IN THE SUPREME COURT OF THE STATE OF NEVADA

NELSON RODRIGUEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50915

FILED

MAR 24 2009

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of possession of a controlled substance. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge. The district court sentenced appellant Nelson Rodriguez to serve a prison term of 12 to 33 months.

First, Rodriguez contends that the district court erred by instructing the jury on a lesser included-offense over his objection. Rodriguez claims that the State's request for the lesser-included offense instruction violated his Sixth Amendment right to be informed of the nature and cause of the accusations against him and violated his Fourteenth Amendment right to due process and a fair trial by undermining his theory of defense at the last minute with a change in the accusations. Rodriguez further claims that the district court erred by concluding that it was compelled to give the State's lesser-included offense instruction.

"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." Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1081

(2005). Consequently, the charging document "must [provide] a plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075(1). If the charging document is "definite enough to prevent the prosecutor from changing the theory of the case" and informs "the accused of the charge he is required to meet," it provides the defendant with adequate notice that he must defend against lesser-included offenses. See Slobodian v. State, 98 Nev. 52, 54, 639 P.2d 561, 563 (1982) (internal quotation marks and citation omitted). This court has observed that "NRS 175.501 makes no distinction between prosecution and defense in providing that a defendant 'may be found guilty of an offense necessarily included in the offense charged,'" and it has sustained the propriety of instructions on lesser-included offenses obtained by the State over defendants' objections. Rosas v. State, 122 Nev. 1258, 1268, 147 P.3d 1101, 1108 (2006).

Here, the State's criminal information charged Rodriguez with possession of a controlled substance with the intent to sell, a charge that necessarily includes the lesser offense of possession of a controlled substance. See Fairman v. State, 83 Nev. 137, 143, 425 P.2d 342, 345 (1967). Accordingly, the criminal information adequately informed Rodriguez that he must be prepared to defend against possession of a controlled substance, and the district court did not err by instructing the jury on this lesser-included offense.

Second, Rodriguez contends that the district court erred by denying his motion to dismiss the count of possession of a controlled substance with the intent to sell, which he made at the conclusion of the State's case. However, "a district court may not dismiss a criminal allegation after the close of the evidence, but instead is limited to giving

an acquittal instruction or, after the jury returns a verdict of guilt, entering a judgment of acquittal or granting a new trial." Vallery v. State, 118 Nev. 357, 366, 46 P.3d 66, 73 (2002) (citing NRS 175.381). Accordingly, we conclude that the district court did not err by denying Rodriguez's motion.

Third, Rodriguez contends that the district court erred by instructing the jury on flight. Rodriguez specifically claims that there was insufficient evidence of flight to warrant the instruction, and he alternatively claims that the instruction was improper because it did not include a "consciousness of guilt" element. The district court instructed the jury that,

> The flight of a person after the commission of a crime, or upon arrival of the police, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proven facts in deciding the questions of his guilt.

A flight instruction may be given "if evidence of flight has been admitted." Potter v. State, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980). However, "[f]light is more than merely leaving the scene of the crime. It embodies the idea of going away with a consciousness of guilt and for the purpose of avoiding arrest." Id. at 876, 619 P.2d at 1222. Therefore, "[f]light instructions are valid only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." Jackson v. State, 117 Nev. 116, 121, 17 P.3d 998, 1001 (2001). To satisfy this requirement, "four inferences must be justified: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from

consciousness of guilt concerning the crime charged to actual guilt of the crime charged." U.S. v. Silverman, 861 F.2d 571, 581 (9th Cir. 1988) (internal quotation marks and citation omitted). This court reviews a district court's decision to give a nonstatutory instruction for an abuse of discretion. See Tavares v. State, 117 Nev. 725, 734 n.21, 30 P.3d 1128, 1133 n.21 (2001), holding modified on other grounds by Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 110 (2008). And this court has upheld flight instructions that did not specifically address consciousness of guilt. See Weber v. State, 121 Nev. 554, 582, 119 P.3d 107, 126 (2005); Miles v. State, 97 Nev. 82, 85 n.1, 624 P.2d 494, 496 n.1 (1981).

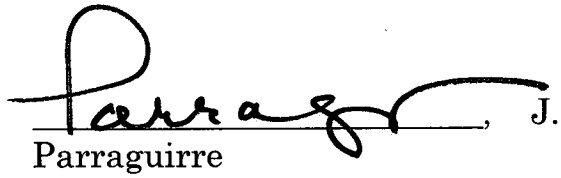
Here, the district court heard testimony that Officer Richard Lanave observed Rodriguez cut across three lanes of traffic on a bicycle in a manner that nearly caused an accident. Believing that Rodriguez posed a substantial traffic hazard, Officer Lanave initiated a traffic stop. He drove up to Rodriguez with his red lights flashing and his siren activated. After he got Rodriguez's attention, Officer Lanave signaled to Rodriguez to pull over and stop. Rodriguez ignored the flashing red lights, siren, and hand signals and continued to travel. Officer Lanave used his patrol car to stop Rodriguez, after which Rodriguez attempted to put down his bicycle and move away from the officer. Shortly thereafter, Officer Lanave struggled with Rodriguez, and Rodriguez dropped several rocks of cocaine.

Based on this testimony, the district court could reasonably infer that Rodriguez fled as a result of his consciousness that he was guilty of unlawful possession of a controlled substance and his desire to avoid apprehension and prosecution. We conclude that there was sufficient evidence to warrant the fight instruction and that the district

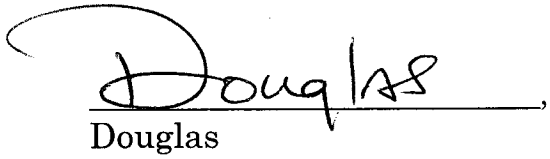
court's instruction adequately informed the jury of the manner in which it may consider the evidence of flight.

Having considered Rodriguez's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Parraguirre



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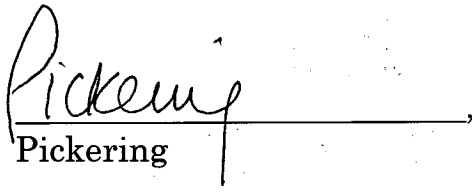
Douglas



_____, J.
Pickering

cc: Hon. Kenneth C. Cory, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk