

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAVIER BRUNO MICHEL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40466

**FILED**

DEC 08 2003

ORDER OF AFFIRMANCE

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

Javier Michel appeals his felony conviction for driving under the influence (DUI). Police arrested Michel for driving while intoxicated with his good friend, Anthony McGuire. A jury convicted Michel of a DUI after a two-day trial. The district court enhanced the conviction to a felony DUI because Michel had two prior DUI convictions in the past seven years. The court sentenced Michel to thirty-six months with a minimum parole eligibility after twelve months.

On appeal, Michel claims the district court erred by enhancing his conviction to a felony DUI. He also argues the district court abused its discretion by (1) not allowing McGuire's prior DUI conviction into evidence to show bias, (2) not allowing Kesha Baca's testimony into evidence to show his habit was to abstain from driving while he had a suspended driver's license, and (3) instructing the jury on consciousness of guilt. We conclude Michel's claims are meritless.

FACTUAL SUMMARY

On the day of the incident, Baca drove Michel, her husband, and their son from Reno to Carson City. The purpose of their trip was to observe McGuire's brother graduate from the police academy. After the graduation, McGuire and Michel went to Red's Bar and Grill in Carson City to celebrate with a large group. Baca and her son went to her parent's home. While at Red's, Michel and McGuire ate and drank beer.

After a couple hours, Baca returned to the bar to take Michel home. McGuire approached and told Michel, "Don't worry, dude. I'll take you home." Kesha left the bar without Michel.

After leaving Red's, McGuire drove Michel to the Carson Nugget in his van. McGuire claims he ordered food, but could not eat because he felt ill from consuming alcohol. He claims he returned to the van and passed out.

At 2 a.m., McGuire's van was seen traveling northbound on Interstate 395 in an erratic manner. A motorist and his wife witnessed the van's erratic behavior and contacted the Nevada Highway Patrol (NHP). They followed the van until an officer could locate it.

When NHP Officer Joseph McKay located the van, he activated his lights and siren. The van did not stop immediately, but began traveling on the road's shoulder at thirty-five miles per hour. When the van finally stopped, Officer McKay rapidly approached the van. He did not observe anyone sitting in the driver or passenger seat. When he looked into the van, he saw two people lying on a small bed in the rear. McGuire was lying on the driver's side with a blanket wrapped around him. Michel was lying on the passenger's side face down on top of blankets.

When Officer McKay stopped the van, Officer Graham Hunter assisted him in performing an investigation. Officer Hunter opened the van's rear passenger door and told Michel to exit the vehicle. Michel responded, "Why, I wasn't driving?" A strong alcohol odor emanated from the van. Michel was pale and his eyes were red. He appeared to be wide awake. Michel said, "My uncle works for internal affairs." Michel then

yelled to McGuire, "Tell them you were driving." He also told the officers, "Please don't arrest me."

After Michel and McGuire exited the van, Officer Hunter entered the van to determine who was driving. In concluding Michel was the driver, Officer Hunter considered several factors including the relative size of McGuire and Michel and their positioning in the van. Sometime after Michel's arrest, McGuire contacted him. During their conversation, Michel asked McGuire "to tell the cops that [he] was driving because [he] never took a Breathalyzer."

A jury convicted Michel of committing a DUI. The district court enhanced Michel's conviction to a felony DUI because he had two prior DUI convictions which occurred within the past seven years. This appeal follows.

## DISCUSSION

### DUI enhancement

Michel claims the district court erred by considering both his prior DUI convictions for enhancement purposes. His second conviction was pleaded as a first offense DUI. He argues that when he pleaded guilty to the subsequent DUI, "he wasn't told that it could be used to enhance a future conviction to a felony rather than a second offense."

We review a question of law de novo.<sup>1</sup> A person convicted of a third or subsequent DUI offense within seven years is guilty of a category B felony.<sup>2</sup> We have held that any two prior DUI offenses can be used for enhancement "so long as they occurred within 7 years of the principal

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<sup>1</sup>Paige v. State, 116 Nev. 206, 208, 995 P.2d 1020, 1021 (2000).

<sup>2</sup>NRS 484.3792(1)(c).

offense and are evidenced by a conviction."<sup>3</sup> There is a limited exception to this rule. A second offense obtained pursuant to a guilty plea agreement "specifically permitting the defendant to enter a plea of guilty to first offense DUI and limiting the use of the conviction for enhancement purposes"<sup>4</sup> may not be used to enhance a subsequent DUI conviction. The reasoning behind this exception is to uphold "the integrity of plea bargains and the reasonable expectations of the parties relating thereto."<sup>5</sup> This exception does not apply where the use of a prior conviction for enhancement purposes is not limited.<sup>6</sup>

We conclude the district court did not err by enhancing Michel's third offense to a felony DUI. Michel's second DUI occurred in Douglas County. During Michel's prosecution for the second DUI, the State sought confirmation of his first DUI offense from Washoe County. Although the prosecutor ordered evidence of the prior conviction, it had not arrived by Michel's hearing date. As such, Michel's defense attorney argued that without an official record, he could only assume Michel did not have a prior DUI conviction.

The prosecutor involved with Michel's second DUI said she never negotiated with Michel to limit his conviction for future enhancement purposes. When Michel pleaded guilty to the DUI, the district court also informed Michel that the conviction could be used

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<sup>3</sup>Speer v. State, 116 Nev. 677, 679-80, 5 P.3d 1063, 1064 (2000).

<sup>4</sup>Id. at 680, 5 P.3d at 1065 (emphasis added).

<sup>5</sup>Id.

<sup>6</sup>Id.

against him in the future. It is irrelevant that Michel was not specifically told the conviction could be used to enhance a third conviction to a felony DUI.

McGuire's prior conviction

Michel argues McGuire had a motive to lie about who was driving on the night of the incident. McGuire had a prior DUI conviction and wanted to avoid prosecution for a second DUI offense. By not allowing him to admit McGuire's prior DUI conviction to show bias, Michel asserts the district court abused its discretion.

The district court's decision to admit or exclude evidence will not be disturbed absent an abuse of discretion.<sup>7</sup> "[W]ithin the limits of the exercise of sound discretion a cross-examiner must be permitted to elicit any facts which show bias, interest or similar feelings which may color the witness[']s testimony."<sup>8</sup> The cross-examiner may attack the witness's credibility by showing he has a prior felony conviction.<sup>9</sup> However, evidence of mere arrests or misdemeanor convictions "may not ordinarily be admitted even for the limited purpose of attacking a witness's credibility."<sup>10</sup>

McGuire's conviction was a misdemeanor and not a felony, statutorily barring Michel from introducing the conviction to attack

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<sup>7</sup>Honeycutt v. State, 119 Nev. \_\_\_, \_\_\_ n.17, 56 P.3d 362, 368 n.17 (2002).

<sup>8</sup>Azbill v. State, 88 Nev. 240, 246-47, 495 P.2d 1064, 1068 (1972).

<sup>9</sup>Id. at 247, 495 P.2d at 1068; see NRS 50.095(1).

<sup>10</sup>Sheriff v. Hawkins, 104 Nev. 70, 75, 752 P.2d 769, 773 (1988); see NRS 50.095(1).

McGuire's credibility.<sup>11</sup> The district court, therefore, did not abuse its discretion by refusing to allow Michel to introduce the misdemeanor conviction.

Evidence of habit

Michel argues Baca should have been allowed to testify that she had driven him wherever he needed to go for the past six months while his driver's license was suspended. Michel asserts this shows his habit was not to drive with a suspended driver's license. In excluding the testimony, Michel claims the district court applied the wrong law and precluded him from presenting his theory of the case.

A district court's decision to admit or exclude evidence will not be disturbed absent an abuse of discretion.<sup>12</sup> NRS 48.059(1) states that evidence of a person's habit "whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity" therewith. Habit "may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine."<sup>13</sup>

When arrested, Michel had a suspended driver's license resulting from his prior DUI convictions. As a result, Baca said she had driven Michel everywhere for the past six months. Michel asserts this is admissible evidence of habit to show he abstained from driving with a suspended license. We disagree. This is not proper evidence of habit.

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<sup>11</sup>See NRS 50.095(1).

<sup>12</sup>Honeycutt, 119 Nev. at \_\_\_ n.17, 56 P.3d at 368 n.17.

<sup>13</sup>NRS 48.059(2).

Baca's testimony is also not indicative of whether Michel abstained from driving when he was drinking with friends outside her presence. We conclude the district court did not abuse its discretion in excluding Baca's testimony.

Michel's remaining arguments are without merit. The district court did not rely on Rembert v. State.<sup>14</sup> The district court also did not base its decision solely on the fact that Michel had two prior DUI convictions. Rather, the district court decided not to admit Baca's testimony as evidence of habit after listening to the parties' arguments. The district court then stated that it would not admit evidence of habit "especially in light of the fact" Michel had two prior DUI convictions involving alcohol.

#### Consciousness of guilt instruction

Michel argues the consciousness of guilt instruction essentially told the jury he was the true driver and that he asked McGuire to lie about who was driving when the incident occurred. Whereas, Michel claims his reason for asking McGuire to admit to driving was consistent with innocent behavior. He pleaded with McGuire to tell the truth.

We review a district court's decision to give a particular instruction for an abuse of discretion.<sup>15</sup> An abuse of discretion occurs if

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<sup>14</sup>104 Nev. 680, 683, 766 P.2d 890, 892 (1988).

<sup>15</sup>See Howard v. State, 102 Nev. 572, 578, 729 P.2d 1341, 1345 (1986); see also Quillen v. State, 112 Nev. 1369, 1381, 929 P.2d 893, 901 (1996).

the trial court's decision is arbitrary and capricious or exceeds the bounds of law or reason.<sup>16</sup>

"Proof that after a crime was committed, the accused did any number of acts calculated to avoid detection, arrest, prosecution or conviction has been considered circumstantial evidence probative of a mental state called 'consciousness of guilt.'"<sup>17</sup> "Behavior indicative of a 'guilty mind' encompasses a wide range of acts."<sup>18</sup> The possibility of alternative reasons for flight does not render the inference irrational or impermissible.<sup>19</sup>

We conclude sufficient evidence existed to support at least an inference that Michel asked McGuire to tell authorities he was driving for the purpose of escaping prosecution. As police detained Michel, he yelled to McGuire, "Tell them you were driving." Michel later asked McGuire "to tell the cops that [he] was driving because [he] never took a Breathalyzer." There are only two plausible reasons Michel would have asked McGuire to claim he was driving. Michel was the true driver, but wanted to escape prosecution, or McGuire was the true driver and Michel wanted him to

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<sup>16</sup>See State Dep't Mtr. Veh. v. Root, 113 Nev. 942, 947, 944 P.2d 784, 787 (1997).

<sup>17</sup>29 Am. Jur. 2d Evidence § 316 (1994).

<sup>18</sup>Id.; see Tavares v State, 117 Nev. 725, 734, 30 P.3d 1128, 1134 (2001) (holding a "plan to flee" is relevant when the evidence shows a plan and the plan was undertaken with a consciousness of guilt).

<sup>19</sup>U.S. v. Clark, 45 F.3d 1247, 1251 (8th Cir. 1995); see Guy v. State, 108 Nev. 770, 777, 839 P.2d 578, 583 (1992) (holding that it is error to issue a flight instruction where the reasons the defendant fled from police are too numerous to attribute solely to the crime in question and each scenario is equally plausible).





admit it. Because one of the plausible theories is consistent with innocent behavior does not preclude a consciousness of guilt instruction.<sup>20</sup>


Contrary to Michel's assertions, the district court did not instruct the jury to believe Michel was driving and that his statements were made to avoid prosecution. The district court instructed the jury to decide whether Michel's statements evidenced a consciousness of guilt. If so, the jury was to decide the weight and significance to be given the statements. Based on the testimony provided, it was up to the jury to decide whether Michel's statements evidenced a consciousness of guilt and the extent that it did so.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Shearing

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Jerome Polaha, District Judge  
Washoe County Public Defender  
Attorney General Brian Sandoval/Carson City  
Washoe County District Attorney Richard A. Gammick  
Washoe District Court Clerk

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<sup>20</sup>Clark, 45 F.3d at 1251.