IN THE SUPREME COURT OF THE STATE OF NEVADA

CRISTIAN ALEJANDRO GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87849

FILED

APR 30 2025

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of driving under the influence of intoxicating liquor with a prior felony DUI conviction. Eleventh Judicial District Court, Lander County; Jim C. Shirley, Judge.

On May 6, 2023, dispatch in Lander County received multiple calls about a reckless driver on the road. Nevada Highway Patrol Trooper Church saw a vehicle fitting the description driving 94 mph on Interstate 80 and initiated a stop. The body camera video shows that the driver of the vehicle, appellant Christian Gonzales, turned off the vehicle and threw his keys on the ground at 4:52 p.m. Trooper Church brought Gonzales to Lander County Jail and conducted three field sobriety tests, which Gonzales failed. At 6:52 p.m., Trooper Church conducted a blood draw from Gonzales showing a blood alcohol content (BAC) of 0.182.

Gonzales was charged with driving under the influence of intoxicating liquor with a prior felony DUI conviction. He was convicted by a jury and sentenced to 4-10 years in prison. Gonzales now appeals, arguing the district court (1) erred in seating an alternate juror who worked as a deputy court clerk and was familiar with the case, and (2) abused its discretion in admitting the results of the blood test. He further argues

cumulative error requires reversal of his conviction. We address each argument in turn.

Reversal is not warranted for the district court's failure to excuse the deputy court clerk

During voir dire, one of the potential jurors disclosed that she was employed as a deputy court clerk for the district court at which the trial was being held (the clerk). She stated that she was familiar with Gonzales' case because she handled filings in his case. Her job required her to go through the documents from justice court and check for clerical errors before filing them in district court. Many of the documents in Gonzales' case, which the clerk presumably reviewed, referenced a prior felony DUI conviction. The clerk was seated as an alternate juror but did not deliberate with the jury.

Gonzales' counsel did not ask the district court to strike the potential juror for cause. Therefore, we analyze whether the district court's failure to sua sponte excuse the clerk amounted to plain error. *See Nelson v. State*, 123 Nev. 534, 543, 170 P.3d 517, 524 (2007) (reviewing for plain error the district court's failure to sua sponte excuse a veniremember). "To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record." *Id.* (quoting *Garner v. State*, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000)). But for this court to grant relief, the error must have "affected [the appellant's] substantial rights." *Id.*

"The test for determining if a veniremember should be removed for cause is whether a veniremember's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Id.* at 543-44, 170 P.3d at 524 (internal quotation marks omitted). "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that [he] acted in

conformity therewith." NRS 48.045(2). With respect to a second felony DUI—which requires a previous felony DUI conviction—NRS 484C.410(2) specifically states that the previous conviction must be alleged in the compliant, but "must not be read to the jury or proved at trial." This court has held that it is "[u]nquestionably . . . error" for a district court to admit any reference to a prior DUI conviction during the trial phase. *Koenig v. State*, 99 Nev. 780, 784, 672 P.2d 37, 40 (1983).

With these standards in mind, Gonzales asserts that it was error for the district court to seat the clerk as an alternate juror because she likely had seen references to Gonzales' previous felony DUI conviction in her review of the filings. We agree with Gonzales that there was a high likelihood that the clerk had seen references to the prior conviction and that, therefore, she might impermissibly infer that Gonzales acted in conformity with that criminal propensity in this instance, thereby "prevent[ing] or substantially impair[ing] the performance of [her] duties as a juror." *Nelson*, 123 Nev. at 543-44, 170 P.3d at 524 (internal quotation marks omitted). Therefore, the district court plainly erred in failing to excuse the clerk.

We conclude, however, that reversal is not warranted on this basis as the error did not affect Gonzales' substantial rights. In *Dixon v. State*, we held that a district court erred in failing to sustain a *Batson* objection during its selection of alternate jurors. 137 Nev. 217, 223, 485 P.3d 1254, 1259 (2021); *see Batson v. Kentucky*, 476 U.S. 79 (1986). Nonetheless, we found that "[t]he error had no effect on the outcome of [appellant's] trial and was therefore harmless because no alternate deliberated with the jury." *Dixon*, 137 Nev. at 223, 485 P.3d at 1259. We reach the same conclusion here. As previously noted, the deputy clerk did

not participate in deliberations. The jury was instructed to "not discuss the case amongst [them]selves or allow anyone to speak of it in [their] presence." Gonzales has provided no indication that this instruction was violated. Because Gonzales cannot demonstrate that the error had any effect on the outcome of the trial, reversal of the verdict is not warranted on this basis.

The district court erred in admitting the blood test results, but the error was harmless

Gonzales filed a motion in limine seeking to exclude the results of his blood sample, which the district court denied. "The admission or exclusion of evidence rests within the district court's sound discretion." *State v. Eighth Jud. Dist. Ct. (Armstrong)*, 127 Nev. 927, 931, 267 P.3d 777, 780 (2011). NRS 484C.110 provides three theories through which the State may prove a DUI, stating:

> 1. It is unlawful for any person who:
>
> (a) Is under the influence of intoxicating liquor;
>
> (b) Has a concentration of alcohol of 0.08 or more in his or her blood or breath; or
>
> (c) Is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have a concentration of alcohol of 0.08 or more in his or her blood or breath,
>
> to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

The district court here found that Gonzales' blood sample was taken at two hours and 20 or 30 seconds after he turned off his vehicle, and it showed a BAC of 0.182. Gonzales argues that because his blood sample was taken outside of the two-hour window, it was inadmissible for purposes of proving a violation of NRS 484C.110(1)(c) and would be unfairly

prejudicial for purposes of proving a violation under NRS 484C.110(1)(a) or (b). We agree. NRS 484C.110(c) requires that a blood sample be taken "within 2 hours" to prove the elements of a DUI. Here, though the toxicologist who tested Gonzales' sample—Sherry Baughman—testified that a mere 20 or 30 seconds would have made no difference in the test results, the test was not taken "within 2 hours." Therefore, we conclude the test was inadmissible under NRS 484C.110(c).

In *Armstrong*, we affirmed a district court's decision to exclude the results of a single blood sample taken two hours and 31 minutes after the stop on the grounds that there were insufficient indicia that a reliable retrograde extrapolation calculation could be made to show that the defendant was intoxicated while driving. 127 Nev. at 936-37, 267 P.3d at 783. However, we stated that there may be circumstances in which a single blood sample taken beyond two hours is reliable and admissible to prove the elements of a DUI under NRS 484C.110(1)(a) or (b). *Id.* at 937, 267 P.3d at 784. We listed 15 relevant factors for determining whether such a blood sample would be sufficiently reliable to perform a retrograde extrapolation. *Id.* at 936, 267 P.3d at 783. Here, Baughman testified that she could only provide answers to three or four of the relevant factors. She further testified that based on the single blood sample, she would have no way of knowing what Gonzales' blood alcohol content was at the time of driving two hours prior. Therefore, we are not satisfied that the sample was sufficiently reliable to overcome the prejudicial effect of the test results for purposes of proving a DUI under NRS 484C.110(1)(a) or (b). Accordingly, we conclude the district court abused its discretion by admitting the results.

"An error is harmless," however, "if this court can determine, beyond a reasonable doubt, that the error did not contribute to the

defendant's conviction." *Patterson v State*, 129 Nev. 168, 178, 298 P.3d 433, 440 (2013). "[E]ven when retrograde extrapolation evidence is not admissible, other evidence may establish that a defendant was driving under the influence." *Armstrong*, 127 Nev. at 937, 267 P.3d at 784. Under NRS 484C.110(1)(a), the State was only required to prove that Gonzales was operating a vehicle while under the influence of intoxicating liquor. The State provided witness testimony that Gonzales was driving erratically and video evidence showing Gonzales swerving into the shoulder of the highway. Trooper Church testified that he smelled alcohol on Gonzales' breath and that Gonzales showed signs of intoxication, including bloodshot, glassy eyes. Video evidence showed Gonzales telling Trooper Church that he drank alcohol on the day in question. The jury also heard testimony and saw video footage of three field sobriety tests given to Gonzales—including a horizontal gaze nystagmus test, a walk and turn test, and a one-leg stand test—all three of which he failed. We conclude this evidence was sufficient to prove beyond a reasonable doubt that Gonzales was operating a vehicle while intoxicated under NRS 484C.110(1)(a). *See Gordon v. State*, 121 Nev. 504, 511, 117 P.3d 214, 219 (2005) ("Because there was substantial evidence to sustain any one of the three legally sufficient theories of DUI upon which the jury's general guilty verdict rested, we conclude that [defendant]'s conviction may stand.").[1] Accordingly, the district court's error was harmless.

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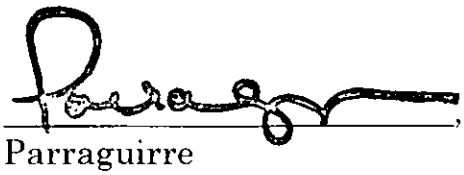
[1]Gonzales also argues Trooper Church was grossly negligent or acted in bad faith by failing to collect the blood sample within 2 hours. But the evidence shows that Trooper Church believed he took the sample within the 2-hour time limit because he was counting minutes, not seconds. This amounts to mere negligence for which no sanctions are appropriate, and the negligence was immaterial because of the substantial evidence supporting

Cumulative error

Gonzales argues that if neither of the two alleged errors is reversible alone, the cumulative effect of the errors requires reversal. *See Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985). Here, although the district court committed two errors, neither error affected Gonzales' substantial rights, and their cumulative effect did not deprive him of a fair trial. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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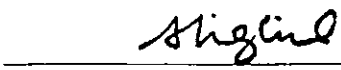

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cc: Hon. Jim C. Shirley, District Judge
Nevada State Public Defender's Office
Attorney General/Carson City
Lander County District Attorney
Clerk of the Court/Court Administrator

Gonzales' conviction under NRS 484C.110(1)(a). *See Gordon*, 121 Nev. at 510-11, 117 P.3d at 218-19.