IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS M. GRIGSBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53627

FILED

SEP 14 2011

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 first-degree murder with the use of a deadly weapon and possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Dennis M. Grigsby raises five contentions on appeal.

First, Grigsby argues that the district court did not provide him an adequate hearing on his motion to dismiss counsel. This court reviews the district court's denial of a motion for substitution of counsel for an abuse of discretion. Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004). There was no abuse of discretion based on the factors set forth in Young: (1) Grigsby did not demonstrate a complete breakdown of the attorney-client relationship; (2) in as much as Grigsby permitted, the district court made a sufficient inquiry into the substance of Grigsby's complaints; and (3) Grigsby did not inform the court that he wanted substitute counsel until his trial had begun, making the request untimely. Id. at 968-69, 102 P.3d at 576.

Second, Grigsby contends that the district court abused its discretion in admitting uncharged bad act evidence concerning the

burning of Grigsby's car without a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). We agree. Burning the car, which was owned by both Grigsby and his estranged wife, exposed Grigsby to criminal liability under Washington law. See Wash. Rev. Code § 9A.48.030 (defining second-degree arson as knowingly and maliciously causing fire that damages vehicle); Wash. Rev. Code § 9A.04.110(12) ("Malice may be inferred from an act done in willful disregard of the rights of another"); Wash. Rev. Code § 9A.72.150 (prohibiting destruction of evidence where person has reason to believe an official proceeding is about to be instituted and has intent to impair its appearance). However, the error is harmless because the evidence was relevant to show Grigsby's consciousness of guilt, the burning of the car was proven by clear and convincing evidence, and its probative value was not substantially outweighed by the danger of unfair prejudice. See Rhymes v. State, 121 Nev. 17, 22, 107 P.3d 1278, 1281 (2005) (providing failure to hold Petrocelli hearing is harmless where record sufficient to determine the admissibility of the uncharged acts); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997) (providing that evidence of uncharged acts are admissible if relevant, proven by clear and convincing evidence, and probative value not outweighed by prejudicial effect); see also Bellon v. State, 121 Nev. 436, 443-44, 117 Nev. P.3d 176, 180 (2005) (providing that evidence of uncharged acts admissible to show consciousness of guilt).

Third, Grigsby contends that the prosecution improperly elicited testimony about his post-arrest silence. We disagree. Questions concerning what a defendant says after his arrest are generally improper. Morris v. State, 112 Nev. 260, 263-64, 913 P.2d 1264, 1267 (1996) (providing prosecution forbidden from commenting upon defendant's post-

arrest, pre-Miranda silence). However, Grigsby invited the line of questioning by examining the witness about Grigsby's reaction to his arrest. See Milligan v. State, 101 Nev. 627, 637, 708 P.2d 289, 295-96 (1985). Therefore, the district court did not err in overruling Grigsby's objection.

Fourth, Grigsby argues that the district court abused its discretion in admitting a photograph of a firearm into evidence when the police did not recover a firearm and did not include the picture in the requested discovery. We disagree. The record does not indicate that the State acted in bad faith or the failure to disclose the photograph in a timely manner caused substantial prejudice. See Evans v. State, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001). Therefore, we conclude that the district court did not abuse its discretion in overruling Grigsby's objection. See Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006).

Fifth, Grigsby contends that the district court erred in overruling his objection to the given lying in wait instruction based on the lack of evidence supporting it and rejecting his proposed lying in wait instruction. We disagree. The given instruction accurately defined lying in wait. See Moser v. State, 91 Nev. 809, 813, 544 P.2d 424, 426 (1975). Further, testimony that Grigsby and the victim had a heated confrontation outside the victim's apartment and that the victim was shot roughly ten minutes later upon his return from an errand was sufficient to support the instruction. See Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) (providing that instruction may be supported by "some evidence, no matter how weak or incredible"). Therefore, the district court did not abuse its discretion in overruling Grigsby's objection and

instructing the jury. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

Having considered Grigsby's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

Douglas, J.
Douglas

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

cc: Hon. Donald M. Mosley, District Judge
Bunin & Bunin
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk