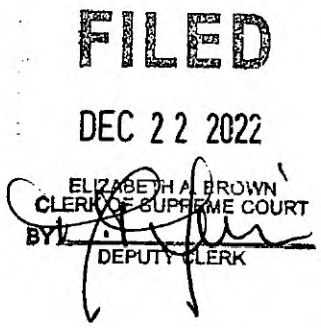
IN THE SUPREME COURT OF THE STATE OF NEVADA

DONALD DIBBLE; AND ADOLFO OROZCO-GARCIA,
Appellants,
vs.
THE JUSTICE COURT OF LAS VEGAS TOWNSHIP IN AND FOR THE COUNTY OF CLARK; THE HONORABLE JUSTICE OF THE PEACE, ANN E. ZIMMERMAN; AND THE STATE OF NEVADA,
Respondents.

No. 83058



ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for a writ of mandamus or review challenging a contempt order arising from a preliminary hearing in a criminal matter. Eighth Judicial District Court, Clark County; Bita Yeager, Judge.

Appellant Donald Dibble is an investigator employed by the law firm representing appellant Adolfo Orozco-Garcia in the underlying criminal case. During a pre-charge meeting with the Clark County District Attorney's Office (CCDA), counsel for Orozco-Garcia submitted an investigative report from Dibble that included statements from Orozco-Garcia's co-defendant, Melinda Mier.[1] Neither Mier nor any attorney on her behalf were part of the Orozco-Garcia meeting with the CCDA. At the time of the pre-charge meeting with the CCDA, Mier had not been charged and was only a potential witness. Subsequently, both Orozco-Garcia and Mier were charged and a preliminary hearing as to both was held in the Las

[1] We do not recount the facts except as necessary to our disposition.

22-40264

Vegas Justice Court. The State initially sought to exclude Dibble from the courtroom under the exclusionary rule because they expected to call him as a witness. Orozco-Garcia's counsel objected but stated, "I have no problem if they want to put [Dibble] on the stand and ask him about that [Mier] statement." The State's request was denied by the court and Dibble was allowed to stay in the courtroom. Thereafter, as part of the State's case against Mier, Dibble was called by the State to testify about the statements Mier had made to him. Orozco-Garcia's counsel objected to Dibble being called as a witness. The court ultimately overruled the objection but Dibble refused to testify, asserting the privilege under NRS 48.105, and the justice court found him in contempt. Appellants, joined by Mier, petitioned the district court for judicial review, asserting that NRS 48.125 and NRS 48.105's privileges applied and, additionally, that ordering Dibble to testify violated Orozco-Garcia's right to choose his counsel, since the law firm Dibble works for would be conflicted out pursuant to NRPC 3.7. The district court denied the petition and upheld the contempt order. This appeal followed.[2] We affirm.

NRS 48.125 and NRS 48.105 do not protect statements outside of pre-charge plea negotiations or settlement discussions

The district court's decision to grant or deny a writ petition is reviewed for an abuse of discretion, but when the writ petition raises questions of statutory interpretation, the review is de novo. *Reno Newspapers, Inc. v. Haley*, 126 Nev. 211, 214, 234 P.3d 922, 924 (2010). "In interpreting a statute, we begin with the text of the statute to determine its plain meaning and apply clear and unambiguous language as written." *Locker v. State*, 138 Nev. Adv. Op. 62, 516 P.3d 149, 152 (2022) (internal

[2]Mier did not join the appeal.

quotation marks omitted). Based on its plain language, NRS 48.125 "prohibits the prosecution from making any use of statements *made by an accused*, either during plea negotiations or while entering a plea of guilty, at a later trial on the same charges." *Mann v. State*, 96 Nev. 62, 66, 605 P.2d 209, 211 (1980) (emphasis added). NRS 48.105(1) prohibits evidence of conduct or statements made during compromise negotiations to be used to prove liability for or invalidity of a claim, but NRS 48.105(2) "qualifies the reach of NRS 48.105(1) by providing that the introduction of evidence is not prohibited if offered for another purpose." *Davis v. Beling*, 128 Nev. 301, 312, 278 P.3d 501, 509 (2012) (internal quotation marks omitted).

Nothing in the statutes extends the protections and privileges in NRS 48.125 or NRS 48.105 to statements made outside of plea negotiations or made by individuals other than the accused or the accused's attorneys in criminal proceedings. *See generally McKenna v. State*, 101 Nev. 338, 344-45, 705 P.2d 614, 618-19 (1985) (recognizing that under NRS 48.125, a defendant's nonverbal response was not privileged because detectives specifically stated they lacked authority to make deals, so the conversation was not a plea negotiation), *overruled on other grounds by Nunnery v. State*, 127 Nev. 749, 776-77, 263 P.3d 235, 253-54 (2011); *see also Laman v. Nev. Real Estate Advisory Comm'n*, 95 Nev. 50, 58, 589 P.2d 166, 171 (1979) (recognizing that under NRS 48.105(2), an appellant's written statement submitted to an investigator was an unqualified assertion of facts and admissible as such, despite a desire to achieve an "expeditious and less harsh resolution"). Therefore, those protections do not extend to all evidence simply because the evidence was provided during an offer to compromise or during a plea negotiation meeting; rather, they only extend to evidence which falls within the statutory bounds.

Thus, the district court did not abuse its discretion in denying the writ petition. The State is calling Dibble to testify about statements he obtained from Mier as part of the State's presentation of evidence against Mier. Mier was not involved in the Orozco-Garcia pre-charge meeting, nor had she been charged at that time. Thus, Mier's statement to Dibble was not "evidence of a plea of guilty" as she had no "expectation of negotiating a plea at the time of discussion" and she was not "an accused" when she made the statement. Neither NRS 48.125 nor NRS 48.105 prohibit Dibble's testimony on Mier's statement to him because her statement was not part of any Orozco-Garcia plea negotiations or a statement made as an effort to compromise.

Testimony from a defendant's investigator on a co-defendant's statement, when the co-defendant is represented by separate counsel, does not violate a defendant's right to choice of counsel

"The Sixth Amendment right to counsel encompasses . . . the right of a non-indigent defendant to be represented by the counsel of his or her choice." *See Patterson v. State*, 129 Nev. 168, 175, 298 P.3d 433, 438 (2013). This right, however, is not absolute and is balanced against the need for fairness. *Id.* RPC 3.7(a) prohibits a lawyer from acting "as advocate at a trial in which the lawyer is likely to be a necessary witness," unless an exception applies.

Appellants' disqualification-of-counsel argument has no merit as Dibble being called as a witness does not disqualify Orozco-Garcia's counsel. Dibble's testimony regarding Mier's statement is in the State's case against Mier, who is not part of Orozco-Garcia's defense team. Investigators are part of a defendant's defense team but are permitted to testify as potential witnesses on certain matters so long as those matters are not privileged. *See e.g., Haynes v. State*, 103 Nev. 309, 317-18, 739 P.2d 497, 502-03 (1987) (determining that non-incriminatory statements by

defendant's retained psychiatrist were admissible when the State called the psychiatrist as a rebuttal witness). As determined above, Mier's statement to Dibble is not privileged. Further, the statement is not a confession, and there has also been no showing that such statements would implicate Orozco-Garcia and potentially raise co-defendant testimony issues or, by proxy, any right to counsel concerns. *See generally Bruton v. United States*, 391 U.S. 123 (1968). Accordingly, we

ORDER the judgment of the district court AFFIRMED.[3]

_____, C.J.
Parraguirre

_____, J.
Hardesty

_____, J.
Stiglich

_____, J.
Cadish

_____, J.
Pickering

_____, J.
Herndon

cc: Hon. Bita Yeager, District Judge
Michael H. Singer, Settlement Judge
Flynn Giudici, PLLC
Clark Hill PLC
Christiansen Trial Lawyers
Clark County District Attorney
Eighth District Court Clerk

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[3]The Honorable Abbi Silver having retired, this matter was decided by a six-justice court.