IN THE SUPREME COURT OF THE STATE OF NEVADA

BRANDON L. PARISH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41891

FILED

MAR 17 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, for first-degree murder by child abuse. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Samantha Storm was born on July 23, 1995. She was nearly twenty months old when she died on April 18, 1997. At the time of her death, Samantha lived with her mother, Dawn Mathiasen, and Mathiasen's parents in Henderson. Appellant Brandon Parish had recently completed Air Force boot camp and was stationed at Nellis Air Force Base in Las Vegas. Parish was assigned to a "desk job," but he aspired to become a military policeman. Parish was unhappy with his desk job assignment and began showing signs of frustration and disinterest with the military. Though underage, Parish had begun drinking frequently. Parish's demeanor and alcohol abuse detracted from his job performance. As a result, Parish had been disciplined by the Air Force and was in the process of receiving a general discharge.

Mathiasen and Parish began a relationship on March 6, 1997. On March 15, 1997, Mathiasen introduced Parish to her parents and Samantha. On Friday, March 28, 1997, Mathiasen's parents went out of town and Mathiasen invited Parish to spend the night with her. The next morning, Mathiasen went to a nail appointment and left Samantha alone

05-05213

with Parish, both of whom were still sleeping when she left the house. Mathiasen returned home to find both Samantha and Parish still asleep. Parish returned to Nellis AFB shortly thereafter. Later that morning, Mathiasen noticed a bruise in the shape of a handprint on Samantha's backside and upper thighs. Mathiasen called her neighbors to come and look at the bruising. The neighbors advised Mathiasen to take photographs of the bruises, which she did. Mathiasen did not report the incident to the police, but did question Samantha's day care about potential causes of the injury. The owner of Samantha's day care testified that she had never seen bruises on Samantha before that weekend.

Parish visited Mathiasen's home again on the evening of April 3, 1997. Mathiasen testified that Parish repeatedly entered Samantha's room after Samantha was asleep and would "rouse her up and bring her back out to play, or sometimes I had observed him in her room gently talking to her." The next morning, Samantha's left foot was swollen and deeply bruised; so swollen that Mathiasen could not put socks or shoes on her. Mathiasen attempted to leave Samantha at day care that day, but Samantha had to be picked up at lunchtime because she was in pain. The day care center suggested that Mathiasen take Samantha to the doctor. Instead, Mathiasen took Samantha to the home of Mathiasen's aunt. Mathiasen's aunt later took Samantha to a Quick Care where doctors determined that the foot was not broken. Neither Mathiasen nor her aunt called the police.

On April 9, 1997, Mathiasen took Samantha to eat a take-out dinner with Parish at Nellis AFB. Later that evening, Mathiasen left Samantha alone with Parish while Mathiasen left the base to buy cigarettes at a nearby 7-11. Mathiasen testified that Samantha was

"happy and playing" when she left, but that upon her return Samantha's demeanor had changed and Parish was acting "cranky." Mathiasen took Samantha home to put her in bed shortly after returning from the 7-11. The next morning, Samantha's day care noticed deep purple and black bruises on Samantha's temples and inside one ear. Mathiasen testified that the bruising was not apparent when she dropped Samantha off and that the bruising worsened during the half-hour she spent at the day care center.

Mathiasen then took Samantha to Nellis AFB to confront Parish about the bruises on Samantha's face. Samantha's bruises continued to worsen during that confrontation. Parish told Mathiasen that Samantha had not been injured while left alone with him, and both Parish and Mathiasen drove Samantha to the hospital. Dr. Tamara Pottker, a pediatric emergency room physician in Las Vegas, treated Samantha and determined that the bruises were caused by blunt force trauma. Dr. Pottker testified that the bruises on Samantha's face could be seen from ten feet away and, given the nature and severity of the injuries, she determined that Samantha was a victim of child abuse.

Medical staff alerted the Henderson Police Department, and Sergeant Robert Wamsley of the Henderson Police Department Detectives Bureau responded to question Mathiasen about the incident. Detective Wamsley asked Mathiasen about the injuries and whether or not Parish had been left alone with Samantha. Mathiasen lied and said that Parish had not been alone with Samantha. Parish had asked her to lie so as not to damage his reputation and ability to enter police work.

Mathiasen and Samantha then accompanied Detective Wamsley to the station where Detective Wamsley asked more questions,

took photographs of Samantha's injuries, and took Mathiasen's statement. The next day, Detective Wamsley notified Mathiasen by telephone that Samantha was not to be left alone with Parish. On April 12, 1997, Detective Wamsley again telephoned Mathiasen and told her that Samantha was to have no contact with Parish. On April 16, 1997, Mathiasen obtained Detective Wamsley's permission to take Samantha to visit Parish so long as Samantha was never left alone with him.

On the evening of April 17, 1997, Mathiasen took Samantha to visit Parish at Nellis AFB. Immediately upon their arrival, Parish told Mathiasen that he was hungry and asked Mathiasen to go to Arby's for him. Mathiasen testified that she could smell alcohol on Parish's breath and that there were several beer cans lying around his room. Nevertheless, Mathiasen left Samantha, who was already asleep, alone with Parish and went to Arby's. While Mathiasen was at Arby's, airman Frank Pack, whose room adjoined Parish's room, heard lashing sounds and crying emanating from Parish's room. Pack and another airman, Jeffrey Fisher, went to see what was the matter. Parish told them that he was tossing Samantha in the air, but that she did not like it. Pack and Fisher noticed that Samantha looked dazed and disoriented.

Shortly thereafter, Mathiasen returned from Arby's. Mathiasen testified that Parish was angry when she returned and continued to drink heavily while eating. After she ate, Mathiasen laid down on the bed next to Samantha. Samantha crawled over to her mother, hugged her, and threw up. While Mathiasen was changing clothes, Fisher and Pack returned to Parish's room. The three men then argued about Samantha's condition, and Fisher and Pack offered to take

the child to the emergency room. Mathiasen refused their assistance, claiming that Samantha vomited regularly because of her allergies.

Mathiasen then took Samantha home, put her to bed, and took a shower. Parish, who had accompanied Mathiasen to her house, watched TV and drank beer while Mathiasen showered. When she got out of the shower, Parish called Mathiasen into Samantha's room because Samantha was having a seizure. Mathiasen attempted to call 911 emergency services, but Parish prevented her, saying that he was not allowed to be at the house and that he would get in trouble. Instead, Mathiasen attempted to administer CPR and then called her aunt who lived next door. Mathiasen's aunt testified that Samantha's head and legs had gone limp, there was foam coming out of her mouth, the whites of her eyes were completely red, and she was not moving. Dawn's aunt then took Samantha next door and called 911 emergency services.

Dr. James Swift, a pediatric intensive care physician in Las Vegas, testified that when Samantha arrived at the hospital, she had extensive swelling on the right side of her scalp, her pupils were fixed and dilated, and she was completely motionless. Dr. Swift testified that Samantha's condition indicated to him that she had suffered a serious brain injury. A Computerized Axial Tomography (CAT) scan revealed that Samantha had suffered a displaced skull fracture; pieces of Samantha's skull had been forced into her brain causing "global" brain swelling. Dr. Swift testified that the severity of Samantha's injury approximated a fall from 3-5 stories. Dr. Swift further testified that he had compared Samantha's x-rays and that her injuries from April 10, 1997, did not contribute to her condition on April 17, 1997. Samantha never regained consciousness and died as a result of her injuries.

Medical staff notified the Henderson Police Department of Samantha's injury, and the police dispatched Detective Wamsley. After speaking with Dr. Swift about Samantha's condition, Detective Wamsley took Mathiasen into a private room for questioning. Mathiasen initially told Detective Wamsley that she had been alone at home with Samantha when Samantha had vomited, that she had placed Samantha on the bed, and that she found Samantha motionless on the floor after she got out of the shower. Detective Wamsley told Mathiasen that Samantha's injuries were not consistent with her story and that when Samantha died she would be charged with murder because, according to her own story, she was the only one who could have caused Samantha's injuries.

