

IN THE SUPREME COURT OF THE STATE OF NEVADA

NICKY JUVENAL ALVAREZ,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 57292

FILED

MAR 07 2012

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of possession of a controlled substance with the intent to sell. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge.<sup>1</sup>

Self-representation

Appellant Nicky Juenal Alvarez contends that the district court erred by denying his motions for self-representation and failing to conduct a hearing pursuant to Faretta v. California, 422 U.S. 806 (1975). A criminal defendant has a constitutional right to represent himself at trial so long as he knowingly, voluntarily, and intelligently waives his right to counsel. Vanisi v. State, 117 Nev. 330, 337-38, 22 P.3d 1164, 1169-70 (2001). However, the defendant's right to self-representation may be denied "if the request is untimely, equivocal, or made solely for purposes of delay or if the defendant is disruptive." Id. at 338, 22 P.3d at

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<sup>1</sup>District Judge Kenneth Cory decided the pretrial motions and District Judge Valorie Vega presided over the trial.

1170. The district court conducted a hearing on Alvarez's pretrial motion to dismiss counsel, during which the following colloquy occurred:

THE COURT: Are you asking for a different attorney or are you asking to go pro se, without counsel?

THE DEFENDANT: Actually, I got a question for Your Honor because we got a library in jail, and we usually—when we want to have some answers about law we send a kite to the library and sometimes they don't answer us. And if I request to be pro se in this case am I allowed to have a coach?

(Emphasis added.) We conclude that Alvarez's statement to the district court rendered his pretrial motion to dismiss counsel equivocal and therefore the district court did not err by denying his motion without conducting a Faretta hearing. We further conclude that Alvarez's subsequent motion to act as co-counsel was not a request for self-representation and was properly denied.

#### Prior bad act evidence

Alvarez contends that the district court erred by admitting evidence of a prior bad act because there was no evidentiary hearing and the prior bad act was not proven by clear and convincing evidence. See Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1334 & n.4, 930 P.2d 707, 711-12 & n.4 (1996). The record reveals that the district court conducted a hearing and considered the factors for admitting the prior bad act evidence. See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). We conclude that the State presented clear and convincing evidence of Alvarez's prior bad acts and that the district court did not abuse its discretion in ruling that some of this evidence could be

admitted at trial. See Fields v. State, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009); Salgado v. State, 114 Nev. 1039, 1043, 968 P.2d 324, 327 (1998) (an evidentiary hearing is not required to assess the quality and quantum of prior bad act evidence).

#### Proposed jury instruction

Alvarez contends that the district court erred by rejecting his proposed theory of defense instruction and denying him the right to present his defense. “A defendant in a criminal case is entitled, upon request, to a jury instruction on his theory of the case so long as there is some evidence, no matter how weak or incredible, to support it.” Harris v. State, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (internal quotation marks and alteration omitted). Here, because some evidence supported Alvarez’s theory that he was merely a procuring agent for an undercover police detective, we conclude that the district court abused its discretion by rejecting Alvarez’s proposed instruction on this defense. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005); see generally Adam v. State, 127 Nev. \_\_\_, \_\_\_, 261 P.3d 1063, 1066-67 (2011) (the procuring agent defense may be used to defend against a charge under NRS 453.337). However, we are convinced beyond a reasonable doubt that the error did not contribute to the jury’s verdict and was harmless under the facts and circumstances of this case. See Crawford, 121 Nev. at 756, 121 P.3d at 590. We further conclude that Alvarez was not deprived of his right to present a defense.

#### Use of restraints

Alvarez contends that the district court erred by gagging and shackling him during the course of the trial. We review a district court’s decision to physically restrain a defendant during trial for abuse of

discretion. See Deck v. Missouri, 544 U.S. 622, 629 (2005); Nelson v. State, 123 Nev. 534, 545, 170 P.3d 517, 525 (2007). The record reveals that on the second day of trial Alvarez addressed the district court several times outside the presence of the jury and was warned that if he kept talking he would be removed from the courtroom. Later, in the jury's presence, Alvarez stood up and asserted that his constitutional rights were being violated. The district court again warned Alvarez that if he kept interrupting and talking he would be removed from the courtroom. Despite the district court's warnings, Alvarez continued to talk, announcing that he had a motion for a mistrial and that his defense attorney was "worthless." The district court excused the jury, addressed Alvarez's motions and concerns, and decided to have Alvarez gagged instead of removed from the courtroom. The district court specifically instructed the marshals not to bind Alvarez so that he could communicate with his attorney in writing. Towards the end of the day, Alvarez removed his gag and announced in the jury's presence that he wanted to testify. Thereafter, the district court decided that Alvarez would be gagged, bound, and seated at the defense table before the jury returned the next morning. Because the record demonstrates that the district court fully and fairly informed Alvarez that his conduct was wrong and warned him of the consequences of further misconduct, we conclude that the district court did not abuse its discretion by ordering Alvarez gagged and bound when he continued to disrupt the orderly course of the trial. See NRS 175.387.

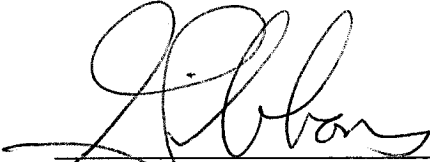
#### Proper person motions

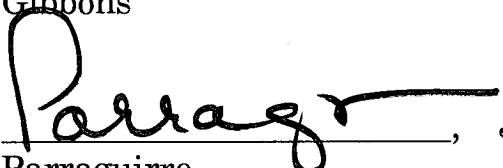
Alvarez contends that the district court erred by summarily denying the proper person motions that he made during the trial. Alvarez

claims that he made a proper person motion to act as co-counsel, moved for a mistrial because the State failed to provide discovery, and attempted to object to defense counsel's trial strategy because he did not want to admit guilt. The record reveals that the district court denied Alvarez's proper person motion to act as co-counsel because he failed to support his motion with relevant authority. The district court denied Alvarez's proper person motion for a mistrial because the local court rules prohibit a defendant from filing a motion while he was represented by counsel.<sup>2</sup> See EDCR 3.70. And Alvarez did not challenge defense counsel's strategy and defense counsel did not "admit facts that amount[ed] to a guilty plea" during the course of the trial. Jones v. State, 110 Nev. 730, 738, 877 P.2d 1052, 1057 (1994) (internal quotation marks omitted). Given this record, we conclude Alvarez has not demonstrated that the district court erred in denying his proper person motions.

Having considered Alvarez's contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

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

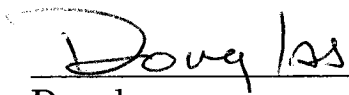
  
\_\_\_\_\_, J.  
Parraguirre

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<sup>2</sup>The record reveals that the district court discussed Alvarez's discovery issue with defense counsel during a sidebar at the bench before denying the motion for a mistrial.

DOUGLAS, J. dissenting:

I respectfully disagree with the majority's conclusion that the district court did not abuse its discretion by ordering Alvarez gagged and bound. "[T]he use of visible restraints during trial is unconstitutional unless justified by an essential state interest . . . that is specific to the defendant." Nelson v. State, 123 Nev. 534, 545, 170 P.3d 517, 525 (2007) (internal quotation marks omitted). Moreover, when deciding whether to use physical restraints, the district court must balance the defendant's constitutional rights with the essential state interest it seeks to protect and may only restrain the defendant "as a last resort." Id. (quoting Hymon v. State, 121 Nev. 200, 207, 111 P.3d 1092, 1098 (2005)); see also Illinois v. Allen, 397 U.S. 337, 344 (1970). Because there is no indication that Alvarez's behavior implicated an essential state interest that could not be protected by a lesser means, see NRS 175.387(1) (identifying the sanctions that may be imposed when a defendant's conduct interferes with the orderly course of a trial), the district court did not intermittently inform Alvarez that his restraints would be removed if he agreed not to interrupt the proceedings, cf. NRS 175.387(3), and the district court did not instruct the jury that while deliberating on its verdict it must disregard the fact that Alvarez was restrained, see Thomas v. State, 94 Nev. 605, 609, 584 P.2d 674, 676-77 (1978), I would reverse the judgment of conviction and remand this case to the district court for a new trial.

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Valorie J. Vega, District Judge  
Hon. Kenneth C. Cory, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk