IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CHARLES STANLEY BUBAK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 69096

FILED

FEB 08 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a visual presentation depicting sexual conduct of a child. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

There are two issues before this court.[1] The first, concerning the introduction of prior bad act evidence, is resolved on procedural grounds, given the district court's acknowledgment that it had not conducted a *Petrocelli*[2] hearing.[3] However, the second issue concerning Bubak's motion for a mistrial is more complex. This court must determine

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[1]After reviewing the record, we reject Bubak's argument that the State failed to present sufficient evidence to prove that he knowingly possessed child pornography. We conclude that, taking all evidence in the light most favorable to the State, a rational jury could have concluded that the essential elements of the crime were proven beyond a reasonable doubt. *See* NRS 200.730; *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995).

[2]*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

[3]*See Qualls v. State*, 114 Nev. 900, 901-04, 961 P.2d 765, 766-67 (1998) (concluding that the district court erred by failing to hold a *Petrocelli* hearing to determine whether evidence of a defendant's gang affiliation was admissible).

17-900222

if the late discovery and early admission of inculpatory evidence, combined with the district court's failure to remedy the resulting prejudice, resulted in a trial so fundamentally unfair, as to require a mistrial.

The introduction of prior bad act evidence

As an initial matter, we agree with the appellant that the incomplete folder which contains 128 empty files, with names describing sexual acts with children, is bad act evidence and may have been offered for propensity purposes, and thus improperly admitted.[4]

As the district court commented, and the State conceded, that a *Petrocelli* hearing was never held, we conclude that the district court erred. *Qualls*, 114 Nev. at 901-04, 961 P.2d at 766-67 (concluding that a district court erred by failing to hold a *Petrocelli* hearing to determine whether evidence of a defendant's gang affiliation was admissible). Should the State seek to introduce the evidence at a retrial, it must follow the requirements for the admission of prior bad act evidence under NRS 48.045(2). Specifically, the State must request admission of the evidence and demonstrate prior to trial that: "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the

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[4]The State contended, both below and on appeal, that because it is not a crime to possess file names without any images, the file names do not constitute bad act evidence. We note that NRS 48.045(2) expressly applies not only to other crimes, but to other wrongs or acts. Considering the particularly heinous nature of the file names, we fail to see how the files do not qualify as uncharged misconduct *e.g.*, one such file title included references to bestiality with a child. Accordingly, we reject the State's argument as NRS 48.045(2) is not limited to other crimes; rather it applies to wrongs or acts as well.

danger of unfair prejudice. *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012).

Our dissenting colleague suggests that on retrial, the evidence presented will mirror the original trial as this court does not rule the file names are inadmissible. However, this court was prevented from conducting its own *Petrocelli* analysis due to the State's failure to advance any theory for the admission of the files under NRS 48.045(2) below or on appeal. It is the duty of the State to clearly articulate under NRS 48.045(2) the purpose for which admission of uncharged misconduct evidence is sought and to meet the requisite standard of proof. The State has not yet done so in light of its position that the file names are not bad act evidence.

We caution the district court that based upon the shocking and disgusting nature of the names, and the quantity of empty files with those kinds of names, the prejudicial effect of their admission may be high.[5] Accordingly, the district court should carefully analyze the probative value when conducting the necessary balancing test. Additionally, should the district court admit the evidence, and this court does not suggest that it should or should not, the district court is required to issue a limiting instruction *before* the jury hears the bad act evidence. *See Tavares v. State*, 117 Nev. 725, 733, 30 P.3d 1128, 1133 (2001). Finally we note that the State properly abandoned the argument that the

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[5]Based on the arguments presented, or lack thereof, this court cannot conclude that the admission of the file names, the majority of which referenced deviant sexual acts with young children, did not affect the verdict.

file names are admissible pursuant to the res gestae doctrine. *See* NRS 48.035(3).

Bubak's motion for a mistrial

"The decision to deny a motion for a mistrial rests within the district court's discretion and will not be reversed on appeal absent a clear showing of abuse." *Ledbetter v. State,* 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (quoting *Randolph v. State,* 117 Nev. 970, 981, 36 P.3d 424, 431 (2001)) (internal quotation marks omitted).[6] "A defendant's request for a mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from receiving a fair trial." *Rudin v. State,* 120 Nev. 121, 144, 86 P.3d 572, 587 (2004) (footnote omitted). We review the erroneous denial of a mistrial for harmless error. *See Parker v. State*, 109 Nev. 383, 388-89, 849 P.2d 1062, 1065-66 (1993) (holding that the erroneous denial of a mistrial was harmless because the evidence supporting Parker's guilt was overwhelming).

This case centers on the investigation of a used MacBook computer, purchased by Bubak from an unknown previous owner. LimeWire, a program which allows users to share electronic files, was downloaded on the MacBook prior to Bubak's purchase. The State

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[6]Our dissenting colleague contends that by concluding the district court abused its discretion by failing to grant a mistrial, this court is breaking with precedent established by our state supreme court. However, our colleague conflates precedent and practice, as the precedent created in *Rudin* clearly establishes that a mistrial must be granted when an action unfairly prejudices the defendant, and the district court then fails to neutralize the prejudice and ensure a fair trial. *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004) ("Rudin must demonstrate that Amador's actions prejudiced her defense and that the district court failed to neutralize Amador's performance to ensure a fair trial.").

contended that members of the Henderson Police Department observed through special software, someone using LimeWire on Bubak's computer to download a 13-minute child pornographic video (the "PTHC-Open" video). Despite investigating the case and holding the computer for over four years, on the eve of trial, the State again affirmatively represented to Bubak that it could not find any trace of the "PTHC-Open" video on the computer, which constituted the basis for the child pornography charges.

Furthermore, during opening statements to the jury, the State conceded the police never found any trace of the "PTHC-Open" video on the MacBook, but instead argued that Bubak must have deleted the video. Bubak's counsel, however, asserted that police never found the video on Bubak's computer because it was never there, and that even if the video had been there and he had deleted it, "remnants" of the video would remain on the computer, yet there were none. Following opening statements, the district court released the jury for the day.

That evening, the State's expert witness, Detective Holman, decided to further investigate the MacBook in order to better prepare for his court appearance. Holman's investigation led him to discover an image that contained the opening scene of the "PTHC-Open" video (the thumbnail evidence) and search terms used on a LimeWire account. The State informed Bubak's counsel of the newly discovered evidence a few minutes before the second day of trial was to begin. Bubak's counsel immediately requested a continuance, arguing that the continuance was necessary to allow his expert witness to examine the thumbnail evidence. Counsel further argued that allowing Detective Holman to testify about the thumbnail evidence, and the search term evidence, would result in an

unfair trial, in part because the defense had yet to receive a copy of the new evidence.

The State acknowledged that Detective Holman had failed to locate the thumbnail even though he had previously conducted several forensic examinations of the MacBook. The State argued, however, that a continuance was unnecessary because the defense expert had access to a copy of the MacBook's hard drive and could have located the evidence himself. Likening the instant matter to a civil case, the State argued that this was similar to a situation in a construction defect case in which thousands of documents are disclosed during discovery, but the opposing party fails to find the damaging evidence revealed on one of the pages. The district court agreed with the State, and concluded that the thumbnail evidence and search terms did not constitute newly discovered evidence. Therefore, the district court denied Bubak's request for a continuance.

The State first informed the defense of the existence of the thumbnail at 1:08 p.m. on June 9th. Detective Holman testified about the thumbnail evidence that day and the defense was not given a copy of the evidence until 4:55 p.m. The trial resumed at 9:32 a.m. on June 10th. At that time, Bubak's counsel brought his motion for a mistrial because his expert had yet to forensically review the evidence and he would be unable to adequately cross-examine Detective Holman. Bubak informed the district court that because his expert's office hours ended at 5:00 p.m. and counsel did not receive the evidence until 4:55 p.m., the expert had been unable to evaluate the evidence.

Further, counsel informed the court that because Bubak was represented by the Clark County Public Defender's Office, counsel must first get any extra expenses approved before agreeing to pay the expert for

his additional time. Finally, to refute the State's argument that the defense expert could have located the evidence himself, counsel represented that because the computer allegedly contained child pornography, his expert must make an appointment and view the evidence at the police laboratory, therefore the nature and impact of the new evidence could not be easily studied. Nevertheless, despite the clear prejudice demonstrated by Bubak in not being able to forensically evaluate the new evidence, the district court denied the motion and allowed Detective Holman to resume his testimony.[7]

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[7]Our dissenting colleague's reliance on *Evans v. State*, 117 Nev. 609, 28 P.3d 498 (2001), is misplaced as the case is distinguishable. As the dissent notes, the district court in *Evans* delayed cross-examination for a day to allow the defense to review the new evidence, a letter. Here, the district court denied the motion for a continuance and took no steps to alleviate the prejudice resulting from the late disclosure. *See Zessman v. State*, 94 Nev. 28, 32, 573 P.2d 1174, 1177 (1978) ("The remedy for prejudicial surprise resulting in a defendant's inability to present his defense adequately is a continuance, and where, as here, a motion for a continuance is made in good faith and not for delay, the motion should be granted."); *Rose v. State*, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007) (footnote omitted) (holding that a district court may abuse its discretion by "denying a defendant's request for a modest continuance" when the delay was not the defendant's fault).

Further, the dissent's contention that Bubak had nearly two days to evaluate the evidence and formulate a defense is incorrect, as the timeline presented in the order clearly demonstrates that Bubak had 19 hours, which included sleeping time, to prepare a new strategy prior to the resumption of testimony, and had no time to have a scientific evaluation conducted. Finally, we would note that in *Evans*, the defense was confronted with a letter written by a lay witness, while here Bubak was confronted with highly technical evidence and would need the assistance of his expert witness in formulating a cross-examination strategy.

Following the denial of the motion for a mistrial, Detective Holman testified that he discovered during this new investigation that the thumbnail image had been accessed approximately eight times while the computer was in Bubak's possession. Due to the failure to grant even a modest continuance, Bubak's counsel was then forced to cross-examine Detective Holman on this crucial point, without the assistance of his expert witness. Following Detective Holman's testimony, the State rested and the defense was then forced to present its case without ever evaluating the thumbnail evidence.

Bubak attempted to undermine the State's case by calling his own expert, retired LVMPD Detective Larry Smith. Smith was a founder of the Las Vegas Metropolitan Police Department's Internet Crimes Against Children Unit. Smith testified that Detective Holman's forensic investigation had been compromised, as thousands of files had been created, modified, or their access dates had been changed, while the Henderson Police Department had sole control of the MacBook. During the State's cross-examination, the prejudice caused by the late introduction of the thumbnail related evidence was made evident, as the State asked Smith to confirm or refute Detective Holman's assertion that the thumbnail had been accessed eight times while in Bubak's custody. However, Smith testified that as he had not been able to forensically review the thumbnail related evidence, he could not confirm or refute Detective Holman's testimony.

As a result of the denial of Bubak's motion for a continuance, he was essentially ambushed by the use of the State's thumbnail evidence. Detective Holman was allowed to testify about the thumbnail evidence even *before* defense counsel received a copy of it. Further, because defense

counsel received the evidence so late, Smith was not able to forensically review it prior to his testimony. Consequently, defense counsel was unable to effectively cross-examine Detective Holman about the thumbnail evidence, and Smith was unable to attempt to refute or even question the State's allegation about access dates.

We are cognizant of the fact that ambush[8] has a negative connotation in the law. We stress that there is no allegation that the prosecutor knew of the evidence prior to the second day of trial, nor is there any hint that the State intentionally withheld the evidence from Bubak. Instead, it appears that both parties were surprised by Detective Holman's eleventh hour search and discovery of the new evidence. Further, the State informed Bubak of the discovery the following afternoon.

Nevertheless, it is clear that the decision to allow immediate admission of the new evidence had an effect on Bubak's intended defense similar to what happens when a party is confronted with withheld, untimely, or surprise detrimental evidence. *See Land Baron Inv., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. ___, ___ n.14, 356 P.3d 511, 522 n.14 (2015) (emphasis added) (stating that "[t]rial by ambush traditionally occurs where a party withholds discoverable information and

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[8]Despite the assertion to the contrary in the dissent, we are not accusing the State of ambushing Bubak. Instead, we use the term ambush to illustrate the effect the late discovery of new evidence had upon the fairness of the trial. Further, our order does not suggest that it was improper for the police to continue investigating the case during the trial. Instead our focus is upon the prejudicial effect of the immediate introduction of the new evidence, combined with the failure of the district court to take any steps which may have minimized the prejudice, and thereby ensuring a fair trial.

then later presents this information at trial, *effectively ambushing* the opposing party through *gaining an advantage by the surprise attack*[,]" and observing that although the appellants were "already aware of" the arguments and evidence respondents raised, "[t]he trial judge . . . *took steps necessary to mitigate any damage*"). Accordingly, the district court was constrained to protect Bubak's right to a fair trial. Here, the prejudice was clear. Bubak told the jury that had the video been on the MacBook, "remnants" would have been located. Therefore, the introduction of the evidence served to directly undermine counsel's opening statement, trial strategy, and credibility.

Further, we agree with the dissent that granting a mistrial should be the last resort. However, because the district court denied Bubak's motion for a continuance, the court was left with no adequate remedy to lessen this prejudicial effect, nor did it even try. Given that the evidence in this case was interpreted through the lens of competing expert testimony, the prejudice caused by the denial of the continuance was palpable after Detective Holman testified, and became even more apparent during Smith's testimony. Nevertheless, we note the jury acquitted him on the more serious charge of preparing, advertising, or distributing materials depicting pornography involving a minor.

Yet, the dissent contends that despite the prejudice, a mistrial is not warranted as the State did not violate any discovery provisions. Although criminal defendants have no general right to discovery, "[n]evertheless, under certain circumstances the late disclosure even of inculpatory evidence could render a trial so fundamentally unfair as to violate due process." *Lindsey v. Smith*, 820 F.2d 1137, 1151 (11th Cir. 1987). In fact, the example posited by the Eleventh Circuit is directly on

point, as the court noted "a trial could be rendered fundamentally unfair if a defendant justifiably relies on a prosecutor's assurances that certain inculpatory evidence does not exist and, as a consequence, is unable to effectively counter that evidence upon its subsequent introduction at trial." *Id.* It is also well established that district courts have a duty to "protect the defendant's right to a fair trial[.]" *Rudin*, 120 Nev. at 140, 86 P.3d at 584; *see also United States v. Evanston,* 651 F.3d 1080, 1091 (9th Cir. 2011) (stating that the district court is to manage the trial so as to avoid "a significant risk of undermining the defendant's due process rights to a fair trial"); *Valdez v. State,* 124 Nev. 1172, 1183 n.5, 196 P.3d 465, 473 n.5 (2008) ("[T]he district court had a sua sponte duty to protect the defendant's right to a fair trial.").

Accordingly, we conclude that because the thumbnail evidence was the strongest evidence demonstrating that Bubak *knowingly* possessed child pornography, defense counsel did not receive the evidence until after the State's expert began testifying, the trial hinged on which expert the jury believed, and the defense expert was never able to forensically review the evidence, the prejudicial impact of the admission was strong. As such, the district court was compelled to protect Bubak's right to a fair trial and, by failing to grant a continuance or take any steps which would lessen the prejudicial impact of the late discovery, a mistrial became necessary.[9]

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[9]Although we conclude that sufficient evidence exists to support Bubak's conviction, *see supra* note 1, this result does not foreclose a finding that the denial of the motion for a mistrial was not harmless. While reviewing a sufficiency of the evidence challenge, we must take all evidence in a light most favorable to the State, and determine whether "*any* rational trier of fact could have found the essential elements of the

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Accordingly, we conclude the district court abused its discretion by denying the motion for a mistrial, and we

ORDER the judgment of conviction REVERSED, and we REMAND this matter to the district court for a new trial.

Silver, C.J.

Gibbons, J.

...*continued*

crime beyond a reasonable doubt." *See Milton*, 111 Nev. at 1491, 908 P.2d at 686-87 (citation omitted) (internal quotation marks omitted). However, we will conclude that the erroneous denial of a mistrial is harmless only when the prejudicial effect of the error is weak and there is otherwise strong evidence supporting the conviction. *See Parker*, 109 Nev. at 389, 849 P.2d at 1066.

As discussed throughout this order, the prejudicial effect of the late disclosure and early admission of the newly discovered evidence is strong. However, the evidence supporting the conviction is not overwhelming, or even otherwise compelling, as the State must demonstrate Bubak *knowingly* possessed the video. *See United States v. Flyer*, 633 F.3d 911, 920 (9th Cir. 2011) (holding that deleting a file, on its own, is insufficient to establish the defendant knowingly possessed child pornography). In fact, the jury acquitted Bubak on the second charged count, distributing child pornography. While Detective Holman testified that the access dates of the thumbnail reveal that the image was viewed by someone while the computer was in Bubak's possession, Detective Holman was forced to concede that he mismanaged the computer investigation which resulted in approximately 22,000 files having their access dates altered. However, Smith could not confirm if the thumbnail access dates were altered because he never conducted an examination of the evidence. Therefore, the evidence may be different upon retrial.

TAO, J., dissenting:

I don't doubt that the district court could have granted a mistrial in this case; had it done so, I also have no doubt that we would affirm its decision on appeal as falling within its discretion. *See Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). But that's not the question before us. "In the instant case, we are not reviewing a trial court's grant of a mistrial . . . rather, we are reviewing a denial of a mistrial motion and must determine under what circumstances a mistrial *must* be granted, not simply when a mistrial may permissibly be granted." *United States v. Atisha*, 804 F.2d 920, 926 (6th Cir. 1986).

Asking what a district court *can* do, and asking what it *must* do, is asking two very different questions. By holding that the district court "abused its discretion" in not granting a mistrial, the majority concludes that the district court had no choice but to grant one, thus turning a "can" into a "must." But I can find no published case since at least the early 1990's (and quite possibly earlier than that) in which the Nevada Supreme Court has ever reversed a district court for refusing to grant a mistrial merely because the defendant believed that the trial had somehow become "unfair." *See McNamara v. State*, 132 Nev. ___, ___, 377 P.3d 106, 108 n.1 (2016) (affirming denial of mistrial based on alleged prosecutorial misconduct); *Nunnery v. State*, 127 Nev. 749, 785, 263 P.2d 235, 259 (2011) (affirming denial of mistrial despite surprise testimony that the defendant may have been a lookout in another unsolved and uncharged crime); *Zana v. State*, 125 Nev. 541, 546-48, 216 P.3d 244, 248-49 (2009) (affirming denial of mistrial despite jury misconduct); *Rose v. State*, 123 Nev. 194, 206-7, 163 P.3d 408, 416-17 (2007) (affirming denial of mistrial even though witness improperly referred to inadmissible

polygraph results); *Summers v. State*, 122 Nev. 1326, 1335, 148 P.3d 778, 784 (2006) (affirming denial of mistrial despite surprise testimony that defendant threatened a witness' life); *Viray v. State*, 121 Nev. 159, 111 P.3d 1079 (2005) (affirming denial of mistrial based on jury misconduct); *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004) (affirming denial of mistrial despite evidence that defense counsel was unprepared for trial); *Randolph v. State*, 117 Nev. 970, 36 P.3d 424 (2001) (affirming denial of mistrial despite prosecutor misstating the definition of "reasonable doubt"); *Mortenson v. State*, 115 Nev. 273, 281-82, 986 P.2d 1105, 1110-11 (1999) (affirming denial of mistrial even though prosecutor failed to provide copy of expert's report prior to testimony); *Sherman v. State*, 114 Nev. 998, 965 P.2d 903 (1998) (affirming denial of mistrial despite prosecutor's violation of pre-trial order in limine); *Leonard v. State*, 114 Nev. 1196, 969 P.2d 288 (1998) (affirming denial of mistrial even though judge referred to defense counsel as a "trickster" and allowed evidence to be presented to the jury while one of the defense attorneys was absent from the courtroom); *Tinch v. State*, 113 Nev. 1170, 946 P.2d 1061 (1997) (affirming denial of mistrial even though State failed to disclose witness' prior handwritten statement); *Lisle v. State*, 113 Nev. 540, 937 P.2d 473 (1997) (affirming denial of mistrial based upon alleged insufficiency of trial evidence); *Hardison v. State*, 104 Nev. 530, 763 P.2d 52 (1988) (affirming denial of mistrial after witness testified that the defendant had previously been in prison); *see also Lee v. State*, 385 P.3d 55, 2016 WL 4446803 (Nev. 2016) (unpublished) (affirming denial of mistrial sought when jury was shown gruesome autopsy photos).

If we're not going to follow the Nevada Supreme Court's lead, then I would think that there ought to be something pretty extraordinary

about this case to justify a departure from twenty years of precedent. Because there isn't, I respectfully dissent.

I.

What was so "unfair" about this trial that the district court not only *could have* mistried it, but *must have* done so?

Criminal trials need not be perfect. *See Ennis v. State,* 91 Nev. 530, 533, 539 P.2d 114, 115 (1975) (a defendant "is not entitled to a perfect trial"). Because the rules of discovery in criminal cases are far more limited than they are in civil cases—for example, there are no interrogatories, no requests for admission, and there is no right to take transcribed depositions of every witness before trial—unexpected things sometimes happen during criminal trials. Witnesses sometimes fall apart under cross-examination or change their testimony as previous perceptions are forgotten or old memories are refreshed; other witnesses can't be located; evidence sometimes degrades over time in the evidence locker—those are just some of the relatively commonplace events that every prosecutor, defense attorney, and trial judge has to deal with on a regular basis. As appellate judges, we'd prefer those things to never happen, but they do; and when they do, the question for us is only whether the events undermined the fundamental integrity of the trial, not whether the trial could have been better.

And sometimes police discover new evidence after trial has already begun, just as Detective Holman did here. My colleagues act as if uncovering new evidence during trial is something both outlandish and unprecedented (going so far as to label it an "ambush"); but the truth is that, while it shouldn't be part of a prosecutor's regular practice, it's also not uncommon. *See United States v. Atisha,* 804 F.2d 920, 926 (6th Cir.

1986) (affirming conviction even though important evidence was disclosed on the eve of trial: "There is *always* a possibility that new evidence will be discovered, even if the defense was structured around assurances made by the government."); *see also Evans v. State*, 117 Nev. 609, 638, 28 P.3d 498, 518 (2001) (although incriminatory letter was not disclosed until after witness had begun testifying, "[t]he record indicates that the prosecutor disclosed the letter to the defense as soon as he learned of its significance; therefore, no discovery violation occurred"); *United States v. Herring*, 582 F.2d 535, 541 (10th Cir. 1978) (holding that the prosecution's disclosure of a handwriting expert's opinion on the first day of the trial was not a discovery violation when prosecutor did not know of its relevance until then); *United States v. Wixom*, 529 F.2d 217, 220 (8th Cir. 1976) ("Defendant claims unfair surprise at trial because the government did not disclose to defense counsel its intention to call" a particular witness until after the start of trial; conviction affirmed when "the government did advise defense counsel in this regard shortly after government counsel became aware that the witness could testify"); *United States v. Smith*, 496 F.2d 185, 190 (10th Cir. 1974) (copies of incriminatory checks admissible even though given to the defense only "as the trial opened").

Furthermore, I'm not sure that it's necessarily a bad thing to allow the police to keep investigating even while a trial is imminent or has already begun. Although in this case Detective Holman's last-minute review of the computer hard drive uncovered additional incriminatory evidence, he could just as easily have uncovered exculpatory evidence that could have favored Bubak, and surely Bubak would want to know about any such evidence no matter when it was found. *See, e.g., Dettloff v. State*, 120 Nev. 588, 591, 97 P.3d 586, 596 (2004) (prosecutor properly abandoned

reliance upon certain evidence previously used to obtain indictment after receiving information on the eve of trial that undermined its validity).

