

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUANO SAEL BATALLA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58528

FILED

FEB 08 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *R. Malone*
DEPUTY CLERK

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of possession of a controlled substance (Xanax) with the intent to sell. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

First, appellant Juano Sael Batalla contends that the district court erred by allowing the State to present evidence that he offered to sell Ecstasy to the undercover police officers and by doing so without giving a limiting instruction to the jury. We review the district court's decision to admit or exclude evidence for abuse of discretion or manifest error. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). We conclude that the district court manifestly erred in ruling that the evidence was admissible under the res gestae doctrine because the witnesses could have described the charged offense without referring to the other bad act. See NRS 48.035(3); Bellon v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (limiting the admission of evidence under NRS 48.035(3) to the statute's express provisions). Further, the evidence was not admissible as an uncharged bad act. See NRS 48.045(2); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). However, we

conclude that the error was harmless given the overwhelming evidence of guilt. See NRS 178.598; Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998); see also Tavares v. State, 117 Nev. 725, 731-32, 30 P.3d 1128, 1132 (2001) (failure to give a limiting instruction is reviewed for harmless error).

Second, Batalla contends that the district court erred by instructing the jury that “[t]he Defendant is presumed innocent until the contrary is proved.” Batalla argues that the word “until” should have been replaced with “unless” because “until” suggests a sense of inevitability and has the effect of lessening the State’s burden of proof. We review a district court’s decision to give a jury instruction for abuse of discretion or judicial error. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). We conclude that the district court did not abuse its discretion by giving this instruction because, when read as a whole, it contemplates that a defendant’s guilt might not be proven and accurately reflects the law. See NRS 175.191; Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005).

Third, Batalla argues that cumulative error deprived him of a fair trial. We have found only one error, which was harmless. “One error is not cumulative error.” U.S. v. Sager, 227 F.3d 1138, 1149 (9th Cir. 2000); see also Hoxsie v. Kerby, 108 F.3d 1239, 1245 (10th Cir. 1997) (“Cumulative-error analysis applies where there are two or more actual errors.”); State v. Perry, 245 P.3d 961, 982 (Idaho 2010) (“[A] necessary predicate to the application of the doctrine [of cumulative error] is a finding of more than one error.”).

We have considered Batalla’s contentions and concluded that he is not entitled to relief. However, our review of the record reveals a clerical error in the judgment of conviction; it states that Batalla was

convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. Accordingly, we

ORDER the judgment of conviction AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.

Cherry, J.
Cherry

Pickering, J.
Pickering

Hardesty, J.
Hardesty

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