

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA BACHARACH

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DOCKET NUMBER: 69677

Appellant,

)

Electronically Filed
Jun 09 2016 09:46 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

vs.

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THE STATE OF NEVADA,

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Respondent.

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FAST TRACK STATEMENT

1. Name of party filing this fast track statement:

Joshua Bacharach.

2. Name, law firm, address, and telephone number of attorney submitting this fast track statement:

Rochelle T. Nguyen, Esq.
Nguyen & Lay
732 S. Sixth Street, Suite 102
Las Vegas, Nevada 89101
Telephone: (702) 383-3200

3. Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:

N/A.

4. Judicial district, county, and district court docket number of lower court proceedings:

Eighth Judicial District Court, Clark County, C-14-299425-1.

5. Name of judge issuing decision, judgment, or order appealed from:

The Honorable Douglas E. Smith.

6. Length of trial. If this action proceeded to trial in the district court, how many days did the trial last?

Four (4) days.

7. Conviction(s) appealed from:

Count 1 – Attempt Murder with Use of a Deadly Weapon (Category B felony, NRS 200.010, 200.030, 193.330, and 193.165); Counts 2, 4, 6, and 8 – Discharge of Firearm from or within a Structure or Vehicle (Category B felony, NRS 202.287); Counts 3, 5, 7, and 11 – Assault with a Deadly Weapon (Category B felony, NRS 200.471); Count 12 – Stop Required on Signal of Police Officer (Category B felony, NRS 484B.550.3b); Count 13 – Resisting Public Officer with Use of a Firearm (Category C felony, NRS 199.280); Count 14 – Possession of a Firearm with Altered or Obliterated Serial Number (Category D felony, NRS 202.277); and, Counts 15 and 16 – Possession of a Firearm by Ex-Felon (Category B felony, NRS 202.360). Appellant’s Fast Track Appendix, Volume I, pages 121-126 (hereinafter, “[Volume number] AA [Page number]”).

8. Sentence for each count:

The district court sentenced Mr. Bacharach as follows: As to Count 1 – to a maximum of two hundred forty (240) months with a minimum parole eligibility of ninety-six (96) months, plus a consecutive term of two hundred forty (240) months

maximum with a minimum parole eligibility of ninety-six (96) months for use of a deadly weapon; As to Count 2 – to a maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months; As to Count 3 – to a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-eight (28) months; As to Count 4 – to a maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months with a minimum parole eligibility of twenty-eight (28) months; As to Count 6 – to a maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months; As to Count 7 – to a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-eight (28) months; As to Count 8 – to a maximum of one hundred eighty (180) months with a minimum parole eligibility of seventy-two (72) months; As to Count 11 – to a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-eight (28) months; As to Count 12 – to a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-eight (28) months; As to Count 13 – to a maximum of sixty (60) months with a minimum parole eligibility of twenty-four (24) months; As to Count 13 – to a maximum of sixty (6) months with a minimum parole eligibility of twenty-four (24) months; As to Count 14 – to a maximum of forty-eight (48) months with a minimum parole eligibility of nineteen (19) months; as to Count 15 – to a maximum of seventy-two (72) months with a minimum

parole eligibility of twenty-eight (28) months; As to Count 16 – to a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-eight (28) month; As to Count 17 – to a maximum of seventy-two (72) months with a minimum parole eligibility of twenty-eight (27) months; all counts to runs consecutive with each other; with zero (0) days credit for time served. I AA 128-129.

9. Date district court announced decision, sentence, or order appealed from:

December 30, 2015. I AA 128, 145-147.

10. Date of entry of written judgment or order appealed from:

Judgment of Conviction: January 08, 2016. I AA 127-129.

(a) If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

N/A.

11. If this appeal is from an order granting or denying a petition for a writ of habeas corpus, indicate the date written notice of entry of judgment or order was served by the court:

N/A.

(a) Specify whether service was by delivery or by mail:

N/A.

12. If the time for filing the notice of appeal was tolled by a post-judgment motion,

(a) specify the type of motion, and the date of filing of the motion:

N/A.

(b) date of entry of written order resolving motion:

N/A.

13. Date notice of appeal filed:

Notice of Appeal filed by counsel: January 26, 2016. I AA 130-132.

14. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(b), NRS 34.560, NRS 34.575, NRS 177.015, or other:

NRAP 4(b).

15. Specify statute, rule or other authority which grants this court jurisdiction to review the judgment or order appealed from:

NRS 177.015(3).

16. Specify the nature of disposition below, e.g., judgment after bench trial, judgment after jury verdict, judgment upon guilty plea, etc.:

Judgment after jury verdict.

17. Pending and prior proceedings in this court. List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal (e.g., separate appeals by co-defendants, appeal after post-conviction proceedings):

N/A.

18. Pending and prior proceedings in other courts. List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., habeas corpus proceedings in state or federal court, bifurcated proceedings against co-defendants):

N/A.

19. Proceedings raising same issues. List the case name and docket number of all appeals or original proceedings presently pending before this court, of

which you are aware, which raise the same issues you intend to raise in this appeal:

N/A.

20. Procedural history. Briefly describe the procedural history of the case (provide citations for every assertion of fact to the appendix, if any, or to the rough draft transcript):

The State of Nevada charged the Defendant, Joshua Bacharach, by way of Indictment, with the following: Count 1 – Attempt Murder with Use of a Deadly Weapon (Category B felony, NRS 200.010, 200.030, 193.330, and 193.165); Counts 2, 4, 6, 8, and 10 – Discharge of Firearm from or within a Structure or Vehicle (Category B felony, NRS 202.287); Counts 3, 5, 7, 9, and 11 – Assault with a Deadly Weapon (Category B felony, NRS 200.471); Count 12 – Stop Required on Signal of Police Officer (Category B felony, NRS 484B.550.3b); Count 13 – Resisting Public Officer with Use of a Firearm (Category C felony, NRS 199.280); Count 14 – Possession of a Firearm with Altered or Obliterated Serial Number (Category D felony, NRS 202.277); and, Counts 15, 16, and 17 – Possession of a Firearm by Ex-Felon (Category B felony, NRS 202.360). Appellant’s Fast Track Appendix, Volume I, pages 52-57 (hereinafter, “[Volume number] AA [Page number]”).

On May 22, 2015, a jury found Mr. Bacharach guilty of all but two charges following a four (4) day jury trial. I AA 121-126.

The district court sentenced Mr. Bacharach as described in paragraph 8, *supra*. I AA 127-129.

21. Issues on appeal. State concisely the principal issue(s) in this appeal:

- I. **THE DISTRICT COURT ERRED BY INSTRUCTING THE JURY ON FLIGHT, BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE CONCLUSION THAT MR. BACHARACH'S GOING AWAY WAS NOT JUST A MERE LEAVING.**
- II. **THE DISTRICT COURT ERRED BY NOT GRANTING A MISTRIAL AFTER STATE'S WITNESS EUFRASIA NAZAROFF INTRODUCED TESTIMONY THAT SHE SPOKE WITH THE GANG UNIT.**

22. Legal argument, including authorities:

- I. **THE DISTRICT COURT ERRED BY INSTRUCTING THE JURY ON FLIGHT, BECAUSE THERE WAS NO EVIDENCE TO SUPPORT THE CONCLUSION THAT MR. BACHARACH'S GOING AWAY WAS NOT JUST A MERE LEAVING.**

The giving of a flight instruction is reversible error where evidence of flight has been not admitted. Miles v. State, 97 Nev. 82, 85, 624 P.2d 494, 496 (1981) (citing Potter v. State, 96 Nev. 875, 619 P.2d 1222 (1980)). Additionally, “a flight instruction may give undue influence to one phase of evidence, therefore [this Court] will carefully scrutinize it to be certain that the record supports the conclusion that appellant’s going away was not just a mere leaving but was with a consciousness of guilt and for the purpose of avoiding arrest.” Id. The Nevada Supreme Court reviews a district court’s decision to give or refuse to give a

nonstatutory jury instruction for an abuse of discretion. Tavares v. State, 117 Nev. 725, 734, 30 P.3d 1128, 1133 (2001) (citing Castillo v. State, 114 Nev. 271, 282, 956 P.2d 103, 110 (1998)).

