

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD CHARLES MARTIN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39557 FILED

OCT 15 2002

LETITIA W. BLOOM
CLERK OF THE SUPREME COURT
BY: [Signature]

ORDER AFFIRMING IN PART AND REMANDING IN PART TO
CORRECT JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of driving under the influence of an intoxicating liquor or controlled or prohibited substance, a category B felony. The district court sentenced appellant Richard Charles Martin to serve a prison term of 12-30 months, and ordered him to pay a fine of \$2,000.00.

Martin contends the district court erred in not granting his motion for a mistrial after the prosecution committed misconduct during its closing argument. More specifically, when the State described Martin's offense as a felony, it violated an order of the district court prohibiting such a reference. While we conclude that the prosecutor's use of the word "felony" was improper, the error was harmless, and therefore the district court did not abuse its discretion in denying Martin's motion for a mistrial.¹

"Denial of a motion for a mistrial is within the sound discretion of the district court, and that ruling will not be reversed absent

¹See Ross v. State, 106 Nev. 924, 928, 803 P.2d 1104, 1106 (1990); see also NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

a clear showing of abuse of discretion.”² In the instant case, even though the prosecutor committed misconduct, we conclude that it was harmless in light of the overwhelming evidence of Martin’s guilt.³ The arresting police officer testified at trial that he observed Martin driving erratically, and that Martin drove through a stop sign. After initiating a traffic stop, the officer testified that he smelled the odor of alcohol on Martin, and that when asked, Martin answered with slurred speech that he had consumed approximately ten beers prior to driving. Martin, as well, testified at trial that he had consumed approximately ten beers. Martin failed several field sobriety tests, and when he was later taken into custody and given a standard breath test at the police station, Martin’s blood alcohol content registered .215. Therefore, we conclude that Martin was not entitled to the relief requested.

Our review of the judgment of conviction, however, reveals a clerical error. The judgment of conviction states that Martin was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. Therefore, we conclude that this matter must be remanded to the district court for the limited purpose of entering a corrected judgment of conviction. Accordingly, we


²McKenna v. State, 114 Nev. 1044, 1055, 968 P.2d 739, 746 (1998).

³See King v. State, 116 Nev. 349, 356, 998 P.2d 1172, 1176 (2000) (holding where evidence of guilt is overwhelming, even aggravated prosecutorial misconduct may constitute harmless error); Skiba v. State, 114 Nev. 612, 614-15, 959 P.2d 959, 960-61 (1998) (although prosecutorial comment was violative, it was not reversible because there was overwhelming evidence of defendant’s guilt); Rippo v. State, 113 Nev. 1239, 1254, 946 P.2d 1017, 1026 (1997) (prosecutorial error was harmless in light of the overwhelming evidence of guilt supporting the conviction).

ORDER the judgment of conviction AFFIRMED AND
REMAND this matter to the district court for the limited purpose of
correcting the judgment of conviction as directed above.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. John P. Davis, District Judge
Nye County Public Defender/Gensler Earnest
Attorney General/Carson City
Nye County District Attorney/Tonopah
Nye County Clerk