

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID WINFIELD MITCHELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50305

**FILED**

JUL 22 2010

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

ORDER AFFIRMING IN PART, VACATING IN PART,  
AND REMANDING

This is an appeal from a judgment of conviction and an amended judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appellant David Mitchell argues that the district court lacked the jurisdiction to resentence him while his appeal was pending and that a variety of other errors require reversal. Although we agree that the district court lacked the jurisdiction to resentence Mitchell while his appeal was pending, we conclude that Mitchell's remaining arguments lack merit. Accordingly, we affirm Mitchell's original conviction, vacate his amended judgment of conviction, and remand to allow the district court to resentence Mitchell on the deadly weapon enhancement upon issuance of the remittitur.<sup>1</sup>

The district court lacked jurisdiction to resentence Mitchell

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<sup>1</sup>The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Mitchell contends that the district court lacked the jurisdiction to correct his sentence and enter an amended judgment of conviction while his appeal was pending before this court. We agree.

After a notice of appeal has been filed, jurisdiction is “vested solely in the supreme court until the remittitur issues to the district court.” Buffington v. State, 110 Nev. 124, 126, 868 P.2d 643, 644 (1994); see also NRS 177.155 (“The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in this title.”); NRS 177.305 (“After the certificate of judgment has been remitted, the Supreme Court shall have no further jurisdiction of [an] appeal.”).

Here, the district court amended Mitchell’s sentence after he had filed his appeal. Because the district court lacked the jurisdiction to amend Mitchell’s sentence while his appeal was pending, we vacate the amended judgment of conviction and remand for sentencing pursuant to this court’s decision in State v. Dist. Ct. (Pullin), 124 Nev. 564, 188 P.3d 1079 (2008).<sup>2</sup>

Various alleged errors

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<sup>2</sup>The State contends that NRS 176.555, which allows a district court to “correct an illegal sentence at any time[,]” provides an exception to our general rules of appellate jurisdiction. However, NRS 176.555 only allows the district court to correct an illegal sentence at any time during which it has jurisdiction. Cf. Medina v. State, 122 Nev. 346, 356 n.25, 143 P.3d 471, 477 n.25 (2006) (instructing the district court to correct a clerical error after it regained jurisdiction following remittitur). Accordingly, NRS 176.555 does not change our jurisdiction analysis.

Mitchell also contends that his conviction should be reversed because the district court erred in its handling of various evidentiary issues, the district court erred in accepting some jury instructions while rejecting others, the district court failed to follow proper procedure relating to jury questions, and the district court erred in requiring him to submit to DNA testing as part of his sentence. We address each contention below.

#### Evidentiary issues

Mitchell argues that the district court erred in several evidentiary rulings by: (1) admitting evidence regarding the victim's missing ring; (2) allowing hearsay testimony by the victim's ex-boyfriend, Scott Chiari; (3) sustaining the prosecution's objection to testimony regarding another ex-boyfriend, Steven Furlong; and (4) allowing questioning related to witness Dan Nuckolls' ability as a crime scene analyst.

We review "a district court's decision to admit or exclude evidence . . . [for] an abuse of discretion." Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000).

First, the district court did not abuse its discretion in admitting evidence that Mitchell possessed a ring that belonged to the victim because his possession of the ring showed that he had lied about his contact with the victim and spoke directly to his guilt of the crimes at issue. See NRS 48.015 ("['R]elevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."); NRS 48.025 ("All relevant evidence is admissible . . .").

Second, the district court did not abuse its discretion in admitting testimony by Chiari that the victim “pointed out to a gentleman out by the trash bins [later identified as Mitchell], and said, ‘See that guy right there? He—he—he stares at me all the time. He gives me the creeps.’” This testimony was admissible both as a present sense impression pursuant to NRS 51.085 and as a then-existing state of mind pursuant to NRS 51.105.

Third, the district court did not err in refusing to allow Mitchell to question a witness about evidence that the victim had insulted Furlong in bed shortly before the murder because the proffered evidence would have constituted inadmissible hearsay. See NRS 51.035 (“Hearsay’ means a statement offered in evidence to prove the truth of the matter asserted . . . .”); NRS 51.065 (“Hearsay is inadmissible except as provided in this chapter . . . .”). The witness testified that he did not hear about the statements through Furlong, but “from others.” The record does not indentify the source of the statements. Accordingly, we cannot conclude that every level of hearsay had been satisfied in order to admit the statement. See NRS 51.067 (“Hearsay included within hearsay is . . . [inadmissible unless] each part of the combined statements conforms to an exception to the hearsay rule . . . .”). Moreover, Mitchell’s argument that the statements were not offered for the truth of the matter asserted, but instead to show the detective’s state of mind in compiling his list of subjects, fails because the detective’s state of mind was irrelevant. See Shults v. State, 96 Nev. 742, 751, 616 P.2d 388, 394 (1980) (“In order for the state of mind exception to be applicable, the [hearsay proponent’s] state of mind must be a relevant issue . . . .”).

Fourth, the district court did not err in allowing the State to question Nuckolls regarding his ability as a crime scene analyst. The record indicates that the State properly rehabilitated Nuckolls after Mitchell attacked his ability to remember events and credentials as a crime scene analyst. See NRS 50.085 (indicating that evidence may be introduced to support witness credibility once it has been attacked.); NRS 50.275 (contemplating that an expert witness's qualifications will be explored to determine the scope of his or her testimony.).

#### Instructional error

Mitchell argues that the district court erred in its handling of several jury instructions. In particular, he contends that the district court erred in rejecting the following jury instruction: "Evidence has been admitted tending to show that STEVEN FURLONG had a character trait for aggressive, violent behavior. You may consider this evidence in determining if he was acting in conformity with this character trait on January 6, 1982 in the death of Sheila Jo Harris."

The district court properly rejected this jury instruction for two reasons. First, while a defendant has the right to have the jury instructed on the law supporting his theory of the case, see Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1032 (1995) (recognizing a defendant's right to have the jury instructed on relevant legal principles), he does not have the right to have the jury instructed on the facts supporting his theory of the case. See NRS 175.161(1) (indicating that a district court "may not charge the jury in respect to matters of fact."). Here, the proffered jury instruction did not speak to any legal theory held by the defense, but only to Mitchell's factual theory that someone else committed the crime.

Second, the instruction directly contradicts the familiar evidentiary rule that “a person’s character or a trait of his . . . character is not admissible for the purpose of proving that [he] acted in conformity therewith.” NRS 48.045(1). Accordingly, the district court was correct in rejecting Mitchell’s proffered instruction.<sup>3</sup>

#### Juror questions

Mitchell argues that the district court failed to follow proper procedure regarding jury questions based on numerous alleged irregularities in the district court’s procedure. However, because the district court’s actions in this case accord with our precautionary measures for jury questions as laid out in Flores v. State, 114 Nev. 910, 913, 965 P.2d 901, 902-03 (1998) (providing a list of procedural safeguards that the district court should employ to minimize the risks inherent in jury questions), we conclude that the district court did not abuse its discretion in allowing several jury questions. Id. (“[A]llowing juror-inspired questions in a criminal case is . . . a matter committed to the sound discretion of the trial court.”).

#### DNA testing

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<sup>3</sup>In addition to the argument addressed above, Mitchell argues that the district court erred in (1) instructing the jury regarding admissions, (2) instructing the jury on inapplicable theories of murder, (3) instructing the jury on the difference between first-degree and second-degree murder, (4) instructing the jury that neither side is required to produce all evidence that may bear on the case, (5) instructing the jury that they could ask to be further informed of the law, and (6) misstating the standard of proof. After carefully reviewing the record and relevant authority, we conclude that these arguments lack merit.

Mitchell contends that the district court erred in requiring him to submit to DNA testing as part of his sentence because the State already had a sample of his DNA. NRS 176.0913 provides that:

1. If a defendant is convicted of [a felony]:

...

(b) A biological specimen must be obtained from the defendant pursuant to the provisions of this section and the specimen must be used for an analysis to determine the genetic markers of the specimen.

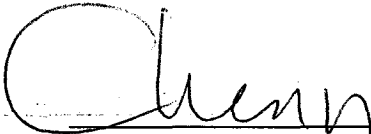
Subsection 5 of NRS 176.0913 provides an exception from the biological specimen requirement for any defendant who has previously submitted such a specimen for conviction of a prior offense unless the court determines that an additional sample is necessary.

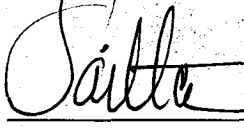
Mitchell's argument that he falls within this exception fails for two reasons. First, although the State obtained biological specimens from him during the course of their investigation of the crime at hand, these specimens were not obtained pursuant to a sentencing mandate for a prior offense as the exception requires. Second, the statute grants the district court discretion to determine when an additional sample is necessary. Because the record provides no assurance that the DNA samples obtained from Mitchell during the investigation of this case are of the same quality and type as the specimens that may be collected pursuant to NRS 176.0913(1)(b), we conclude that the district court did not err in ordering Mitchell to submit to DNA testing.<sup>4</sup> Accordingly, as specified above, we

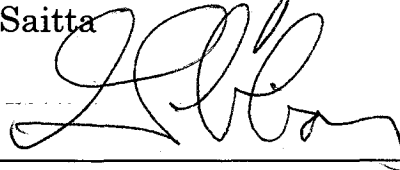
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<sup>4</sup>Mitchell also argues that (1) the State engaged in misconduct and (2) cumulative error requires reversal. First, while some of the  
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AFFIRM the judgment of conviction, VACATE the amended judgment of conviction, and REMAND for proceedings consistent with this order.

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

  
\_\_\_\_\_, J.  
Saitta

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

cc: Hon. James Todd Russell, District Judge  
State Public Defender/Carson City  
Attorney General/Carson City  
Carson City District Attorney  
Carson City Clerk

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prosecutor's statements are of concern to this court, we nonetheless conclude that they do not constitute plain error. See Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005) (reviewing unobjected-to attorney misconduct for plain error).

Second, because we conclude that there was no error other than the district court's improper amendment of Mitchell's sentence without jurisdiction, we reject Mitchell's argument that cumulative error requires reversal.