In the instant case, the State argued that “clearly here we have flight over and over and over again.” VI AA 711. Here the District Court gave the flight instruction over Mr. Bacharach’s objection. I AA 91. The State and the District Court miscomprehend flight. A flight instruction is given typically in a situation where an alleged crime is committed and the person flees the scene or the jurisdiction, and under circumstances that suggest consciousness of guilt. In this case, the State’s characterization of an on-going flight is incorrect. Essentially, the State argues that in this case the “flight” consisted of the actual commission of the charged acts. The State did not contend that there was some action independent of the acts giving rise to the charges at issue. There are no allegations that Mr. Bacharach’s going away was with a consciousness of guilt and for the purpose of avoiding arrest.

Therefore, the district court erred by instructing the jury on flight, because there was no evidence to support the conclusion that Mr. Bacharach’s going away was not just a mere leaving.

**II. THE DISTRICT COURT ERRED BY NOT GRANTING A
MISTRIAL AFTER STATE’S WITNESS EUFRASIA
NAZAROFF INTRODUCED TESTIMONY THAT SHE
SPOKE WITH THE GANG UNIT.**

“A district court’s decision to admit or exclude [prior bad act] evidence under NRS 48.045(2) rests within its sound discretion and will not be reversed on appeal absent manifest error.” Fields v. State, 125 Nev. 785, 789, 220 P.3d 709, 712 (2009) (quoting Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006)).

NRS 48.045(2) prohibits the use of “other crimes, wrongs or acts ... to prove the character of a person in order to show that he acted in conformity therewith.” Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” NRS 48.045(2).

““To be deemed an admissible bad act, the trial court must determine, outside the presence of the jury, that: (1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.”” Fields, 125 Nev. at 790, 220 P.3d at 713 (quoting Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). In assessing “unfair prejudice,” the Nevada Supreme Court “reviews the use to which the evidence was actually put--whether, having been admitted for a permissible limited purpose, the

evidence was presented or argued at trial for its forbidden tendency to prove propensity.” Id. at 790, 220 P.3d at 713. “Also key is ‘the nature and quantity of the evidence supporting the defendant's conviction beyond the prior act evidence itself.’” Id. (quoting Ledbetter, 122 Nev. at 262 n.16, 129 P.3d at 678-79 n.16).

“[I]mproper reference to criminal history is a violation of due process since it affects the presumption of innocence; the reviewing court therefore must determine whether the error was harmless beyond a reasonable doubt.” Manning v. Warden, 99 Nev. 82, 87, 659 P.2d 847, 850 (1983) (citing Chapman v. California, 386 U.S. 18, 24 (1967)). The Nevada Supreme Court has determined that “‘the test for determining a reference to criminal history is whether a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity.’” Homick v. State, 108 Nev. 127, 140, 825 P.2d 600, 608 (1992) (citing Manning, 99 Nev. at 86, 659 P.2d at 850).

Prior to the start of testimony in the State’s case in chief, the State indicated that it would be calling witness Eufrasia Nazaroff. II AA 296. She was described by the State as the mother of the defendant’s children. Id. The State further elaborated that Nazaroff had knowledge about things she was not allowed to talk about. Id. The State and Mr. Bacharach recognized that she had the potential to cause a mistrial by testifying to prior and/or uncharged bad acts on the part of Mr. Bacharach, which the State never sought to introduce. Id. The District Court agreed

and admonished Nazaroff prior to her testimony. The District Court specifically instructed Nazaroff not to talk about “any gang affiliation, any moniker, or nickname.” II AA 297-298. She was further instructed that if she violated the Court’s order that she would go to jail and someone would have to come and get her child. Id. The Court, the State and counsel for Mr. Bacharach, listed several topics that were not allowed. II AA 299. The Court again reminded Nazaroff that if she was to blurt out any of these topics she would be arrested. II AA 298.

While answering questions on direct examination by the State, Nazaroff, indicated that the gang unit police were showing her Facebook pictures of Mr. Bacharach. Mr. Bacharach immediately objected and moved for a mistrial. II AA 373. At the bench conference, the District Court indicated that it had not been paying attention. Id. Specifically, the District Court stated, “I’m sorry. I was putting my calendar for tomorrow together. So what was the question.” Id. At that point counsel for both parties had to summarize the testimony just presented for the district court. Id. Upon hearing counsel’s summary, the District Court indicated that it was not going to grant the Motion for mistrial. Id. Furthermore, the District Court did not remand the witness into custody as it had previously warned it would do.

23. Preservation of issues. State concisely how each enumerated issue on appeal was preserved during trial. If the issue was not preserved, explain why this court should review the issue:

The issues were preserved in a timely appeal and contemporaneous objections to the errors. II AA 373.

24. Issues of first impression or of public interest. Does this appeal present a substantial legal issue of first impression in this jurisdiction or one affecting an important public interest: If so, explain:

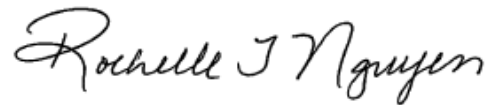
N/A.

VERIFICATION

1. I hereby certify that this fast track statement complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this fast track statement has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 in 14 point Times New Roman.
2. I further certify that this fast track statement complies with the page- or type-volume limitations of NRAP 3C(h)(2) because it is proportionately spaced, has a typeface of 14 points or more, and contains 2,504 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track statement and that the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track statement, or failing to raise material issues or arguments in the fast track statement, or failing to

cooperate fully with appellate counsel during the course of an appeal. I therefore certify that the information provided in this fast track statement is true and complete to the best of my knowledge, information and belief.

Dated this 08th day of June, 2016.

A handwritten signature in black ink, reading "Rochelle T. Nguyen". The signature is written in a cursive, flowing style.

ROCHELLE T. NGUYEN, ESQ.
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ROUTING STATEMENT

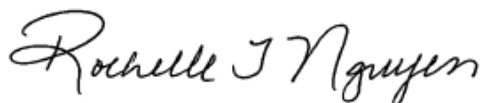
NRAP 3C(e)(1)(B) provides that a fast track statement “shall” include the following:

A statement setting forth whether the matter should be retained by the Supreme Court or assigned to the Court of Appeals, including reference to any appropriate provision in Rule 17.

NRAP 17(b)(1) provides that the Court of Appeals shall hear “any direct appeal from a judgment of conviction based on a jury verdict that does not involve a conviction for any offenses that are category A or category B felonies.”

This matter should be assigned to the Nevada Supreme Court, because the instant appeal challenges a judgment of a conviction based on jury verdict involving convictions for numerous category B felonies.

Dated this 08th day of June, 2016.



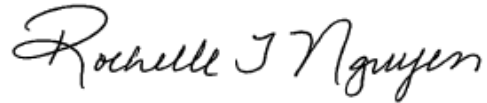
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CERTIFICATE OF ELECTRONIC TRANSMISSION

The undersigned hereby declares that on June 08, 2016, an electronic copy of the foregoing APPELLANT’S FAST TRACK STATEMENT was sent via the master transmission list with the Nevada Supreme Court to the following:

STEPHEN B. WOLFSON
Clark County District Attorney

ADAM PAUL LAXALT
Nevada Attorney General

A handwritten signature in cursive script that reads "Rochelle T. Nguyen".

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