Mathiasen then admitted that she had taken Samantha to visit Parish and that Samantha had suffered her injuries while left alone with Parish. Detective Wamsley, in cooperation with the Air Force Office of Special Investigations, then investigated Mathiasen's story and the possible causes of Samantha's death. Parish was taken into custody as a result of the investigation. On June 9, 1997, the State charged Parish with open murder by information. That same information charged Mathiasen with second-degree murder and child abuse and neglect with substantial bodily harm. On May 22, 1998, the State filed an amended information charging Parish with first-degree murder by child abuse. Mathiasen and Parish were tried together and on May 27, 1998, a jury convicted Parish of first-degree murder by child abuse and convicted Mathiasen of child abuse and neglect with substantial bodily harm. The jury hung on Mathiasen's second-degree murder charge.

The district court sentenced Parish to life imprisonment with the possibility of parole after twenty years and Mathiasen to fifteen years

imprisonment with the possibility of parole after six years. Parish appealed his initial conviction, and this court reversed the judgment of conviction and remanded for a new trial on the ground that the jury instructions improperly shifted the burden to disprove malice aforethought to Parish.[1] On April 28, 2003, Parish's retrial began and on May 20, 2003, a jury convicted him of first-degree murder by child abuse. On July 10, 2003, the district court sentenced Parish to life imprisonment with the possibility of parole after twenty years. Parish timely appealed the judgment of conviction.

DISCUSSION

Pre-injury photograph

During Mathiasen's testimony, the district court admitted, over Parish's objection, a picture of Samantha taken before she was injured. Parish argues that the district court abused its discretion by admitting the photograph because the photograph was not for identification purposes and served only to inflame juror sympathy. We disagree.

District courts have broad discretion to admit gruesome or inflammatory photographic evidence, and the decision to admit such evidence will not be overturned absent a manifest abuse of that discretion.[2] A district court's finding that the photographs were helpful to the jury is sufficient to justify admission.[3] We have held that pre-injury

---

[1]Parish v. State, Docket No. 32810 (Order of Reversal and Remand, December 4, 2001).

[2]Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978).

[3]Id.

photographs are relevant to demonstrate the extent of the injuries, to explain the cause of death, and to identify the victim.[4] Further, the admission of pre-injury photographs "reveals nothing gruesome or inflammatory which could have excited or prejudiced the jury."[5]

The photograph in issue was taken a short time before Samantha was killed and showed the way she looked prior to her injuries. The district court did not abuse its discretion because the photograph was relevant to show identification, demonstrate the extent of the injuries, and explain the cause of death.

References to Parish's first trial

Parish next argues that the district court abused its discretion by failing to grant a mistrial after two State witnesses referred to Parish's first trial. We disagree.

The district court has discretion to grant or deny a mistrial and the grant or denial will not be overturned absent a manifest abuse of that discretion.[6] When the motion for mistrial follows an inadvertent statement at trial, the moving party must prove that the statement "was so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury."[7]

In this case, the district court allowed Parish to make his objection outside the presence of the jury to avoid drawing attention to the

---

[4]West v. State, 119 Nev. 410, 420, 75 P.3d 808, 815 (2003).

[5]Cutler v. State, 93 Nev. 329, 332, 566 P.2d 809, 811 (1977).

[6]Rudin v. State, 120 Nev. 121, 142, 86 P.3d 572, 586 (2004).

[7]Allen v. State, 99 Nev. 485, 490, 665 P.2d 238, 241 (1983).

references. The State opposed the motion on the grounds that the references were brief; the district attorney clarified the testimony in one instance, and in the other instance the district attorney and the witness were talking at the same time. After considering the parties' positions, the district court stated that Parish had failed to meet his burden of proof because neither witness mentioned Parish by name and the jury could have believed that the witnesses were talking about Mathiasen's trial. The district court invited counsel to submit a limiting instruction regarding the references. Counsel submitted such an instruction to the court and it was administered to the jury.

Parish has offered no evidence that the inadvertent references to prior proceedings jeopardized his fundamental right to a fair trial. Furthermore, Parish has offered no evidence that the district court's limiting instruction was insufficient to neutralize any prejudice that he may have suffered. Accordingly, the district court did not abuse its discretion because Parish failed to meet his burden of proof for a mistrial. Even if the district court abused its discretion, the error did not mandate reversal.

We review improper trial statements "under a harmless error standard,"[8] which requires the State to prove, beyond a reasonable doubt, that the error did not contribute to the verdict.[9] The harmless error standard creates a balancing test whereby overwhelming evidence of guilt

---

[8]State v. Carroll, 109 Nev. 975, 977, 860 P.2d 179, 180 (1993).

[9]Flanagan v. State, 112 Nev. 1409, 1419, 930 P.2d 691, 697-98 (1996).

may render even constitutional errors insignificant.[10] In State v. Carroll, we reversed a district court's grant of a new trial because the prosecutor's reference to the defendant's in-custody status was "inadvertent and unintentional" and there was "overwhelming and uncontroverted evidence of respondent's guilt."[11] The instant case is analogous to Carroll. The references to the first trial were inadvertent, unintentional, and did not specifically mention Parish. Furthermore, the evidence of Parish's guilt is overwhelming. The State presented twenty-seven witnesses whose testimony cumulatively established that Samantha showed no signs of abuse until her mother started dating Parish, that Samantha showed signs of physical abuse after being left alone with Parish, and that Samantha suffered a fractured skull and died after being left alone with Parish on April 17, 1997. The district court's error, if any, was comparatively insignificant.

Prior testimony

Parish next argues that the trial court's admission of his prior testimony violated his Fifth Amendment right to remain silent and his Sixth Amendment right to be adequately advised of the consequences of testifying. We disagree.

A defendant's waiver of his Fifth Amendment right to silence is final.[12] The prosecution may admit defendant's prior testimony during

---

[10]Carroll, 109 Nev. at 977, 860 P.2d at 180.

[11]Id. at 977, 860 P.2d at 180.

[12]Byford v. State, 116 Nev. 215, 224, 994 P.2d 700, 707 (2000).

its case-in-chief at retrial.[13] A defendant's prior testimony may be admitted even in the absence of an explicit warning that his testimony could be used against him in future proceedings.[14] In this case, Parish concedes that his first trial included an appropriate canvass advising him on the record of his Fifth Amendment right to testify or remain silent and that he would be subject to cross-examination and impeachment if he chose to testify. Accordingly, Parish forever waived his right to silence when he voluntarily testified at his first trial.

Prior testimony, if otherwise admissible, may be used against the defendant even if he refuses to testify at retrial.[15] NRS 51.325 allows for the admission of prior testimony at a later trial if the declarant is unavailable and the case involves the same party or parties in privity. Parish was "unavailable" for the purposes of the statute because he invoked his Fifth Amendment right to silence at retrial.[16] Further,

---

[13]Turner v. State, 98 Nev. 103, 105-06, 641 P.2d 1062, 1063-64 (1982).

[14]Byford, 116 Nev. at 224, 994 P.2d at 707. In Byford, this court noted that the claim, now asserted by Parish,

> rests on the unspoken premise that even though he considered it in his best interest to testify when faced with the certainty of his first trial, he would nevertheless have chosen not to testify to avoid the possibility, if he had been informed of it, that his testimony might be used at retrial. This premise makes no sense, and the argument has no merit.

Id.

[15]Turner, 98 Nev. at 105, 641 P.2d at 1063.

[16]Byford, 116 Nev. at 226, 994 P.2d at 708.

Parish's retrial included the same parties, Parish and the State. Thus, Parish's prior testimony was admissible under NRS 51.325.

Parish's prior testimony was also admissible as a party admission under NRS 51.035(3)(a)[17] because the prior testimony was Parish's own statement and it was used against him at retrial.[18] Nevertheless, even an admission is inadmissible unless it is relevant evidence.[19] Prior testimony is relevant if it "place[s] defendant at the scene, or establishe[s] that an altercation occurred."[20] Parish never once denied meeting Samantha or even being left alone with her. Accordingly, Parish's prior testimony places Parish at the scene of the crime, alone with Samantha and is, therefore, relevant under the test above. The district court did not abuse its discretion because the relevant prior testimony was admissible under either NRS 51.325 or NRS 51.035(3)(a).

Parish also contends that the admission of his prior testimony constituted an impermissible comment on his decision to remain silent at retrial. We disagree.

First, as outlined above, the district court found that the jury most likely believed that references to the "first trial" referred to

---

[17]"'Hearsay' means a statement offered in evidence to prove the truth of the matter asserted unless: . . . . (3) The statement is offered against a party and is: (a) His own statement . . . ."

[18]See Turner, 98 Nev. at 106, 641 P.2d at 1064.

[19]NRS 48.015 provides that "'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence."

[20]Turner, 98 Nev. at 107, 641 P.2d 1064.

Mathiasen's trial. Further, the State made no comment on Parish's prior testimony whatsoever. The State submitted a transcript of the testimony as an exhibit and referred to the testimony only as "State's Proposed Exhibit 92." Parish's claim is wholly without merit.

Parish next argues that his prior testimony was not admissible because it was compelled. This claim apparently rests on the fact that Parish's first conviction was reversed because of an unconstitutional jury instruction. We disagree.

Parish's claim is, again, analogous to the claim presented in Byford v. State.[21] In Byford, we reversed the defendant's conviction because the prosecution made an improper comment on defendant's Fifth Amendment right to silence.[22] Byford argued that the State could not admit his prior testimony at retrial because the testimony had been compelled by the constitutional violation.[23] We rejected Byford's argument because "the comments occurred after [defendant] testified, therefore, those comments could not have compelled him to testify."[24] Similarly, the improper jury instructions in Parish's first trial followed his testimony; the instructions could not possibly have compelled his testimony. As in Byford, Parish's claim warrants no relief.

---

[21]116 Nev. 215, 994 P.2d 700 (2000).

[22]Id. at 225, 994 P.2d at 707.

[23]Id.

[24]Id.

Improper jury instructions

Parish raises several arguments concerning the propriety of the district court's jury instructions. Parish initially contends that Instruction 5, which instructed "A murder that is the result of child abuse is murder in the first degree," is erroneous. Parish argues that the instruction contains an inaccurate statement of law and that it should have noted that first-degree murder requires proof of malice aforethought. We disagree.

We note initially that Parish would be correct if the word "killing" were substituted for the word "murder" in the instruction. A "killing" by means of child abuse does not necessarily constitute first-degree murder.[25] However, "murder" necessarily describes a killing with malice aforethought.[26] Thus, the instruction is not improper on its face.

In Collman v. State,[27] we rejected a jury instruction on the grounds that it impermissibly shifted the burden of proof by stating that the crime itself was conclusive proof of malice aforethought.[28] Parish contends that Collman mandates reversal of his conviction. We disagree.

---

[25]Collman v. State, 116 Nev. 687, 714, 7 P.3d 426, 445 (2000).

[26]NRS 200.010. The jury was instructed of this definition in Instruction 4.

[27]116 Nev. 687, 7 P.3d 426.

[28]The instruction at issue in Collman stated,

> There are certain kinds of murder which carry with them conclusive evidence of malice aforethought. One of these classes of murder is murder committed by means of child abuse. Therefore, a killing which is committed by child

continued on next page . . .

First, any error or ambiguity in Instruction 5 was cured by the surrounding instructions. Instruction 4 instructed, "murder is the unlawful killing of a human being, with malice aforethought, either express or implied." Instruction 6 instructed that the State must prove, beyond a reasonable doubt, "(1) that . . . the defendant did willfully, feloniously and without authority of law, (2) kill a human being, (3) with malice aforethought, (4) by means of child abuse." Thus, the jury was twice instructed that it must find malice aforethought in order to convict. The instant case is distinguishable from Collman.

Furthermore, Instruction 5 reflects an accurate statement of the law. In NRS 200.030(1)(a), as it existed during the relevant time period, the Legislature explicitly enumerated murder perpetrated by means of child abuse as murder in the first degree.[29] In Graham v. State,[30] we noted that a homicide committed with malice aforethought and in an "enumerated manner" constitutes "first degree [murder] as a matter of law."[31] Instruction 5 was not erroneous because it accurately stated the law.

Parish next contends that he was constitutionally entitled to a jury instruction on lesser-included offenses; namely, second-degree

---

. . . *continued*

> abuse is deemed to be murder of the first degree, whether the killing was intentional or unintentional.

Id. at 711, 7 P.3d at 441.

[29]Graham v. State, 116 Nev. 23, 26, 992 P.2d 255, 256 (2000).

[30]116 Nev. 23, 992 P.2d 255.

[31]Id. at 27-28, 992 P.2d at 257.

murder. Parish argues that a second-degree murder instruction was required because the jury may have found child abuse beyond a reasonable doubt, but not malice aforethought. In that case, Parish argues, the jury may have found him guilty of first-degree murder absent proof of malice aforethought because that was the only crime on which they were instructed. We disagree.

Parish's theory of the case was that Mathiasen killed Samantha. As we stated in Collman, a criminal defendant is not entitled to a lesser-included instruction unless his theory of the case is consistent with the lesser-included offense.[32] Parish's theory of the case is not consistent with a charge of second-degree murder because Parish denied killing Samantha. Accordingly, Parish was not entitled to a second-degree murder instruction.

Furthermore, we have held that a second-degree murder instruction is not warranted if the defendant is charged with first-degree murder enumerated as under NRS 200.030(1)(a).[33] At the time of Samantha's death, murder by child abuse was enumerated as first-degree murder under NRS 200.030(1)(a).[34] Thus, Parish was not entitled to a second-degree murder instruction. If the jury found, beyond a reasonable doubt, that Parish killed Samantha with malice aforethought and by means of child abuse, then Parish was guilty of first-degree murder. If the jury did not so find, then Parish was not guilty of first-degree murder.

---

[32]Collman, 116 Nev. at 710, 7 P.3d at 440.

[33]Wegner v. State, 116 Nev. 1149, 1157, 14 P.3d 25, 30 (2000).

[34]The Legislature amended NRS 200.030 in 1999, moving "child abuse" from NRS 200.030(1)(a) to NRS 200.030(1)(b).

Finally, even if the district court erred in giving Instruction 5 to the jury, or in failing to give Parish a second-degree murder instruction, such error was harmless. An erroneous jury instruction is harmless "when it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'"[35]

As we noted in Wegner v. State, a jury instruction error is not harmless if the defendant "contested the omitted element and there is sufficient evidence to support a contrary finding."[36] In this case, there was not sufficient evidence to support Parish's contention because Instruction 5 contained an accurate statement of Nevada law[37] and Parish was not entitled to a second-degree murder instruction.[38] Furthermore, unlike Wegner, this case involved overwhelming evidence of guilt.

In Wegner, we held that there was no overwhelming evidence of guilt where the prosecution's case involved only one incidence of child abuse and relied almost exclusively on expert medical testimony.[39] In this case, Samantha suffered at least four separate incidences of child abuse, all of which involved major bruising and/or bone fractures. Further, the State presented twenty-seven witnesses whose testimony supported four assertions: (1) Samantha showed absolutely no signs of physical abuse before her mother started dating Parish; (2) Samantha was repeatedly left

---

[35]Id. at 1155, 14 P.3d at 30 (quoting Neder v. United States, 527 U.S. 1, 18 (1999)).

[36]116 Nev. at 1156, 14 P.3d at 30.

[37]Graham, 116 Nev. at 26-27, 992 P.2d at 257.

[38]Id. at 29, 992 P.2d at 258.

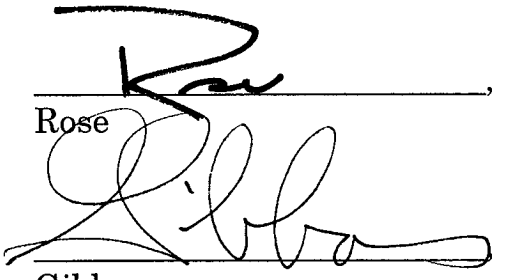
[39]Wegner, 116 Nev. at 1156, 14 P.3d at 30.

alone with Parish for significant periods of time; (3) after being left alone with Parish, Samantha suffered injuries that could only be explained as the result of physical abuse; and (4) Samantha died as a result of a skull fracture similar in severity to a five-story fall after being left alone with Parish on April 17, 1997.

It is clear beyond a reasonable doubt that a reasonable jury would have found Parish guilty of first-degree murder by child abuse even if Instruction 5 had been replaced by a second-degree murder instruction. Any error in the jury instructions was harmless and reversal is not warranted in this case.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Valorie Vega, District Judge
David M. Schieck
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk