

IN THE SUPREME COURT OF THE STATE OF NEVADA

VLADISLAV BYKOV,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42409

FILED

SEP 08 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon jury verdict, of felony DUI. Second Judicial District Court, Washoe County; James W. Hardesty, Judge.

In this appeal, Bykov makes several claims of error by the district court. We have reviewed and considered these claims, and determine that Bykov's claims are without merit.

Jury unanimity

Bykov argues that his constitutional right to a unanimous jury verdict was violated when the district court instructed the jury that they need not unanimously agree upon one of the three alternative theories of driving under the influence.¹ The State contends that the jury need only unanimously agree that the DUI statute was violated, not upon any specific theory. We agree that the jury need not unanimously agree on a specific theory.

¹Bykov bases his argument on United States v. Garcia-Rivera, 353 F.3d 788 (9th Cir. 2003). We conclude that this case is inapposite because it concerns a federal firearms statute and the instructions at issue there are factually distinguishable.

This court reviews a district court's decision to give an instruction for an abuse of discretion.² A district court abuses its discretion if its decision is arbitrary or capricious or if it exceeds the bounds of law or reason.³

In 2002, NRS 484.379 stated:

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor;

(b) Has a concentration of alcohol of 0.10 or more in his 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 0.10 or more in his 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.⁴

In Gordon v. State, we recently validated the approach in instructing the jury in DUI cases.⁵ The instruction here complies with our

²Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

³Id.

⁴The Nevada Legislature substituted "0.08" for "0.10" in 2003 to satisfy a condition for receiving federal funding for the construction of highways. See 2003 Nev. Stat., ch. 421, §§ 6 & 15, at 2559 and 2566, respectively.

⁵121 Nev. ____, ____ P.3d ____ (Adv. Op. No. 51, August 11, 2005); see also Anderson v. State, 121 Nev. ____, ____ P.3d ____ (Adv. Op. No. ____, ____, 2005).

holding in Gordon, and therefore, we conclude no abuse of discretion occurred.⁶

Evidence of prior bad acts

Bykov next argues that the district court erred in admitting evidence of his use of marijuana. In this, he claims that the evidence was collateral, inadmissible under NRS 48.045, constituted improper impeachment, and was irrelevant and prejudicial. The State argues that the evidence was properly admitted in rebuttal and was admissible to impeach Bykov's testimony concerning his failure to pass field sobriety testing.

A district court's decision to admit or exclude evidence is reviewed for an abuse of discretion and will not be disturbed unless it is manifestly wrong.⁷ Evidence of other prior bad acts may be admitted at trial to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."⁸ Before admitting such evidence, the district court must conduct a hearing on the record and determine that (1) the evidence is relevant to the crime charged, (2) the other act is proven by clear and convincing evidence, and (3) the probative value of the other act is not substantially outweighed by the danger of unfair prejudice.⁹

⁶121 Nev. ____, ____ P.3d ____ (Adv. Op. No. 51, August 11, 2005).

⁷Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999).

⁸NRS 48.045(2).

⁹Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

Evidence of Bykov's marijuana use was relevant as contradictory to his testimony regarding his injury and nervousness. In summary, this evidence properly rebutted his denial of any other factors that may have contributed to his failure to satisfactorily complete the tests. Also, Bykov's marijuana use was proven by clear and convincing evidence through blood analysis testimony. Accordingly, the probative value of Bykov's marijuana use was not substantially outweighed by the danger of unfair prejudice. Finally, the district court offered the jury an instruction limiting its use of the evidence. We conclude that the district court did not err by admitting the marijuana evidence.

Remaining claims

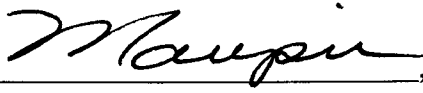
Bykov also argues that the possibility of faulty translation hindered his ability to assist his defense counsel and rendered him incompetent at trial. This is however, belied by the record. The record demonstrates that only one instance of apparent mistranslation occurred, which the interpreter corrected. Bykov failed to raise the issue below and we conclude that no plain error exists.¹⁰

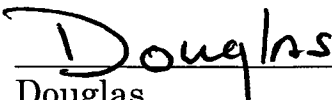
Finally, Bykov argues that the possibility of the interpreter's non-verbatim translation may have obscured his request to represent himself. When the district court allowed Bykov to speak before trial commenced, Bykov expressed dissatisfaction with his defense counsel, but did not request, unequivocally or even equivocally, to represent himself. We, therefore, conclude that the district court did not err in failing to

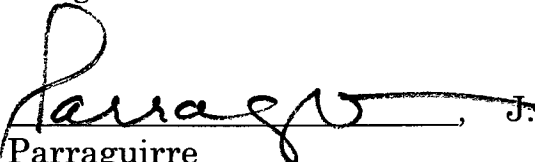
¹⁰NRS 178.602

perform a Faretta¹¹ canvass. Accordingly we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

¹¹Faretta v. California, 422 U.S. 806 (1979)