

IN THE SUPREME COURT OF THE STATE OF NEVADA

PATRICK LEE MILLER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42775

**FILED**

DEC 20 2005

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of insurance fraud. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

Appellant Patrick Miller reported to the Humboldt County Sheriff's Department that someone had broken into his home and had stolen numerous checks on his business account. Later that day, Miller completed a voluntary statement where he indicated that his son, R.M., was a likely suspect. Miller's insurance investigated the claim and Miller did not reveal that his son was a possible suspect. The insurance company soon learned that R.M. was arrested as a suspect, and initiated criminal charges against Miller for insurance fraud, leading to his conviction.

Miller appealed his conviction arguing: (1) that the information was insufficient; (2) that the district court erred by allowing two of the State's non-expert witnesses to offer opinion testimony embracing an ultimate issue; (3) that there was insufficient evidence to convict; and (4) the district court erroneously rejected the defense's proffered jury instructions. In light of the record before us, we affirm the judgment of conviction.

### The information

In a criminal case, a judgment will not be set aside or a new trial granted, “unless the accused is able to affirmatively demonstrate that the information is so insufficient that it results in a miscarriage of justice or actually prejudices him in respect to a substantial right.”<sup>1</sup>

The “charging document must give adequate notice to the defendant of the theories of prosecution,”<sup>2</sup> and “it need not explain all factual evidence to be proved at trial.”<sup>3</sup>

The State charged Miller with insurance fraud. In committing this offense, the State alleged that during the course of Nationwide’s investigation Miller made numerous statements that omitted, concealed, or contained false or misleading information. The exact date Miller made statements to Nationwide was not an element of the crime.<sup>4</sup> Likewise, because insurance fraud is a “continuing offense” it was not necessary to specify the exact date Miller committed the crime.<sup>5</sup>

The information contained a description of the act Miller allegedly committed. Finally, the information was sufficiently clear to

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<sup>1</sup>Laney v. State, 86 Nev. 173, 177, 466 P.2d 666, 669 (1970); see also Viray v. State, 121 Nev. \_\_\_, \_\_\_, 111 P.3d 1079, 1082 (2005) (“inaccurate information does not prejudice a defendant’s substantial rights if the defendant had notice of the State’s theory of prosecution.”).

<sup>2</sup>Koza v. State, 104 Nev. 262, 264, 756 P.2d 1184, 1185 (1988).

<sup>3</sup>U.S. v. Blinder, 10 F.3d 1468, 1476 (9th Cir. 1993).

<sup>4</sup>Perelman v. State, 115 Nev. 190, 192-93, 981 P.2d 1199, 1200 (1999) (continuing nature of insurance fraud does not have to be specifically pleaded in the complaint).

<sup>5</sup>See id.

advise Miller of the theory of the state's case – that during the investigation into his insurance claim, he withheld from or misrepresented to Nationwide the fact that R.M. was a prime suspect in the burglary. Therefore, the information was not deficient.

Opinion testimony

Admissibility of expert or lay opinion testimony “is largely discretionary with the trial court.”<sup>6</sup> A lay witness may testify in the form of an opinion that is rationally based on perception and helpful to a clear understanding of the determination of a fact in issue.<sup>7</sup> Additionally, opinion testimony that is otherwise admissible “is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.”<sup>8</sup>

The State filed a notice of expert witness indicating that it wished to qualify Kelly Watson, the Nationwide attorney assigned to help investigate Miller's claim, and Philip Battin, a senior claims investigator, as experts in insurance law. The district court denied its motion. However, the district court allowed them to testify as lay witnesses. It did not err in allowing the witnesses to opine that R.M.'s status as a suspect was “material to the claim.” Both witnesses had interviewed Miller and reviewed Buxton's police report where R.M. is listed as a potential suspect. Both witnesses reviewed Miller's voluntary statement where he himself noted that R.M. was a suspect. Additionally, both had reviewed Buxton's updated report, which confirmed that R.M. had been arrested in connection with attempting to cash one of the checks that Miller had

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<sup>6</sup>Watson v. State, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978).

<sup>7</sup>NRS 50.265.

<sup>8</sup>NRS 50.295.

reported as stolen during the burglary. Therefore, Watson and Battin's testimony was rationally based on perception.

In order to convict Miller the State had to prove that R.M.'s status as a suspect in the burglary was a "fact material to the claim." Given the complexity of most insurance contracts, Battin and Watson's opinions were helpful in understanding why Nationwide needed to know whether R.M. was a suspect. The opinion testimony was more probative than prejudicial in helping the jury determine this fact in issue.

Therefore, the district court did not err in allowing Battin and Watson to opine on the materiality of the fact that R.M. was a suspect.

#### Jury instructions

Miller submitted two proposed jury instructions for the district court's consideration, proposed instruction 'B' and 'C.' Miller's proposed instruction 'B' contained language that a defendant must "intend" to defraud the insurance company in making a false statement or omitting or concealing a material fact in order to commit insurance fraud. The court rejected Miller's proposed instruction 'B' finding that the State's instruction tracked the statutory language. Miller's proposed instruction 'C' defined material misrepresentation according to this court's decision in Powers v. United Servs. Auto. Ass'n.<sup>9</sup>

Upon request, a criminal defendant is entitled to a jury instruction on his theory of the case if there is some evidence, regardless of

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<sup>9</sup>114 Nev. 690, 962 P.2d 596 (1998).

the evidence's weakness, to support the instruction.<sup>10</sup> However, the defendant's proposed instruction must correctly state the law.<sup>11</sup>

A district court's decision to give or decline a jury instruction is reviewed for an abuse of discretion.<sup>12</sup> If the defense theory is supported by at least some reasonable evidence that would support an alternate jury verdict, "the failure to instruct on that theory constitutes reversible error."<sup>13</sup> However, "[w]here the district court refuses a jury instruction on defendant's theory of the case that is substantially covered by other instructions, it does not commit reversible error."<sup>14</sup>

Although one of Miller's theories of defense was that he never specifically intended to defraud the insurance company, his proposed instruction was not an accurate statement of the law and he was not entitled to an instruction that the State must prove he intended to defraud the insurance company when he made statements in support of his claim.

As to proposed instruction 'C', we hold that the district court abused its discretion by rejecting this instruction. Miller presented some evidence that Nationwide's investigation would not have been different had he initially been honest regarding R.M.'s status as a suspect. Miller's

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<sup>10</sup>Peck v. State, 116 Nev. 840, 844, 7 P.3d 470, 472 (2000).

<sup>11</sup>Duckworth v. State, 113 Nev. 780, 792, 941 P.2d 157, 165 (1997).

<sup>12</sup>Atkinson v. MGM Grand Hotel, 120 Nev. 639, \_\_\_, 98 P.3d 678, 680 (2004) (district court has broad discretion to settle jury instructions and decide evidentiary issues. As such, this court will review a district court's decision to give a particular instruction for an abuse of discretion).

<sup>13</sup>Honeycutt v. State, 118 Nev. 660, 669, 56 P.3d 362, 368 (2002).

<sup>14</sup>Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995).

proposed instruction was a correct statement of the law, and was not substantially covered by the instruction actually submitted or any other instruction.

Accordingly, the district court abused its discretion in refusing Miller's jury instruction. However, we hold that the failure to allow the jury instruction was harmless in light of the substantial evidence presented. It is well settled that this court will not disturb a judgment of conviction supported by substantial evidence.<sup>15</sup>

#### Sufficient evidence

Sufficient evidence is presented where "any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>16</sup>

The State offered evidence that Miller made numerous statements to support his claim under his insurance policy. The record shows that Miller's statements omitted, concealed, or misled Nationwide regarding R.M.'s status as a suspect in the burglary; that R.M. had been arrested in connection with the burglary; and that R.M. had been living at Miller's residence his entire life.

These facts were material to Miller's insurance claim because if he had initially reported these facts to Nationwide then it may well have

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<sup>15</sup>Coffman v. State, 93 Nev. 32, 34, 559 P.2d 828, 829 (1977).

<sup>16</sup>DePasquale v. State, 106 Nev. 843, 848, 803 P.2d 218, 221 (1990); see also Buff v. State, 114 Nev. 1237, 1242, 970 P.2d 564, 567 (1998) (A reviewing court will not disturb a verdict on appeal if it is supported by sufficient evidence.).

summarily denied the claim. Consequently, the State offered sufficient evidence to show that Miller committed insurance fraud.<sup>17</sup>

CONCLUSION

The alleged issues as to the information and opinion testimony are without merit. Miller was not entitled to one of his proposed jury instructions, and as to the other jury instruction, the error was harmless and does not warrant reversal in light of the substantial evidence of guilt. Finally, we conclude sufficient evidence was presented to support the conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Douglas, J.  
Douglas

Rose, J.  
Rose

Parraguirre, J.  
Parraguirre

cc: Hon. John M. Iroz, District Judge  
State Public Defender/Carson City  
State Public Defender/Winnemucca  
Attorney General George Chanos/Reno  
Humboldt County District Attorney  
Humboldt County Clerk

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<sup>17</sup>The State presented sufficient evidence that Nationwide would have conducted the investigation differently had it known that R.M. was a suspect.