IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES WRIGHT, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46964

FILED

JUL 10 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a firearm and eluding a police officer. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. On March 3, 2006, the district court adjudged appellant James Wright, Jr. a habitual criminal and sentenced him to serve a term of life in prison without the possibility of parole.

Wright raises ten issues on appeal. First, Wright contends that the district court erred when it granted his motion to sever the trial, but then reconsidered and denied the motion. "The decision to sever is left to the discretion of the trial court,"[1] and "[i]t is the appellant's 'heavy burden' to show that the district court abused its discretion in failing to sever the trial."[2] We have stated that "where persons have been jointly indicted, they should be tried jointly, absent compelling reasons to the

[1]Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990).

[2]Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001).

contrary."[3] "[S]everance should only be granted when there is a 'serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent that jury from making a reliable judgment about guilt or innocence.'"[4]

Wright argues that the district court's decision not to sever the trial resulted in violations of the Confrontation Clause of the Sixth Amendment. Prior to trial, Wright had filed a motion to sever based on the fact that Gill's statement to Detective David Jenkins, which implicated both Wright and Gill in the robbery, would be inadmissible against Wright if Gill chose not to testify. The district court granted the motion and the State filed a motion to reconsider. After oral argument on the motion to reconsider, the district court determined that if the State could question Detective Jenkins without eliciting the fact that Gill had implicated Wright in the robbery, severance was unnecessary.

During trial, Detective Jenkins was examined without mention of Gill's implication of Wright. Then Gill took the stand in his own defense. The State brought Detective Jenkins back to testify as a rebuttal witness and the fact that Gill had implicated Wright in the robbery was presented to the jury. Pursuant to Bruton v. United States,[5] Wright claims this violated his Sixth Amendment right to confront the witnesses against him. Wright's claim lacks merit.

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[3]Jones v. State, 111 Nev. 848, 853, 899 P.2d 544, 547 (1995).

[4]Rodriguez, 117 Nev. at 808, 32 P.3d at 779.

[5]391 U.S. 123 (1968).

In Bruton, the United States Supreme Court determined that the Sixth Amendment Confrontation Clause was violated when a non-testifying defendant's confession, implicating his codefendant, was admitted at their joint trial.[6] However, in California v. Green, the Supreme Court clarified that "none of our decisions interpreting the Confrontation Clause requires excluding the out-of-court statements of a witness who is available and testifying at trial."[7] Specifically, the Court stated that its decision in Bruton suggested that "no confrontation problem would have existed if Bruton had been able to cross-examine his co-defendant."[8] A week after the decision in California v. Green, the Ninth Circuit Court of Appeals stated that the confrontation rationale of Bruton was not applicable "in a case in which the 'speaking' co-defendant testifies, since the otherwise 'harmed' defendant has 'an opportunity to confront and cross-examine those whose statements inculpated him.'"[9]

In the present case, Gill's statement to police implicating Wright was not elicited until after Gill had taken the stand in his own behalf. Wright had the opportunity to cross-examine Gill regarding the statements and cannot now complain that admission of Gill's confession was in violation of the Confrontation Clause. We conclude that Wright's claims lack merit.

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[6]Id. at 126.

[7]399 U.S. 149, 161 (1970).

[8]Id. at 163.

[9]Mendez v. United States, 429 F.2d 124, 128 (9th Cir. 1970) (quoting Santoro v. United States, 402 F.2d 920, 922 (9th Cir. 1968)).

Wright also contends that the district court erred in denying his motion to sever because he and Gill had antagonistic defenses. Wright's claim is without merit. "Inconsistent or antagonistic defenses . . . do not necessarily entitle defendants to severance, and '[i]nconsistent defenses must be antagonistic to the point that they are mutually exclusive.'"[10] Both defendants claimed that they did not commit the robbery, and that because the robbers were wearing masks and it was dark, they were not positively identified as the robbers. Gill blamed the robbery on Mechele Robinson and a man named "Deshawn." Wright did not testify and his defense was simply that there was not enough evidence to prove that he was one of the robbers. Their defenses were not mutually exclusive, and we conclude that the district court did not abuse its discretion in denying the motion to sever.

Second, Wright argues that the prosecutor committed misconduct when she "promised the district court that there would only be one question posed to Detective Jenkins" about Gill's statement but then eventually extended her questioning. Wright's claim is without merit. First, the record does not reveal that the prosecutor ever made a promise about the evidence to be presented at trial. Rather, the record reflects that the district court, after reconsidering the motion to sever, decided that the defendants would be tried together and ruled that "counsel may not elicit during the State's case in chief any testimony from any source concerning any reference by Mr. Gill directly or indirectly to any other

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[10]Rodriguez, 117 Nev. at 810, 32 P.3d at 780-81 (quoting Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)) (internal citations omitted).

party implicated in the charged offense, except only Mr. Gill." It appears from the record that the understanding that Gill's implication of Wright would not be admissible applied only to the State's case in chief and was the result of a district court order, not a promise by the State. The prosecutor fully complied with the district court's order, and Gill's statement implicating Wright was not presented to the jury until the defense presented its case in chief. Therefore, we conclude that Wright's claim of prosecutorial misconduct is without merit.

Wright's third claim is that the district court erred in failing to sua sponte conduct a pretrial inquiry into the voluntariness of Gill's confession. Wright claims that Gill could not have made a voluntary, knowing, and intelligent waiver of his Fifth Amendment privilege against self-incrimination because at the time of his interview he was still under the influence of heroine and cocaine he had ingested the night before. Wright's claim is without merit. "'The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege.'"[11] Wright's claim in this regard is an impermissible attempt to assert the privilege on behalf of his codefendant.

In addition, neither defendant filed a pretrial motion to suppress the statement. The only objection to introduction of the evidence was voiced by Gill's counsel during trial. Wright cites no authority supporting his argument that the district court should have sua sponte conducted a hearing before trial on the admissibility of the evidence when

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[11]United States v. Judson, 322 F.2d 460, 469 (9th Cir. 1963) (quoting Hale v. Henkel, 201 U.S. 43 (1906), overruled in part on other grounds by Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964)).

no party had requested that it be suppressed. We have previously stated that "we are 'unable to hold that a trial court abused its discretion' in refusing to entertain a motion" to suppress made at trial when defendant had "made no factual representation to the trial court that it did not have an opportunity to make a pretrial motion to suppress or that it was not aware of the grounds for the motion."[12] Wright has made no claim that he was unable to bring a motion to suppress before trial or was unaware of the grounds for doing so. We reason that if the district court has discretion to refuse consideration of a motion to suppress made at trial, it has no duty to consider a motion to suppress that was never made. Therefore, we conclude that Wright's contentions in this regard are without merit.

Fourth, Wright contends that the search and seizure of his automobile was "questionable" because it was pursuant to a search warrant based on his codefendant's interrogation and two searches of the vehicle occurred several days apart. However, Wright never made a motion to suppress the evidence that was recovered from the vehicle. When the State sought to admit that evidence, Wright's counsel stated that he had no objection. As explained above, a district court has no duty to rule on a motion to suppress that was never made. Nonetheless, we conclude that Wright's contentions are without merit.

Based on his interview with Gill the morning after the robbery, Detective Jenkins was able to obtain a search warrant for Wright's white Cadillac and he searched the vehicle at Anderson Towing where it had been taken the night of the robbery. Detective Jenkins found

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[12]One 1970 Chevrolet v. County of Nye, 90 Nev. 31, 35, 518 P.2d 38, 40 (1974).

loose coins, coin wrappers, a yellow page add for the Pizza Baron, walkie talkies, and receipts with Wright's name on them. However, the trunk of the vehicle was locked and Detective Jenkins could not locate the keys or find a trunk release inside the cabin of the vehicle. A week later the towing company discovered that an employee had misfiled the keys. When the mistake was discovered, Detective Jenkins searched the trunk and located additional evidence, including dark clothing, gloves, and a loaded gun.

Wright asserts that the evidence found in the initial search should have been suppressed because the warrant was based on a "questionable statement made by codefendant Gill after ingestion of heroin, cocaine, and failure to sleep." However, we concluded above that the district court properly admitted Gill's statement over an objection that it was involuntary. Therefore, that statement was sufficiently reliable to lend probable cause to the warrant that issued. Wright has made no other claim that the warrant was obtained illegally, and we conclude that his contention in this regard is without merit.

Wright further asserts that the evidence recovered by the subsequent search of the trunk should have been suppressed because the search occurred a week after the warrant issued and the vehicle was unlocked during the period between searches and thus was open to possible tampering. NRS 179.075 permits execution of a search warrant within ten days of its issuance. The vehicle was searched the same day that the warrant issued, and again seven days later. Both of these searches occurred within the ten day time frame specified by statute. And while Wright claims that the vehicle may have been tampered with prior to Detective Jenkin's second search, the vehicle was held at Anderson

Towing during that entire period. Wright argues that the vehicle was unlocked during that time. However, the reason for the delay between searches was the fact that the trunk of the vehicle was locked. It remained locked until Detective Jenkins obtained the car keys. Wright has not demonstrated any likelihood that the evidence found in the trunk of his car was tampered with, and we conclude that Wright's assertions in this regard lack merit.

Fifth, Wright contends that it was either district court error or prosecutorial misconduct when Detective Jenkins testified that he knew Wright by several monikers and that Gill had told him Wright was a known robber. Wright describes this testimony as prior bad act evidence and complains that the failure to hold a pretrial hearing on the admissibility of the evidence constitutes reversible error. Specifically, Wright refers to Detective Jenkins' rebuttal testimony that he knew Wright by several monikers and had suspected Wright was one of the robbers at the beginning of the investigation. Detective Jenkins also testified that when he was interviewing Gill the morning after the robbery, Gill stated, "that was what Mr. Wright always did, he did nothing but robberies."

Detective Jenkins' testimony that he knew Wright by several monikers was not evidence of prior bad acts. Nor was his testimony that he knew who Wright was and felt it was probable that Wright was involved in the robbery. On the other hand, Detective Jenkins' testimony that Gill had described Wright as someone who "did nothing but robberies" was evidence of prior bad acts. Because Wright did not object to

admission of the evidence we review the record for plain error.[13] "In conducting plain error review, we must examine whether there was 'error,' whether the error was 'plain' or clear, and whether the error affected the defendant's substantial rights."[14] "Additionally, the burden is on the defendant to show actual prejudice or a miscarriage of justice."[15]

"[I]nadvertent references to other criminal activity not solicited by the prosecution, which are blurted out by a witness, can be cured by the trial court's immediate admonishment to the jury to disregard the statement."[16] Detective Jenkins' statement was a response to the question "what did codefendant Gill tell you about the robbery and who was involved." The prosecutor's question did not inquire about Wright's past criminal activity and was not intended to elicit the statement that resulted. After Detective Jenkins' testimony, the district court asked both defendants if they desired a jury instruction regarding evidence of other crimes. Wright's counsel stated that he had considered the matter and specifically declined to offer such an instruction. Wright's tactical decision not to remedy the error at trial precludes him from complaining that the error now requires reversal. Further, we conclude that the error does not rise to the level of plain error.

Sixth, Wright contends that the district court erred in failing to question a juror regarding the juror's acquaintance with Wright's

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[13]Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

[14]Green v. State, 119 Nev. 542, 80 P.3d 93, 95 (2003).

[15]Id.

[16]Sterling, 108 Nev. at 394, 834 P.2d at 402.

mother. He argues that failure to question that juror made it impossible to determine whether there was any jury misconduct. Specifically, on the second day of trial, Wright's mother, Mary Stewart, informed an investigator from the district attorney's office that she worked with juror Sunde. Stewart was interviewed in chambers, with counsel present, and informed the district court that she had worked with Sunde for several years, but that she only occasionally saw Sunde and that Sunde had no reason to believe that she was Wright's mother, as she had used the name Stewart for over 12 years.

The district court then specifically inquired whether counsel would like to request examination of Sunde. No request was made. The district court determined that there was "no indication of any impropriety or jury misconduct or risk that the process may be impaired in any way." The district court also found that there was no factual basis to believe that Sunde knew of any relationship between Stewart and any of the parties or witnesses at trial.

As explained above, the failure to raise an issue with the district court generally precludes appellate consideration of that issue.[17] This court may nevertheless address an assigned error if it was plain and affected the appellant's substantial rights.[18] Wright was specifically asked if he desired to question Sunde. He declined the opportunity, and cannot now complain that the district court erred in failing to question her.

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[17]Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[18]NRS 178.602.

Because review of the record does not reveal error, we conclude that no relief is warranted in this matter.

Seventh, Wright complains that there was insufficient evidence to support his convictions for armed robbery and eluding a police officer. Wright contends that because Robinson's testimony was questionable as to its reliability and Detective Jenkins' testimony violated Bruton, the remaining evidence was insufficient to support the convictions. As explained above, we conclude that Detective Jenkins' testimony did not violate Bruton. And the jury is charged with weighing Robinson's credibility.[19] When reviewing the evidence supporting a conviction, this court considers "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[20]

Here, evidence at trial showed that Wright, along with Gill and Robinson, drove in a white Cadillac to an area near the Pizza Baron restaurant in Reno in the early morning hours of May 11, 2004. Robinson testified that after parking the car, Wright and Gill exited and were gone for a short period of time before returning to the vehicle. Pizza Baron employees testified that two men entered the restaurant and one of the two men pointed a gun at the manager and took about $560 from the cash register in bills and rolled coins. Two employees described the robbers as

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[19]Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006).

[20]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original).

African-American men, wearing dark hooded sweatshirts, gloves, and bandanas.

Reno Police Department officers responded to a report of the robbery and attempted pull over a nearby white Cadillac, which Robinson testified was being driven by Wright. The Cadillac briefly stopped, but then sped away. Eventually the Cadillac stopped again. Gill and another man fled the car on foot, and Gill was apprehended and arrested in a nearby field. The second individual escaped. Officers retrieved a bandana and a large amount of cash from the field. Two sweatshirts, loose coins, coin rolls, portable channel radios, a torn advertisement for the Pizza Baron, dark clothing, a bandana, screwdrivers, gloves, and a loaded handgun were later retrieved from the Cadillac. Pizza Baron employees testified that the gun recovered from the trunk of the car was identical to that used during the robbery. Police recovered $552 in bills and rolled coins from the field where Gill was apprehended and about $8 in loose change from the Cadillac.

Robinson and Gill were brought back to a nearby K-mart parking lot and shown to two employees from the Pizza Baron, who both stated that Gill was dressed like the robbers but stated that Robinson was not involved in the robbery. Detective Jenkins interviewed Gill at the Washoe County Jail the morning after his arrest. In a recorded interview, Gill confessed that he was one of the two people who robbed the Pizza Baron the night before and named Wright as the other robber.

The next day, Wright's wife contacted Detective Jenkins and stated that their white Cadillac had been stolen. Wright, the registered owner of the vehicle, was arrested when he came to retrieve the car. Wright consented to a search of his apartment and police found a gun

holster but no matching gun. Police also found a cordless phone with information indicating that an incoming phone call was made to Wright's residence at about 2:24 a.m. the night before from a telephone booth about a mile from where Wright's Cadillac had been stopped after the robbery. Viewing the above evidence in a light favorable to the State, we conclude that it was sufficient for a rational jury to find the elements of armed robbery and eluding a police officer beyond a reasonable doubt.[21]

Eighth, Wright argues that the district court erred in adjudicating him a habitual criminal. He claims that he is entitled to a new sentencing hearing because two of his prior felony convictions may have arisen from the same transaction or event, and because he was prejudiced by the fact that his codefendant Gill had more convictions. He also argues that his first two convictions occurred almost 20 years before trial in this case and are stale.

A trial court judge has the discretion to dismiss a count of habitual criminality.[22] "NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court."[23] At sentencing, the district court noted that a finding of habitual criminality is never automatic, but is a decision made "after careful review of the circumstances of the offense and prior record of the defendant and all

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[21]See NRS 200.380; 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165).

[22]O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007).

[23]Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

material evidence and facts bearing on the question." This is an accurate statement of Nevada law.[24] The district court stated that it had carefully reviewed the presentence report and Wright's prior record, and found that the evidence of guilt at trial was overwhelming and his prior convictions were serious.

Wright complains that his convictions in 1988 for possession of stolen property and discharging a firearm at or into a vehicle arose from the same activity and should not have been considered as separate felonies. It appears from the record that Wright illegally obtained a .308 rifle and a 12-gauge shotgun on November 28, 1987, and then used the shotgun to fire at a vehicle on December 19, 1987. He was first convicted of discharging a firearm. Later, the stolen guns were recovered and Wright was prosecuted in a separate action for possession of stolen property.

In Rezin v. State we determined that "where two or more convictions grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information, those several convictions may be utilized only as a single 'prior conviction' for purposes of applying the habitual criminal statute."[25] We are not faced with that situation here. Wright's convictions were prosecuted in separate informations, and the illegal acts occurred several weeks apart. We conclude that they were properly treated as separate convictions for purposes of the habitual criminal adjudication.

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[24]See Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

[25]95 Nev. 461, 462, 596 P.2d 226, 227 (1979).

With respect to Wright's argument that his sentencing was prejudiced because his codefendant had more convictions, the district judge specifically noted that Gill's criminal record was more expansive. Nevertheless, the district court conducted a careful review of the circumstances of the offense, Wright's prior record, and all material evidence and facts bearing on the question of habitual criminality. Wright has not made a showing that the district court's decision to adjudicate him a habitual criminal was based on anything other than his own criminal record. We conclude that in light of Wright's prior convictions supporting the habitual criminal count,[26] the district court did not err in adjudicating him a habitual criminal.

Ninth, Wright asserts that it was either district court error or prosecutorial misconduct when no pretrial hearing was held to determine whether Robinson was offered a plea deal in exchange for her testimony and because the jury was not presented with an instruction regarding that alleged plea deal. Wright admits that "it appears that Mechele Robinson was not given any plea negotiation for her testimony," but maintains that "there may have been some agreement between she and the State" and "the jury was entitled to know what types of negotiations were made between she and the State for her testimony."

When the State promises consideration in exchange for a witness's testimony, "the terms of the quid pro quo must be fully disclosed

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[26]The State produced four prior judgments of conviction; Wright was convicted of robbery with the use of a firearm in 1995, possession of a controlled substance in 1992, and possession of stolen property and discharging a firearm at or into a vehicle in 1988.

to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction."[27] Here, Robinson was compelled to attend trial by a subpoena. The fact that Robinson had previously been subject to a material witness warrant in this case does not by itself suggest that the State entered into any agreement in exchange for her testimony. And there is no suggestion in the record that Robinson received any benefit from the State in exchange for her testimony. Wright does not cite to any authority requiring a trial court to sua sponte conduct an evidentiary hearing to determine whether any of the State's witnesses may have made a deal in exchange for their testimony. Therefore, we conclude that Wright's claim lacks merit.

Finally, Wright claims that the district court erred in permitting peremptory challenges to be exercised outside his presence in violation of NRS 178.388. He asserts that the district court committed reversible error by excluding him from the questioning of several jurors. We disagree.

Although a defendant has a right to be present at every stage of a criminal proceeding, this right is not absolute.[28] We have stated that "[t]he right to be present is subject to harmless error analysis," and that a "defendant must show that he was prejudiced by the absence."[29]

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[27]Sheriff v. Acuna. 107 Nev. 664, 669, 819 P.2d 197, 200 (1991).

[28]Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001).

[29]Id. at 368, 23 P.3d at 240 (quoting Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996)).

Specifically, a defendant's right to be present is not violated when the district court conducts individual voir dire and dismisses the interviewed jurors.[30]

During voir dire, jurors Turner and Giuliani indicated that they might be racially biased because of past experiences. Rather than discuss these experiences in front of the other jurors, and risk tainting the rest of the jury pool, the district court interviewed these two jurors in chambers. Defense counsel waived Wright's presence. The two jurors were questioned, and both were dismissed for cause. Two replacement jurors, Lee and McFarland, were then interviewed. At that point, Gill's attorney stated that he had not anticipated interviewing more than two potential jurors outside the presence of his client, and that in light of comments made by one juror, his client should be present. The district court granted a recess to allow defense counsel the opportunity to discuss the jurors' responses with their respective clients. The record indicates that juror Lee was excused for cause, because upon counsels' return to chambers a replacement juror, Wheeler, was brought in to be questioned. Subsequently, peremptory challenges were made in the presence of the defendants and Wheeler was challenged by the State.

Of the five prospective jurors questioned outside Wright's presence, only McFarland was part of the jury and only after Wright and his attorney were given time to discuss McFarland's answers during voir dire. Wright does not deny that his counsel discussed McFarland's responses with him, and Wright was present for the exercise of all

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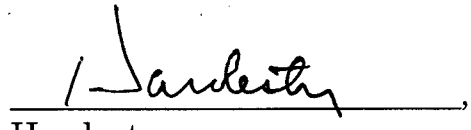
[30]Rose v. State, 123 Nev. ___, ___, 163 P.3d 408, 417 (2007).

peremptory challenges and provided input in the decision making process. He has failed to demonstrate that he was prejudiced by not being present during McFarland's questioning; therefore, we conclude that he is not entitled to relief on this claim.

Having considered Wright's claims and concluded that no relief is warranted, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Hardesty

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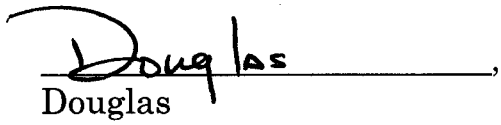

_____, J.
Douglas

cc: Hon. Brent T. Adams, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk