IN THE SUPREME COURT OF THE STATE OF NEVADA

SCOTT BARTLETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45645

FILED

JUL 10 2006

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 committing an unlawful act related to human excrement or bodily fluid. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. The district court sentenced appellant Scott Bartlett to serve a prison term of 36-90 months to run consecutively to the sentence imposed in district court case no. C208088.

First, Bartlett contends that the initial and amended criminal information failed to provide him with adequate notice of the offense charged. Bartlett claims that elements of the offense were omitted from the charging documents, and therefore his conviction must be reversed. We disagree.

This court has stated that "[a] criminal defendant has a substantial and fundamental right to be informed of the charges against him so that he can prepare an adequate defense."[1] The charging document "must be a plain, concise and definite written statement of the

[1]Viray v. State, 121 Nev. ___, ___, 111 P.3d 1079, 1081 (2005).

essential facts constituting the offense charged."[2] However, when a challenge to the sufficiency of the charging document is raised after a verdict, the verdict cures any technical defects unless the defendant has been prejudiced by the defective charging document.[3]

We conclude that the charging documents sufficiently put Bartlett on notice of the essential facts constituting the offense and allowed him to prepare a defense. The initial and amended criminal information made it clear that Bartlett was being charged, pursuant to NRS 212.189(1)(d), with intentionally throwing urine on Corrections Officer William L. Burchinal, while he was in custody at the Clark County Detention Center. Therefore, we conclude that Bartlett cannot demonstrate prejudice and his contention is belied by the record.

Second, Bartlett contends that the district court committed reversible error by failing to instruct the jury on the lesser-included offense of misdemeanor battery. Bartlett concedes that "application of the elements test does not result in misdemeanor battery qualifying as a lesser included offense of an alleged NRS 212.189 violation." Nevertheless, Bartlett asks this court to overrule Barton v. State, which held that a lesser offense is lesser-included when "the elements of the lesser offense are an entirely included subset of the elements of the

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[2]NRS 173.075(1).

[3]Laney v. State, 86 Nev. 173, 178, 466 P.2d 666, 669-70 (1970).

charged offense,"[4] and reinstate the disapproved of "same conduct" test discussed in Owens v. State.[5] We decline the invitation.[6]

Third, Bartlett contends that the district court erred in failing to declare a mistrial after a corrections officer's testimony allegedly inferred that Bartlett's tattoos "indicated gang involvement or being a former prison inmate." Officer Burchinal testified that he could identify Bartlett as the individual who threw urine at him by, in part, his heavily-tattooed arms. The State moved to have Bartlett show his arms to the jury for identification purposes. The district court overruled Bartlett's objection and granted the State's motion. On appeal, Bartlett concedes that the baring of his arms to the jury did not violate his right against self-incrimination.[7] After Bartlett displayed his arms for the jury, the following exchange took place:

> Q. And Officer, are those the arms that you saw holding the urine-filled milk carton?
>
> A. Yes, ma'am.
>
> . . . .
>
> Q. Do you recognize those arms?
>
> A. Yes, ma'am.

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[4]117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001); see also Blockburger v. United States, 284 U.S. 299 (1932).

[5]100 Nev. 286, 680 P.2d 593 (1984), overruled by Barton, 117 Nev. 686, 30 P.3d 1103.

[6]See generally Smith v. State, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004) (citing approvingly to Barton's adoption of Blockburger and the elements test for determining when to provide lesser-included offense instructions).

[7]See Jacobs v. State, 91 Nev. 155, 158, 532 P.2d 1034, 1036 (1975).

> Q. Why do you recognize those arms?
>
> A. Because in my job as a corrections officer, part of it is observing tattoos, 'cause that could tell the nature – the individual, whether it's gang related, former prison –
>
> MR. SPEED: Objection, Judge. Objection. He recognized the arm. He testified to that.
>
> . . . .
>
> THE COURT: That's all we need. The remainder of the answer is stricken. It's not relevant. It's not necessary.

(Emphasis added.) Bartlett claims that Officer Burchinal's testimony was unduly prejudicial and denied him his constitutional due process right to a fair trial.[8] We disagree.

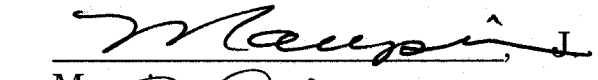
Initially, we note that Bartlett did not move for a mistrial. Further, Bartlett fails to demonstrate that he was prejudiced in any way by the challenged exchange. Officer Burchinal's comment was general in nature and did not specifically refer to Bartlett's tattoos. Moreover, defense counsel objected and the district court ordered the statement stricken from the record. The district court also instructed the jury prior to deliberations to "disregard any evidence to which an objection was sustained by the court and any evidence ordered stricken by the court." This court "presume[s] that the jury followed the district court's orders

[8]See NRS 48.035(1) ("Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."); see also U.S. Const. amends. V, XIV; Nev. Const. art. 1, § 8(5).

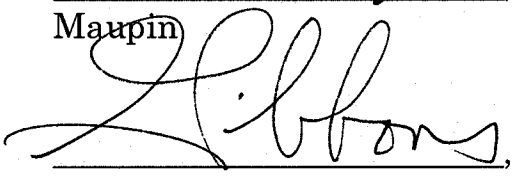
and instructions."[9] Therefore, we conclude that the district court did not err in failing to sua sponte declare a mistrial.[10]

Having considered Bartlett'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 Bartlett was convicted pursuant to a guilty plea. The judgment of conviction should have stated that Bartlett 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.[11] 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.



_____, J.
Maupin



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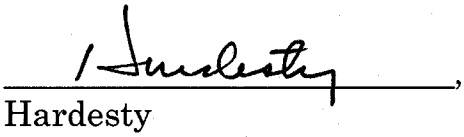

_____, J.
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[9]Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004).

[10]See Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) ("When the evidence of guilt is overwhelming, even a constitutional error can be comparatively insignificant.").

[11]See Ledbetter v. State, 122 Nev. ___, ___, 129 P.3d 671, 681 (2006).

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