

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO MCKIBBINS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 46098

**FILED**

**MAR 07 2007**

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon and failure to stop on the signal of an officer. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

Appellant Antonio McKibbins argues that his Sixth Amendment right to a fair trial was violated when the district court allowed Frank Kocka, who was appellant's former counsel, to testify against him at trial.<sup>1</sup> He contends that the district court should not have permitted Kocka to testify as a rebuttal witness to discredit Jennifer McKibbins' alibi testimony that she was with appellant on the night that Yahira Garcia's car was stolen from her. Appellant argues that the district court should not have allowed Kocka to testify that Jennifer never informed him about having an alibi for the appellant.

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<sup>1</sup>We note that appellant's trial counsel had objected to the introduction of Kocka's testimony, as to Jennifer's disclosure of an alibi, only on attorney-client privilege grounds.

This court reviews a district court's decision to admit or exclude evidence for an abuse of discretion.<sup>2</sup>

We conclude that the district court did not abuse its discretion in allowing Kocka to testify that Jennifer had never informed him about having an alibi. Pursuant to NRS 49.095,<sup>3</sup> we conclude that Jennifer's communications (purported alibi) with Kocka do not fall under the scope of the attorney-client privilege retained by the appellant.

Arguably, even if these purported communications fell under the scope of the attorney-client privilege, we conclude that Jennifer waived any privilege when she testified at trial about her communications with Kocka.<sup>4</sup>

Consequently, because Jennifer's purported communications with Kocka about the existence of an alibi do not fall under the scope of

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<sup>2</sup>Jezdik v. State, 121 Nev. 129, 135, 110 P.3d 1058, 1062 (2005).

<sup>3</sup>NRS 49.095 provides that:

A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications:

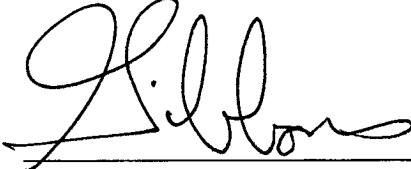
1. Between himself or his representative and his lawyer or lawyer's representative.
2. Between his lawyer and the lawyer's representative.
3. Made for the purpose of facilitating the rendition of legal services to the client, by him or his lawyer to a lawyer representing another in a matter of common interest.

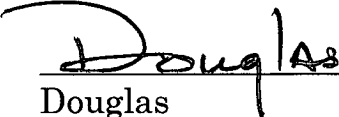
<sup>4</sup>See Singelton v. State, 90 Nev. 216, 218, 522 P.2d 1221, 1222 (1974).

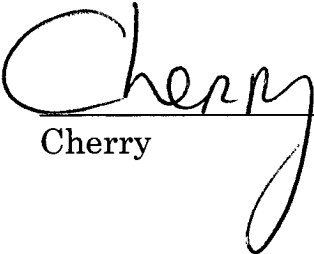
the attorney-client privilege, we conclude that the district court did not abuse its discretion in allowing Kocka to testify in rebuttal that Jennifer had never informed him about having an alibi for the appellant.

As to appellant's remaining contentions, we conclude that they are without merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

cc: Hon. Stewart L. Bell, District Judge  
JoNell Thomas  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Eighth District Court Clerk