The Nevada Supreme Court has held that the sudden discovery of new incriminatory evidence in the middle of trial does not require the district court to grant a continuance of the trial for even a single day, to say nothing of mistrying the whole thing. In *Evans v. State*, 117 Nev. at 637-38, 28 P.3d at 517-18, just before taking the stand to testify, a witness named Shirannah Rice handed the prosecutor a previously undisclosed letter that incriminated the defendant (the letter was sent by the defendant asking the witness to change her testimony in specific ways). The prosecutor gave the letter to the defense later the same day, after Rice's direct examination had already commenced. *Id.* at 637, 28 P.3d at 517. The defense counsel requested a continuance of the trial to investigate the letter, asserting that he was unprepared to cross-examine Rice and other witnesses in view of the sudden disclosure of the letter. *Id.* The district court denied the request for a continuance of the entire trial but permitted defense counsel to delay Rice's cross-examination until the next day while other witnesses testified instead. *Id.*

The Nevada Supreme Court observed that the district court has "broad discretion" and "does not abuse its discretion absent a showing that the State acted in bad faith or that the nondisclosure caused substantial prejudice to the defendant which was not alleviated." *Id.* at 638, 28 P.3d at 518. The court then concluded that "the prosecutor disclosed the letter to the defense as soon as he learned of its significance; therefore no discovery violation occurred" and dismissed defense counsel's assertion of prejudice by noting "Evans's claim that he was prejudiced remains conclusory; he does not specify how the cross-examination of any

witnesses was inadequate. . . . despite the unavoidably late disclosure of the letter, no substantial prejudice resulted." *Id.* The court observed that, even though the district court refused to adjourn the entire trial, the defendant's claim of prejudice was undermined by the fact that the defense could prepare overnight for Rice's cross-examination the next day. *Id.*

Nor should it matter that the late-discovered evidence might cause both parties to have to change their "theory of the case" after the prosecutor had previously represented that no such evidence existed. In *United States v. Atisha*, the Sixth Circuit rejected an argument very similar to Bubak's:

> The defendant nonetheless asserts that he was severely prejudiced by justifiably relying on the government's representations regarding its evidence and theory of the case; that defense counsel committed himself to a theory of defense and a strategy which he might not have chosen had he been informed about the beef incident. Specifically, defense counsel committed himself to placing the defendant on the stand and represented to the jury that only two thefts were involved. Atisha argues that the government's conduct was tantamount to "sandbagging" and that a new trial was essential in order to provide him an opportunity to restructure his defense. . . .
>
> Although defense counsel arguably committed himself during opening argument to proceed in a particular matter, we do not believe that the district court was required to exclude the evidence or grant a mistrial.
>
> First, the mere fact that the defendant was surprised by the evidence does not mandate that the evidence be excluded. *See Herring*, 582 F.2d at 541; *United States v. Wixom*, 529 F.2d 217, 220 (8th Cir.1976) (per curiam). Second, there is no

> rule that evidence must be excluded or a mistrial granted on the basis that a defendant had committed himself to a theory which was undermined by new evidence. *See United States v. Bavers,* 787 F.2d 1022, 1028 (6th Cir.1985). There is *always* a possibility that new evidence will be discovered, even if the defense was structured around assurances made by the government.

804 F.2d 920, 925 (6th Cir. 1986); *see also Dettloff v. State,* 120 Nev. 588, 591, 97 P.3d 586, 596 (2004) (conviction affirmed despite defense complaint regarding the prosecutor's "changes in position during the case" when prosecutor abandoned reliance upon certain evidence previously used to obtain indictment after receiving information on the eve of trial that undermined its validity); *United States v. Burgin,* 621 F.2d 1352, 1359 (5th Cir. 1980) (prosecutor not required to provide "detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial").

Accordingly, I would conclude that any "unfairness" that occurred during Bubak's trial wasn't extraordinary, or even uncommon.

II.

Did Bubak suffer clear and severe prejudice nonetheless?

According to Bubak, he was unable to effectively respond to the late disclosure of Holman's testimony and the thumbnail photo (collectively, "the thumbnail evidence"), and had he been given time to investigate, he and his expert might have adopted a better trial defense than he did. But it seems to me that saying that he "might" have found a better defense is just saying that he "might" have suffered prejudice, because even with all the time in the world he "might not" have found anything at all. *See Moultrie v. State,* 131 Nev. ___, ___, 364 P.3d 606, 610 (Ct. App. 2015) ("The prejudice alleged cannot be hypothetical or

speculative"); *United States v. Rullan-Rivera*, 60 F.3d 16, 18 (1st Cir. 1995) ("A ruling denying a motion for mistrial . . . will be upheld absent a clear showing of prejudice by the defendant-appellant").

In a typical appeal, we sometimes reverse and order a new trial where the error that we're reversing will (presumably) not be repeated during a second trial, and the second trial will therefore differ from the original trial on its face. For example, if any evidence was improperly admitted in an original trial, then a second trial may produce a different verdict because that erroneous evidence will not be re-introduced.

But here, I'm not sure how a subsequent re-trial will differ from the trial that we are reversing. The majority doesn't conclude that the thumbnail evidence was inadmissible and cannot be used in any re-trial; it also does not conclude that the "bad act" would be inadmissible in a subsequent re-trial either. Apparently the State is free to use both, and the district court is free to admit both just as it did the first time around, so the State can rely on the exact same evidence to prove Bubak guilty in the next trial that it relied upon in the first trial.

And there's little reason to believe that Bubak will mount a more successful defense the second time around than he did in the first trial. Notably, the State disclosed the thumbnail evidence first thing in the morning of the second day of trial, Tuesday, June 9, and admitted it into evidence later that day. Detective Holman testified during the second day, Tuesday, and returned to testify again on Wednesday, June 10, and shortly thereafter the State rested its case. The defense began to present its case on Wednesday and announced that it was resting during the afternoon of Thursday, June 11.

Thus, Bubak's expert, Larry Smith, had more than two days to absorb and investigate the thumbnail evidence after Bubak was first notified of it during the morning of Tuesday, June 9, and before the defense rested during the afternoon of Thursday, June 11. But apparently, during those two-plus days, he wasn't able to come up with anything that changed Bubak's defense. How being able to investigate the thumbnail evidence for more than two days on Tuesday, Wednesday, and Thursday before choosing to rest on Thursday differs in any meaningful way from being given a continuance of two days—or mistrying the case and starting it over two days later—is something that neither Bubak nor the majority explain.

I would characterize Bubak's assertions of prejudice as being no less "conclusory" than the defendant's nearly identical assertions in *Evans*. *See* 117 Nev. at 637-638, 28 P.3d at 517-518. Furthermore, Bubak had more time (two-plus days) to investigate and respond to the new evidence than the defendant in *Evans* had (merely overnight). If the latter did not require a mandatory mistrial (or even a continuance), then neither should the former.

Accordingly, I would conclude that Bubak has failed to demonstrate the kind of "clear prejudice" that left the district court no choice but to mistry the entire case.

III.

By its nature, a "mistrial" isn't a tool that a trial court should pick as its first answer to any trial problem. Rather, it's supposed to be something that judges resort to only as a last-ditch solution in response to an error that cannot be fixed with any other lesser tool (such as an instruction or admonition to the jury). *See Rudin*, 120 Nev. at 144, 86

P.3d at 587 (for ineffectiveness of counsel to warrant a mistrial, counsel's performance must be "'so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury'") (quoting *Geiger v. State*, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996)); *Glover v. Eighth Judicial District Court*, 125 Nev. 691, 710, 220 P.3d 684, 697 (2009) (district court must consider, among other things, "the alternatives to a mistrial and choose the alternative least harmful"); *see generally Renico v. Lett*, 559 U.S. 766, 773 (2010) ("'the power [to grant a mistrial] ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes'") (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)); *United States v. Rullan-Rivera*, 60 F.3d 16, 18 (1st Cir. 1995) (granting a mistrial is "to be employed only if the demonstrated harm can be cured by no less drastic means").

Indeed, declaring a mistrial has long been described as an "extreme remedy" that should only be invoked as a "last resort" and whose occurrence should be "exceedingly uncommon." *See, e.g.*, *United States v. Moran*, 778 F.3d 942, 966 (11th Cir. 2015) (referring to "mistrial" as "an extreme remedy"); *United States v. Lara-Ramirez*, 519 F.3d 76, 82 (1st Cir. 2008) ("the declaration of a mistrial must be a last resort"); *United States v. Celio*, 230 F. App'x 818, 827 (10th Cir. 2007) ("A mistrial is a sanction of last resort"); *Hudson v. State*, 179 S.W.3d 731, 738 (Tex. Ct. App. 2005) ("A mistrial is an extreme remedy for prejudicial events that occur at trial and should be exceedingly uncommon"); *United States v. Jones*, 48 F. App'x 835, 836 (3d Cir. 2002) (referring to "the extreme remedy of declaring a mistrial"); *United States v. Rullan-Rivera*, 60 F.3d 16, 18 (1st Cir. 1995) ("Mistrial is a last resort, to be employed only if the demonstrated harm can be cured by no less drastic means"); *Beavers v. Lockhart*, 755 F.2d 657,

663 n.4 (8th Cir. 1985) ("mistrial is considered an extreme remedy"); *Harnage v. State*, 274 So.2d 352, 355 (Ala. 1972) ("The entry of a mistrial is not lightly to be undertaken. Since the law presumes the present jury as good as a future one, the entry should be only a last resort").

This reticence arises from a number of reasons. First, mistrying a criminal case is almost always the most expensive remedy available, burdening jurors, witnesses, the parties, and the judicial system alike with the duty of dismissing a jury that already heard part of the case, impaneling a new jury, and hauling in witnesses again for a second trial. *See St. Louis Southwestern Ry. Co. v. Ferguson*, 182 F.2d 949, 953 (8th Cir. 1950) (a mistrial "nullif[ies] long and expensive trial proceedings").

Second, the State and the defendant aren't the only entities whose interests matter: the "public" has an interest "in seeing that a criminal prosecution proceed to verdict, either of acquittal or conviction." *Illinois v. Somerville*, 410 U.S. 458, 463 (1973).

Third, terminating a trial before verdict implicates potential constitutional "double jeopardy" problems that less extreme remedies might not. Jeopardy attaches once a criminal trial commences, and once it begins, a defendant has a "valued right" to finish the trial before the same jury. *See Arizona v. Washington*, 434 U.S. 497, 503 (1978). Consequently, a mistrial prior to verdict may preclude any re-trial on the same charges if the mistrial was "provoked" by the prosecutor or if the mistrial was ordered without the defendant's consent and was not a "manifest necessity." *Id.* at 505; *see also United States v. Scott*, 437 U.S. 82, 93 (1978).

Requiring district courts to mistry cases that aren't extraordinary runs the risk of normalizing mistrials from an "extreme" remedy of "last resort" into a routine response to ordinary trial mishaps. And I don't see any reason for us to do that.

IV.

Precisely because the decision to mistry a case implicates so much and is so fraught with constitutional concerns, appellate courts give considerable deference to the district court's decision.

> There are compelling institutional considerations for this deference. The trial judge has seen and heard the jurors during their voir dire examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more conversant with the factors relevant to the [mistrial] determination than any reviewing court can possibly be.

Glover v. Eighth Judicial Dist. Court, 125 Nev. 691, 703, 220 P.3d 684, 693 (2009) (quotation marks omitted) (quoting *Arizona v. Washington*, 434 U.S. 497, 513-14 (1978)); *see also Illinois v. Somerville*, 410 U.S. 458, 464 (1973) ("virtually all of the cases turn on the particular facts and thus escape meaningful categorization").

Consequently, the decision whether to grant a continuance or mistrial has always been a discretionary call, reversible only in the event of a "clear" abuse of discretion. *See Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006) (the decision to deny a motion for a mistrial "rests within the district court's discretion and will not be reversed on appeal 'absent a clear showing of abuse'") (quoting *Randolph v. State*, 117 Nev. 970, 981, 36 P.3d 424, 431 (2001)); *Beck v. Seventh Jud. Dist. Court*,

113 Nev. 624, 627, 939 P.2d 1059, 1060 (1997) ("'denial of a motion for mistrial is within the trial court's sound discretion. The court's determination will not be disturbed on appeal in the absence of a clear showing of abuse.'") (quoting *Owens v. State*, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1997)); *see generally Renico v. Lett*, 559 U.S. 766, 773 (2010) ("The decision whether to grant a mistrial is reserved to the "broad discretion" of the trial judge, a point that "has been consistently reiterated in decisions of this Court.").

The legal standard of "clear abuse of discretion" is, by definition, extremely forgiving of district judges: appellate courts must affirm even questionable or borderline decisions so long as they fall "within the ballpark" of what most judges would do; to count as an abuse, a decision ought to fall far outside of any judicial norm. *See State v. Dist. Court*, 127 Nev. 927, 932, 267 P.3d 777, 781 (2011) (defining "clear abuse of discretion" variously as "[a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule" or an error that "does not result from a mere error in judgment, but occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill will").

When we review for "abuse of discretion," we can reverse only for clear legal error, or for a decision that no reasonable judge could have made. *See Leavitt v. Simms*, 130 Nev. ___, ___, 330 P.3d 1, 5 (2014) (stating an abuse of discretion only occurs "when no reasonable judge could reach a similar conclusion under the same circumstances."); *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010) ("While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error."). If other reasonable judges could

have done the same thing in similar circumstances, then no "clear" abuse can be said to have occurred.

Thus, a "clear" abuse occurs only if one of two things happens: either the district court applied a clearly erroneous interpretation of the law, or it otherwise did something that no reasonable judge should do.

In this case, the majority concludes that the district court "abused its discretion" for not doing something rather than for affirmatively ordering something. That means that the thing that it supposedly did not do (order a mistrial) must either have been so unequivocally demanded by settled law that refusing it constituted a clear misapplication of the law; or, alternatively, something about the factual circumstances made a mistrial so obligatory that the matter was no longer discretionary and no reasonable judge could have denied it except through partiality, bias, or ill will. *See Atisha*, 804 F.2d at 926 ("In the instant case, we are not reviewing a trial court's grant of a mistrial . . . rather, we are reviewing a denial of a mistrial motion and must determine under what circumstances a mistrial *must* be granted, not simply when a mistrial may permissibly be granted.").

If the majority is correct, then one of these two things must be true. But if neither is, then no "clear abuse" occurred.

V.

> A trial judge properly exercises his discretion to declare a mistrial if [the jury is unable to reach a verdict] or if a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it succeeded before the jury,

> it would automatically be stripped of that success
> by an appellate court.

Illinois v. Somerville, 410 U.S. 458, 464 (1973). Is there a clear rule of law that the district judge "unreasonably" and "clearly" violated or "overrode" in this case that, properly applied, would have demanded a mistrial?

There isn't. Quite to the contrary, the majority seems to agree that, prior to Bubak's motion for mistrial, no reversible legal error had yet occurred during the trial. For example, the majority doesn't conclude that the thumbnail evidence violated any rule of evidence and was therefore inadmissible; indeed, the majority seems to concede that not only was the thumbnail evidence properly admitted below under all rules of evidence, but will be once again admissible in any future re-trial. *See Atisha*, 804 F.2d at 925 ("the mere fact that the defendant was surprised by the evidence does not mandate that the evidence be excluded").

The majority doesn't conclude that any *Brady* violation occurred. *See Brady v. Maryland*, 373 U.S. 83 (1963) (holding that the State is required to disclose any evidence that is both exculpatory and material to a criminal prosecution); *Giglio v. United States*, 405 U.S. 150 (1972). Quite to the contrary, the State violated no constitutional obligation to disclose the thumbnail evidence before trial because the thumbnail evidence was incriminatory, not exculpatory (indeed, "the strongest evidence demonstrating that Bubak knowingly possessed child pornography").

The majority doesn't conclude that any rule or statute governing discovery in criminal cases was violated; the majority concedes

that none was.[10] *See Evans*, 117 Nev. at 638, 28 P.3d at 518 ("The record indicates that the prosecutor disclosed the letter to the defense as soon as he learned of its significance; therefore, no discovery violation occurred."); *Herring*, 582 F.2d at 541 (disclosing handwriting expert's opinion on the first day of the trial was not discovery violation when prosecutor did not know of its relevance until then); *Wixom*, 529 F.2d at 220 ("Defendant claims unfair surprise at trial because the government did not disclose to defense counsel its intention to call Sletten" until after the start of trial; conviction affirmed when "the government did advise defense counsel in this regard shortly after government counsel became aware that the witness could testify."); *Smith*, 496 F.2d at 190 (copies of checks in violation of a pre-trial order admissible even though they were given to the defense only "as the trial opened").

The majority doesn't conclude that the State's evidence was insufficient to support Bubak's conviction; it expressly agrees that the evidence was entirely sufficient to prove Bubak guilty.

In his brief, Bubak asserts a violation of NRS 174.234 and characterizes Detective Holman's testimony as expert testimony that should have been fully disclosed and described before trial; but the majority doesn't adopt this argument, and it wouldn't require a mistrial anyway. *See Mortenson v. State*, 115 Nev. 273, 986 P.2d 1105 (1999) (affirming denial of mistrial even though prosecutor failed to provide copy

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[10]The majority cites a civil case, *Land Baron Inv. Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. ___, 356 P.3d 511 (2015), but that case involved an appeal from a civil trial in which evidence was disclosed in violation of deadlines firmly imposed by the Nevada Rules of Civil Procedure, which do not apply to criminal cases.

of expert's report prior to his testimony). And in any event, it wouldn't apply to the thumbnail photo itself, which is physical evidence.

The majority comments disapprovingly that the State "changed its theory of the case" during trial. But the majority doesn't seem to conclude that any law required the State (or the defense, for that matter) to disclose its trial "theory" to the other side prior to trial, or to stick to the same theory throughout trial regardless of what happens. *See Atisha*, 804 F.2d at 924 (prosecutor is not required to "disclose evidentiary details or 'to explain the legal theories upon which it intends to rely at trial'") (quoting *United States v. Gabriel*, 715 F.2d 1447, 1449 (10th Cir. 1983)); *United States v. Burgin*, 621 F.2d 1352, 1359 (5th Cir. 1980) (prosecutor not required to provide "detailed exposition of its evidence or to explain the legal theories upon which it intends to rely at trial.").

Finally, the majority doesn't conclude that the State acted in bad faith; even Bubak conceded that the State acted in good faith and notified him of the thumbnail evidence immediately upon discovering it.

Summing this all up, the majority concludes that the State committed no legal error whatsoever before Bubak requested a mistrial. There was no rule, regulation, statute, or constitutional provision that the district court clearly misapplied that should have made a mistrial obligatory rather than discretionary.[11] That should end the matter, and

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[11]The majority cites to *Zessman v. State*, 94 Nev. 28, 573 P.2d 1174 (1978) for the overly broad proposition that a continuance must be granted where prejudice has accrued. But *Zessman* was based upon a violation of a clear statute: the State deprived Zessman of his right to be informed of the charges against him by amending the Information in violation of NRS 173.095, and the amendment prejudiced Zessman in violation of NRS 173.095(1) (which expressly states that the amendment should not be
continued on next page...

there should be nothing left for us to do but to articulate the final conclusion that no "clear abuse of discretion" occurred.

VI.

As for the "bad act" evidence (the folder names), the majority concludes that the district court erred in failing to conduct a *Petrocelli* hearing. *See Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985) (providing that the district court must hold a hearing when the State seeks to admit prior bad act evidence). But failing to conduct a *Petrocelli* hearing isn't by itself reversible error; reversible error only occurs if "bad acts" evidence was improperly admitted at trial whether a pre-trial hearing was conducted or not. *See Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006) ("[T]he failure to hold a proper hearing below and make the necessary findings will not mandate reversal on appeal if (1) the record is sufficient for this court to determine that the evidence is admissible under the test for admissibility of prior bad act evidence . . .; or (2) where the result would have been the same if the trial court had not admitted the evidence." (internal quotation marks omitted)); *see also Qualls v. State*, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998) (rejecting that reversal is required when the trial court does not conduct a *Petrocelli* hearing prior to admitting evidence of prior bad acts).

The majority does not conclude that the "bad act" evidence should not have been admitted, and in any event the district court's admission of the evidence is entitled to considerable deference. *See Diomampo v. State*, 124 Nev. 414, 429-30, 185 P.3d 1031, 1041 (2008)

...continued

permitted if it prejudices the defendant's substantial rights). No such statutory or constitutional violation occurred here.

("'[t]he trial court's determination to admit or exclude evidence of prior bad acts is a decision within its discretionary authority and is to be given great deference'") (quoting *Braunstein v. State*, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002)); *Rhymes v. State*, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005) (reversal for admission of prior bad acts warranted only upon "a showing that the decision is manifestly incorrect."). On appeal, we reverse only errors that tainted the verdict, not mere procedural irregularities that had no effect on the outcome of the trial.

VII.

In the end, my problem with the majority order can be stated thusly: I don't know what principle of law the majority applies to reach its conclusion.

There's a famous story involving two of our greatest jurists, Learned Hand and Oliver Wendell Holmes, having lunch together, during which Judge Hand urged Justice Holmes to: "Do justice, sir, do justice!" Holmes replied: "That is not my job. It is my job to apply the law." *See* Michael Herz, *"Do Justice!": Variations of a Thrice-Told Tale*, 82 VA. L. REV. 111 (1996).

Holmes' point was subtle but simple: unless one sits on a court of pure equity (like an old-fashioned colonial court of chancery), it's not the judge's job to substitute his or her personal conception of how things ought to be in place of faithfully and consistently applying the law to the facts at hand, even if doing so sometimes leads to results that the judge might not personally like.

Courts of pure equity don't exist in Nevada. *See* Nev. Const. Art. VI. Thus, anything and everything this court does in a criminal (as opposed to common-law) case must stem from law, meaning the neutral

application of neutrally-derived principles to the facts determined below. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (explaining that judicial decisions must, when possible, rest upon reasoning and analysis which transcend the immediate result so that non-parties can know whether the holding extends to them); *see also United States v. Fidelity and Deposit Co.*, 895 F.2d 546, 554 (9th Cir. 1990) ("When crafting rules of law, appellate courts must attend to the very real problems of applying those rules in the crucible of litigation.") (Kozinski, J., dissenting).

Under the doctrine of *stare decisis*, appellate courts should not make rulings whose reasoning applies only to a single case and no other. *See Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring) (doctrine of *stare decisis* "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process") (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); *Vasquez v. Hillery*, 474 U.S. 254, 265 (1986) (following general rules of law is "the means by which we ensure that the law will not merely change erratically, but will develop in a principled and intelligible fashion.").

Resolving criminal appeals on a case-by-case basis without neutrally applying neutral rules of law risks reducing this court into a "naked power organ" that just does what it pleases, when it pleases, and how it pleases, without any controlling or restraining principle; when in fact quite the opposite should be true and the ideals of stability, consistency, and predictability ought to sometimes trump the individual outcome of any particular appeal. *See* Richard A. Posner, *The Problems of*

Jurisprudence, Chapter 1: Law as Logic, Rules, and Science, pp. 51 (Harvard 1990) ("Law . . . is concerned not only with getting the result right but also with stability, to which it will frequently sacrifice substantive justice."); *Dickerson v. U.S.*, 530 U.S. 428, 444-55 (2000) (Scalia, J., dissenting) (judicial decisions should not be "an unconnected series of judgments that produce either favored or disfavored results"; rather, consistently applying rules that "make sense" is "the only thing that prevents this Court from being some sort of nine-headed Caesar, giving thumbs-up or thumbs-down to whatever outcome, case by case, suits or offends its collective fancy").

At a practical level, everything we write will be analyzed by district judges, attorneys, and litigants for guidance in future cases with similar, but not identical, facts. Prosecutors and defense counsel will want to know when to make objections and they'll construct arguments around what we write, and district judges will want to know which arguments they ought to accept in deciding how to rule on those objections; all will want to know when and why we'll either affirm or reverse what they do. It therefore becomes incumbent upon us to explain our reasoning fully and completely, and to clearly identify the neutral rule of law that we're applying to dispose of this case or any other, whether the rule is one previously settled or one we create anew.

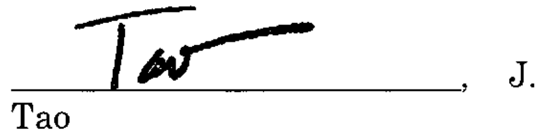
> "[C]ases come in all shapes and varieties, and it is not always clear whether a precedent applies to a situation in which some of the facts are different from those in the decided case. Here lower courts must necessarily make judgments as to how far beyond its particular facts the higher court precedent extends."

Hubbard v. U.S., 514 U.S. 695, 720 (Rehnquist, J., dissenting).

If the facts of this case don't fit the established legal definition of "clear abuse of discretion," then we shouldn't say it does, or else we're misapplying the law ourselves to reach a conclusion not warranted by precedent simply because we think it somehow fair or equitable to do so. Similarly, if we're going to deviate from, or try to distinguish, twenty years of precedent of the Nevada Supreme Court, then we'd better be able to explain pretty clearly why we're doing that as well.

VIII.

Precisely because the majority isn't clear about what principle of law it's applying, I cannot join its reasoning or result. Instead, I would resolve this case on the following settled principle: the disclosure of the thumbnail evidence violated no recognized rule, regulation, statute, or constitutional provision, and caused no undue prejudice to Bubak, and consequently the district court had the power to grant a continuance or mistrial, but was not required to. It therefore acted within the broad range of its discretion when it chose to deny Bubak's motion for a continuance or mistrial, and reversal on appeal is not warranted.



______________________, J.
Tao

cc: Hon. Susan Johnson, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk