expiration of the period of his parole, probation or sentence, whichever is the later date."<sup>6</sup> Parsee, the witness, co-conspirator and co-defendant Johnston sought to impeach through a prior conviction was convicted in 1991. Johnston did not have a certified copy of the conviction, a necessary item to let the court know whether the conviction was time barred or not. Regardless, the court held it would be more prejudicial than probative to admit evidence of the prior conviction of Parsee, the co-defendant. On review, we conclude that the district court did not abuse its discretion, especially when considering that different standard elaborated on by this Court when dealing with attempted impeaching of a defendant:

The state is not facing a loss of life and liberty as is the accused.

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<sup>5</sup>Pineda v. State, 120 Nev. 204, 210, 88 P.3d 827, 832 (2004) (quoting Givens v. State, 99 Nev. 50, 53, 657 P.2d 97, 99 (1983), overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986)).

<sup>6</sup>NRS 50.095(2).

An additional concern is that counsel will question a witness about a prior felony conviction, without having any evidence to support such a conviction, for the mere purpose of tarnishing the witness' character. In such a situation the jury is much more likely to conclude that the criminal defendant is an ex-felon than it is to conclude that the state's witness is an ex-felon, even if both witnesses deny the prior conviction. The criminal defendant's character is already tainted by the mere fact of being the accused.<sup>7</sup>

In Johnston's situation, he was attempting to impeach a defendant in the case, not a prosecution witness. Even assuming Parsee's conviction was not time-barred by statute,<sup>8</sup> and assuming Johnston requested a Petrocelli hearing,<sup>9</sup> which he did not, it would have been unduly prejudicial to admit the prior conviction for a similar crime against the co-defendant, Parsee.

In conclusion, it was not an abuse of discretion for the court to rule that admitting the prior conviction would have been unfairly prejudicial and that such a potential for prejudice substantially outweighed its probative value.

Having considered Johnston'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 Johnston was convicted

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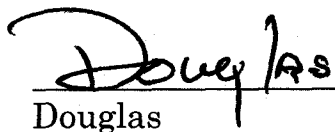
<sup>7</sup>Corbin v. State, 111 Nev. 378, 383, 892 P.2d 580, 583 (1995).

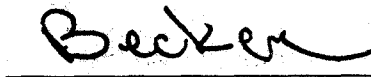
<sup>8</sup>NRS 50.095.

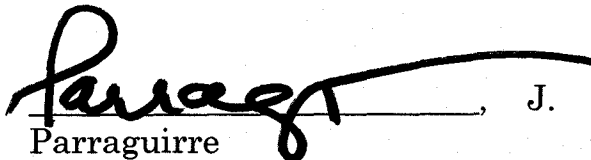
<sup>9</sup>Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

pursuant to a guilty plea. The judgment of conviction should have stated that Johnston was convicted pursuant to a jury verdict. We therefore conclude that this matter should be remanded to the district court for correction of the judgment of conviction. Accordingly we,

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

 J.  
Douglas

 J.  
Becker

 J.  
Parraguirre

cc: Honorable Jackie Glass, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk