IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN RODNEY ORTH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49476

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered upon jury verdict, finding appellant guilty of robbery with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, and eluding a police officer, and adjudicating him as a habitual criminal. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

FACTS AND PROCEDURAL HISTORY

On the night of May 1, 2005, Zachary Zafranovich and his girlfriend Kristy Reynolds were robbed at gunpoint by three men in masks. The intruders arrived at Zafranovich's home shortly after an acquaintance of Zafranovich, Shaelynn Lester, appeared unannounced requesting that he return a computer that allegedly belonged to Orth.[1] The thieves stole a safe as well as some jewelry from Zafranovich's home.

Witness testimony

In recounting the details of the alleged crime to police, Zafranovich, Reynolds, and Lester all reported seeing a red Jeep parked outside Zafranovich's home prior to the break-in. They also identified the

[1]Lester later revealed that Orth had paid her to show up at Zafranovich's home and request the computer.

08-27981

appellant, Sean Orth, as one of the masked men that robbed the home. Zafranovich and Reynolds were able to identify Orth because his mask was knocked off during the robbery. Lester identified Orth on the basis that he and another one of the intruders came to the home of a mutual friend and indicated that they had "got him," referring to Zafranovich.

Police investigation and arrest

According to police, they had probable cause to arrest Orth on the basis of Reynolds' and Zafranovich's May 4, 2005, robbery reports. As a result, they began surveillance of Orth. The next day, May 5, 2005, police spotted Orth driving a white Jeep, which they later discovered belonged to his mother. Officers in an unmarked vehicle chased him but ultimately lost sight of him. Later the same day, police located, and subsequently impounded, the white Jeep that Orth had been driving.

Police next planned to arrest Orth on May 11, 2005. On that day, a number of marked and unmarked police vehicles waited outside of Orth's girlfriend's hotel room. The officers planned to arrest Orth while he was leaving his girlfriend's hotel room on foot but were unable to catch him before he made it to his girlfriend's vehicle. After Orth left the hotel in the vehicle, a lengthy police chase ensued. Orth was ultimately arrested and taken into custody after an accident and pursuit on foot.

After Orth's arrest, police located the red Jeep identified as being at the scene of the crime and acquired search warrants for the red Jeep and the white Jeep. The search warrants authorized police to search both the red and white Jeeps and seize items related to the robbery and Zafranovich's reported lost property. A search of the red Jeep yielded a

number of items including miscellaneous jewelry, a safe, a couple of knife blades, and a full intact knife.[2] The white Jeep contained, among other things, a blue corduroy jacket and two backpacks. One backpack contained a pair of jeans and the other one contained a money belt, a pair of binoculars, a flashlight, and a police scanner. The police scanner was allegedly tuned to a police frequency.[3]

Orth was ultimately charged with armed robbery with the use of a deadly weapon, battery with the use of a deadly weapon, conspiracy to commit robbery with the use of a deadly weapon, and eluding a police officer. He was also charged as a habitual criminal. Orth pled not guilty.

Request for self-representation

Orth requested that he be allowed to represent himself. Accordingly, prior to the preliminary hearing, the justice court conducted a canvass to determine whether Orth was fit to represent himself. Specifically, the justice court judge informed Orth that defending himself would be unwise because he might conduct a defense to his detriment, he would be required to follow the same procedural rules as lawyers, and he would not be able to complain about the competency or efficacy of his representation. Orth indicated that he understood but still wanted to defend himself. Ultimately, the justice court found that Orth was competent to waive his right to counsel and he was doing so "freely, voluntarily and knowingly, and based on [his] responses, with a full

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[2]The jewelry and the safe were not the same items that were reported stolen in this case.

[3]There is some dispute as to whether the scanner was already set to a police channel or police set it there.

appreciation and understanding of the waiver and its consequences." The district court later held a second complete canvass and likewise concluded in the district court proceedings that Orth was competent to represent himself. Orth subsequently represented himself during the jury trial.

Motions to suppress evidence

Prior to trial, the district court denied Orth's motion to suppress the evidence obtained from the white Jeep. At trial, the district court further allowed admission of the police scanner over Orth's objection that it was obtained before the search was completed and police may have altered the frequencies on the scanner. However, when the police scanner was ultimately admitted into evidence, Orth stated that he had no objection. The district court judge also determined that the red Jeep was appropriately searched and that there was probable cause for the search warrant relating to its search.

Trial testimony

At trial, Lester admitted that her story had changed from the time she was interviewed by Reno police officers. She stated that she had changed her testimony because she was afraid of Orth. In this, she explained that Orth had left a message on her answering machine stating "[y]ou better not have told the police anything." She also stated that she believed that Orth had "put money on the books" for her to keep her quiet. Orth did not object to Lester's testimony at any point. In addition, both Orth and the State questioned Lester extensively about her plea bargain, which resulted in her receiving probation for pleading guilty to conspiracy to commit burglary in connection with her part in the crime.

Zafranovich testified at trial that he had a number of felony convictions for which he had completed all of his legal obligations in May

2005. Nonetheless, he admitted to having a relationship with the police. On cross-examination, Orth elicited that Zafranovich had told police that one of the motives for the robbery may have been the approximately $14,000-$17,000 that Zafranovich won at the Atlantis Casino. However, later in the trial, a detective in the case testified that Zafranovich did not report the money he had allegedly won at the Atlantis Casino to be stolen.

Zafranovich's absence from court

After Zafranovich completed his testimony, the district court judge informed him that he was subject to recall and was still under subpoena. Orth subsequently called Zafranovich, who was not in court, to the stand. The district court informed the jury that Zafranovich could not appear because he had surgery the previous day. The district court judge indicated that he would prefer to have Zafranovich testify in person but would consider phone testimony. However, Zafranovich did not return to court. Instead, he informed a detective that he understood he would be subject to contempt of court but was in too much pain to appear. Orth responded by claiming that he would be prejudiced if he did not have the ability to ask Zafranovich more questions about his watches and alleged winnings at the Atlantis Casino. The district court judge determined that the testimony Orth wished to introduce by cross-examining Zafranovich had already been elicited and was not material to the case. Orth subsequently requested permission to read Zafranovich's inconsistent statements at trial and the district court agreed. Orth later read portions of Zafranovich's testimony to the jury.

Jury instructions and sentencing

At the conclusion of the trial, the district court judge provided Orth with the opportunity to object to the State's jury instructions as well

as offer his own. Orth did not request any credibility instructions. Ultimately, the district court provided the jury with a general credibility instruction, which mentioned bias and impartiality, as well as three instructions on the accomplice corroboration rule.

The jury convicted Orth on all counts except for battery with the use of a deadly weapon. The district court found, at sentencing, that Orth was a career criminal who had never completed probation and repeatedly failed to appear in court after numerous arrests.[4] Based on Orth's prior convictions, the district court judge determined that Orth was a habitual criminal and sentenced him to three concurrent life sentences with the possibility of parole in ten years. Orth now appeals.

DISCUSSION

On appeal, Orth raises a number of issues. Among his claims he asserts that the search of both the red and white Jeeps violated the Fourth Amendment and that the district court abused its discretion in failing to provide a jury instruction regarding plea negotiations, admitting inadmissible character evidence, allowing Orth to represent himself, violating his Sixth Amendment right to confrontation, and adjudicating him a habitual criminal. We address each of these claims below.

Search of the red and white Jeeps

Orth argues that police lacked probable cause for a search warrant for either Jeep because Zafranovich and Reynolds failed to call police until days after the robbery was committed and neither of them saw Orth in either the red or white Jeep at the time of the incident. In

[4]The State noted that by November 2000, Orth had accumulated 19 arrests and 20 misdemeanor convictions.

addition, Orth claims that the white Jeep was registered to Orth's mother and that the evidence found in it should have been suppressed at trial.

A search must be based on probable cause.[5] We have held that "'[p]robable cause' requires . . . trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific items to be searched for are: [subject to] seiz[ure] and will be found in the place to be searched."[6] On appeal, we must determine whether there is a substantial basis for the district court's finding of probable cause for a search warrant.[7]

We conclude that there was a substantial basis for the district court's finding of probable cause to search the red Jeep and the white Jeep. In this, we note that Zafranovich and Reynolds identified Orth as one of the intruders that entered their home on the night of the alleged crime and reported that a red Jeep was parked outside of Zafranovich's home before the robbery occurred. We also note that Orth was driving a white Jeep belonging to his mother on one of the occasions that he was chased by police officers. Further, the search warrants authorized police to search the entirety of each Jeep. Accordingly, we conclude that the search of the red and white Jeeps did not violate the Fourth Amendment.[8]

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[5]Keesee v. State, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994).

[6]Id.

[7]Id.

[8]In addition, we note that Orth's argument that he did not consent to the search of the white Jeep is inopposite here given that the vehicle was searched pursuant to a search warrant.

Jury instructions regarding plea negotiations

Orth claims that the prosecutor offered Lester's testimony without providing a hearing as per Sheriff v. Acuna[9] and Sessions v. State.[10] Specifically, Orth asserts that the terms of Lester's quid pro quo should have been fully disclosed to the jury, he should have been permitted to cross-examine her regarding the terms of her plea bargain, and the jury should have been given an appropriate limiting instruction. In addition, Orth claims that Zafranovich had a relationship with police and Orth "attempted to explore this fact, but failed." In this, Orth argues that Zafranovich appeared to be assisting police in exchange for probation instead of a prison sentence on a drug trafficking charge that was resolved in May 2005. He claims that the district court's failure to inform the jury about Zafranovich's plea bargain negotiations or provide a limiting instruction regarding Zafranovich's testimony constitutes reversible error.

We held in Acuna that when the State plea bargains for testimony, "any consideration promised by the State in exchange for a witness's testimony affects only the weight accorded to the testimony, and not its admissibility."[11] Further, the State may not bargain for particularized testimony that produces a specific result. Also, "the terms of the quid pro quo must be fully disclosed 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

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[9]107 Nev. 664, 819 P.2d 197 (1991); see also NRS 175.282.

[10]111 Nev. 328, 890 P.2d 792 (1995).

[11]107 Nev. at 669, 819 P.2d at 200.

instruction."[12] Concern regarding the credibility and reliability of witness testimony is "'satisfied by allowing the jury to evaluate the accomplice's testimony, tested by cross-examination, in light of full disclosure of any plea agreements and careful instructions by the trial court.'"[13]

We conclude that no Acuna violation occurred here. Initially, as indicated in the facts, Lester's plea bargain was fully disclosed to the jury. Further, Orth cross-examined Lester and could have asked more specific questions about the plea bargain if he so desired. While there is some merit to Orth's argument that the district court did not offer a specific limiting instruction pertaining to plea bargains, the district court's general credibility instructions meet the requirements set forth in Acuna. Accordingly, even if the district court could have given a more specific limiting instruction, we conclude that its failure to do so was harmless error. In addition, we conclude that there was no error as to Zafranovich because there is no proof that he was assisting police or engaged in any plea bargain. Rather, Orth's claim that Zafranovich was cooperating with police was merely speculative. Accordingly, we discern no violation of Acuna or Sessions in the instant case.

Character evidence

Orth claims that Lester's testimony that Orth threatened or bribed her constituted evidence of prior bad acts under NRS 48.045 and should have been the subject of a Petrocelli hearing. He further argues

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[12]Id.

[13]Id. (quoting State v. Nerison, 387 N.W. 2d 128, 130 (Wis. Ct. App. 1986) (quoting United States v. Daily, 759 F.2d 192, 198-200 (1st Cir. 1985))).

that Lester's testimony, that Orth was not the type of person that cared for her and that Orth was potentially dangerous, should likewise not have been admitted. In addition, Orth claims that his ex-girlfriend, Kelly McKenzie, improperly testified that she was afraid of him. In this, he further argues that McKenzie should not have been allowed to testify about Orth's threats regarding a ring he stole or his soured relationship with her. Orth claims that the admission of the above-mentioned evidence constituted reversible error because the jury convicted Orth based on prior bad acts and bad character, as opposed to the crimes for which he was charged.

> NRS 48.045(2) provides that:
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> > Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. [Such evidence] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Because prior bad act evidence "forces the accused to defend himself against vague and unsubstantiated charges and may result in a conviction because the jury believes the defendant to be a bad person," it is commonly reversible error to use uncharged bad acts to show criminal propensity.[14] Further, in Meek v. State,[15] we determined that references to witness intimidation at trial constitute reversible error unless the prosecutor can

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

[15]112 Nev. 1288, 1295-96, 930 P.2d 1104, 1108-09 (1996).

provide substantial evidence that the defendant was the source of the intimidation that occurred.[16]

Before allowing admission of prior bad act testimony under Petrocelli v. State,[17] the district court must conduct a hearing outside the presence of the jury and determine "that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[18] Nonetheless, failure to conduct a Petrocelli hearing is not reversible error when the record is sufficient to establish that the evidence is admissible under the test outlined above, or the result would have been the same had the district court excluded the evidence.[19] In addition, we held in Braunstein v. State that "[t]he trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and . . . will not be reversed absent manifest error."[20]

To the extent that the district court failed to hold a Petrocelli hearing, we conclude that such failure to do so constituted harmless error. First, as the State argues, the testimony of Lester and McKenzie that they were afraid of Orth does not constitute character evidence. Instead, it

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[16]Id. at 1295-96, 939 P.2d at 1109.

[17]101 Nev. 46, 692 P.2d 503 (1985).

[18]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1065 (1997) (citing Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996)).

[19]101 Nev. at 52, 692 P.2d at 508.

[20]118 Nev. 68, 72, 40 P.3d 413, 416 (2002).

provides an explanation for why Lester and McKenzie provided inconsistent statements to police. Second, McKenzie's "bad act" testimony provided evidence of Orth's plan to commit the robbery at issue here. Third, Orth did not object at trial to any of Lester's or McKenzie's alleged testimony of prior bad acts.[21] Fourth, Orth himself asked Lester questions about the alleged threats and his bad character. Accordingly, the district court did not improperly admit character evidence and, even if it did, any error that occurred was harmless.[22]

Self-representation

Orth claims that he was precluded from presenting his theory of the case because of his own incompetence. He argues that he had the right to present a defense and receive jury instructions pursuant to his theory of the case, and the failure to provide him with either is reversible error.[23] More specifically, Orth asserts that the district court could have denied him self-representation when he failed to properly impeach Zafranovich and McKenzie, and incriminated himself repeatedly. He also asserts that because of his incompetence, the district court should have intervened and prevented him from continuing to represent himself.

The United States Supreme Court has indicated that, under the Sixth Amendment, a defendant has the right to represent himself,

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[21]We note that Orth was aware of the requirement of a Petrocelli because he requested a sidebar and a separate hearing regarding the admissibility of the evidence for a different, unrelated issue.

[22]Petrocelli, 101 Nev. at 52, 692 P.2d at 508.

[23]Williams v. State, 110 Nev. 1182, 885 P.2d 536 (1994).

without the assistance of counsel, as long as he does so voluntarily.[24] In order to voluntarily represent himself, the defendant must:

> "knowingly and intelligently" forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open."[25]

The defendant in Faretta v. California[26] voluntarily waived his right to counsel when he "clearly and unequivocally declared to the trial judge that he wanted to represent himself and did not want counsel."[27] He was "literate, competent, and understanding" and exercised his informed free will despite warnings that it would be a mistake to refuse the assistance of counsel and that he would be required to follow all of the rules of trial procedure.[28] According to the United States Supreme Court, "technical legal knowledge, as such, [is] not relevant to an assessment of his knowing exercise of the right to defend himself."[29]

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[24]Faretta v. California, 422 U.S. 806, 832 (1975).

[25]Id. at 835 (citations omitted).

[26]422 U.S. 806, 832 (1975).

[27]Id. at 835-36.

[28]Id.

[29]Id. at 836 (emphasis added).

Because it is apparent to us that Orth knowingly and voluntarily waived his right to counsel after being warned of the dangers of doing so at two separate hearings, we conclude that there is no error here. Based on the holding in Faretta, the fact that Orth incompetently represented himself is not a relevant consideration in determining on appeal whether he should have been permitted to represent himself at trial. Accordingly, we conclude that the district court properly allowed Orth to represent himself.

Confrontation of Zafranovich

Orth argues that he should have been able to cross-examine Zafranovich after his accident. In this, Orth claims that he was prejudiced by his inability to question Zafranovich about the fact that the watch Zafranovich claimed was stolen did not actually have Orth's DNA on it, and a recent trip that Zafranovich made to the Atlantis Casino. Orth claims that he had a constitutional right to have Zafranovich testify because Zafranovich was still under subpoena and Orth had discovered new evidence during trial. Orth further maintains that the evidence about which he wanted to examine Zafranovich would have proven that Zafranovich lied about Orth beating him and that Zafranovich never won money at the Atlantis Casino. As a result, Orth asserts that he was deprived of his Sixth Amendment right to confront Zafranovich about the events in question and about an alleged motive for the robbery.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with

the witnesses against him."[30] The Confrontation Clause generally guarantees a defendant a face-to-face confrontation with witnesses testifying against him at trial and "ensures the reliability of the evidence by allowing the trier of fact to observe the demeanor, nervousness, expressions, and other body language of the witness."[31]

We conclude Orth's contention that he was denied his Confrontation Clause rights lacks merit. Orth was permitted to confront Zafranovich face-to-face in court by way of extensive cross-examination. We accordingly conclude that Orth's basic Confrontation Clause rights were satisfied. In addition, we conclude that Orth's claims that he should have been able to recall Zafranovich lack merit because (1) Orth previously asked witnesses about the watch and the trip to the Atlantis Casino, (2) testimony about the watch and Atlantis Casino winnings were not material to Orth's defense, and (3) the district court permitted Orth to read Zafranovich's testimony into evidence in order to impeach him.

Habitual criminal adjudication

Orth claims that he should not have been found to be a habitual criminal. First, he asserts that his prior felony conviction for burglary should not be considered in determining whether he was a habitual criminal because it was a stale and non-violent crime. Second, he argues that his felony convictions for burglary and grand larceny were companion cases that should not have been considered independently of one another. Third, Orth asserts that his felony conviction for possession

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[30]U.S. Const. amend. VI.

[31]United States v. Hamilton, 107 F.3d 499, 503 (7th Cir. 1997).

of a short-barreled shotgun was non-violent and only resulted in probation. Fourth, he claims that his felony conviction for eluding a police officer was concurrently imposed with his probation for possession of a short-barreled shotgun and should not have counted as a separate felony. Fifth, Orth maintains that the last felony conviction for robbery, of which he was convicted in New York, is not a felony in Nevada and, thus, should not have been considered in determining whether he is a habitual criminal. Sixth, Orth claims that a final separate felony conviction was not proven by a judgment of conviction and should not have been used to adjudicate him a habitual criminal.

NRS 207.010(1) defines habitual criminal status. It states that "a person convicted in this State of:"

> (b) Any felony, who has previously been three times convicted, whether in this State or elsewhere, of any crime which under the laws of the situs of the crime or of this State would amount to a felony, or who has previously been five times convicted, whether in this State or elsewhere, of petit larceny, or of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element, is a habitual criminal and shall be punished for a category A felony by imprisonment . . . .

In Rezin v. State,[32] we held 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

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[32]95 Nev. 461, 596 P.2d 226 (1979).

statute."[33] And a district court has broad discretion to dismiss habitual criminal allegations.[34] In exercising that discretion, the district court should consider whether the prior convictions are too old to be probative of habitual criminality.[35]

We conclude that the district court properly found Orth to be a habitual criminal. We note that even if two of the prior convictions grew out of the same transaction and the one from New York was invalid, Orth still committed the requisite three felonies to be found to be a habitual criminal under NRS 207.010(1)(b). Instead, he was convicted of five separate felonies. The felonies were not stale as they did not occur more than 20 years ago and, even though they may not have included violence, they involved dangerous situations. In addition, NRS 207.010(1)(b) includes a crime that is a felony in the state in which the defendant was convicted. Accordingly, the district court was well within its discretion in refusing to dismiss the habitual criminal count and instead finding that Orth was a habitual criminal.

CONCLUSION

In addition to the claims discussed above, we have also considered Orth's remaining arguments, including those related to the failure of the district court to sua sponte grant an acquittal on the charge for robbery with the use of a deadly weapon after expressing its misgivings

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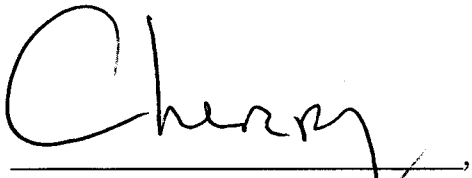
[33]Id. at 462, 596 P.2d at 227.

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

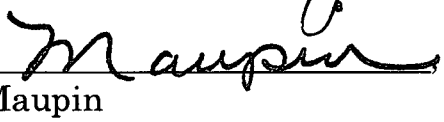
[35]See Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990) (holding that convictions that were 23-30 years old were stale but that convictions that were 8-19 years old, and included violent crimes, were not).

regarding Zafranovich's credibility and sufficiency of the evidence. Because we conclude that Orth's arguments on appeal lack merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



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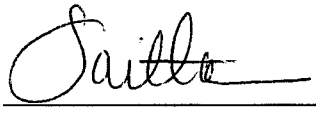

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cc: Hon. Robert H. Perry, District Judge
Mary Lou Wilson
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk