

IN THE SUPREME COURT OF THE STATE OF NEVADA

JOSHUA BACHARACH

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Electronically Filed
Jun 28 2016 01:39 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

CASE NO: 69677

ROUTING STATEMENT: This appeal is appropriately retained by the Supreme Court pursuant to NRAP 17(b)(1) because it is a direct appeal from a judgment of conviction based on a jury verdict that involves a conviction for offenses that are category B felonies.

FAST TRACK RESPONSE

1. **Name of party filing this fast track response:** The State of Nevada
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3. **Name, law firm, address, and telephone number of appellate counsel if different from trial counsel:**
Same as (2) above.
4. **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 raised in this appeal:** None.
5. **Procedural history.**

On July 16, 2014, Joshua W. Bacharach, aka, Joshua William Bacharach, was charged 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, 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 Firearm with Altered or Obliterated Serial Number (Category D Felony – NRS 202.277); and Counts 15 through 17 – Possession of Firearm by Ex-Felon (Category B Felony – NRS 202.360). 1 AA 1-7. On October 28, 2015, Bacharach was arraigned and pleaded not guilty. 1 AA 134. The matter was set for trial. Id. On November 2, 2015, an Amended Indictment was filed. 1 AA 52-58.

On November 2, 2015, Bacharach’s jury trial commenced. 1 AA 137-38. On November 5, 2015, the jury returned a verdict finding Bacharach guilty of Counts 1 through 8, and 11 through 17. 1 AA 121-24; 7 AA 917-21, 929-31.

On December 30, 2015, Bacharach was adjudged guilty and sentenced to the Nevada Department of Corrections as follows: Count 1 – a maximum of 240 months with a minimum parole eligibility of 96 months, plus a consecutive term of 240 months maximum with a minimum parole eligibility of 96 months for the deadly weapon enhancement; Count 2 – a maximum of 180 months with a minimum parole

eligibility of 72 months; Count 3 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 4 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 5 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 6 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 7 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 8 – a maximum of 180 months with a minimum parole eligibility of 72 months; Count 11 – a maximum of 72 months with a minimum parole eligibility of 28 months; Count 12 - a maximum of 72 months with a minimum parole eligibility of 28 months; Count 13 - a maximum of 60 months with a minimum parole eligibility of 24 months; Count 14 - a maximum of 48 months with a minimum parole eligibility of 19 months; Count 15 - a maximum of 72 months with a minimum parole eligibility of 28 months; Count 16 - a maximum of 72 months with a minimum parole eligibility of 28 months; and Count 17 - a maximum of 72 months with a minimum parole eligibility of 28 months; all counts to run consecutive to each other; with zero days credit for time served. 1 AA 145-47; 7 AA 941-43. Bacharach's aggregate total sentence being 1,884 months maximum with a minimum of 747 months. 1 AA 129, 147. The Judgment of Conviction was filed on January 8, 2016. 1 AA 127-29.

On January 26, 2016, Bacharach filed his Notice of Appeal. 1 AA 130-32. Bacharach's Fast Track Statement was filed on June 9, 2016. The State's Fast Track Response is as follows.

6. Statement of Facts.

On the evening of June 26, 2014, Bacharach arrived at Eufrasia Nazaroff's home and asked to borrow her Maroon Dodge Intrepid. 2 AA 368, 370-71. Eufrasia and Bacharach have three children in common, but were not cohabitating at that time. 2 AA 369-70. Bacharach was wearing a bright yellow shirt and a white ballistic bullet-proof vest over his clothing when he left with her vehicle. 2 AA 372; 6 AA 737.

At about 10:45 p.m., Ryan McNabb, a Police Officer with the Las Vegas Metropolitan Police Department, was at the corner of Walnut and Lake Mead when he noticed a Dodge Intrepid, occupied by a male driver, with the high beams on. 4 AA 430, 434, 436, 438. Officer McNabb went north on Walnut, activated his emergency lights, got behind the vehicle, and radioed dispatch that he was going to make a car stop. 4 AA 436-37. As he was getting ready to inform dispatch of the license plate of the vehicle, the male driver, later identified as Bacharach, reached out of the driver door and fired a gun up in the air. 4 AA 438-439. Officer McNabb heard the shot and saw the muzzle flash. 4 AA 439.

Officer McNabb, informed dispatch that Bacharach had discharged a weapon and activated his body camera. 4 AA 440. The vehicle accelerated right after the shot and continued north on Walnut, then turned right on Carey, running through a Stop sign. Id. As soon as Officer McNabb turned on Carey, Bacharach fired two shots at the patrol car. 4 AA 441. Officer McNabb had the patrol car driver side window halfway open and heard a “zing” sound right by his left ear. Id. Bacharach accelerated to about 70 to 80 miles an hour and passed through a solid red light at the intersection of Lamb and Carey. 4 AA 443. Then two more shots, deemed to be the fourth and fifth shots, were fired by Bacharach in the direction of Officer McNabb’s patrol vehicle after the intersection of Lamb and Carey. Id.

The Dodge Intrepid being driven by Bacharach went over the curb at the corner of Carey and Dolly and came to a stop. 4 AA 444-45. Bacharach jumped out of the driver door, ran around the trunk, turned towards Officer McNabb, raised the gun at a parallel angle to the ground and fired at him. 4 AA 445.

Officer McNabb stopped the patrol car in front of 4585 East Carey, got out of the vehicle and saw Bacharach start to point the gun in his direction again. 3 AA 403; 4 AA 446-47. This time Bacharach was unable to fire and seemed to be manipulating the gun as if reloading or clearing a malfunction. 4 AA 446. Officer McNabb fired approximately five rounds to try to stop or incapacitate Bacharach. Id. Bacharach fell backwards, turned, and took off running southbound on Dolly. 4

AA 448. Officer McNabb followed on foot and saw Bacharach near the intersection of Dolly and El Tovar. 4 AA 450. As Officer McNabb went around the corner onto El Tovar he saw a shadow go to his right across the sidewalk by a white truck. 4 AA 452. Officer McNabb heard sirens approaching and waited for back-up. 4 AA 453.

K9 Officer Ernest Morgan arrived to the Dolly and El Tovar area and performed a scan but could not locate Bacharach. 4 AA 526. Officer Morgan got his K9 out and went west on El Tovar when a woman exited her residence, located at 4586 El Tovar. 4 AA 453, 527, 529, 553. She stated an unknown male was in her backyard. 4 AA 553. K9 Officer Morgan entered the home and as he exited to the back yard, located Bacharach by the east side of the rear of the home. 4 AA 533. Bacharach was laying on the ground and refused to comply with the commands to show his hands. 4 AA 535. The K9, Claymore, was released and ran directly towards Bacharach and bit him in the lower part of his leg. Id. Bacharach was placed into handcuffs. 4 AA 453-54. Officer McNabb identified Bacharach as the person he had been chasing, although he was no longer wearing what was believed to have been a white shirt. Id.

A ballistic vest with a white cover and .45 caliber semi-automatic Colt handgun on top of it, were located underneath the white pickup truck parked in front of 4586 El Tovar. 4 AA 575-76, 644. Bacharach's left thumb print was identified towards the base of the Colt .45 magazine. 6 AA 852. A cartridge case was located

on the northbound lane of North Walnut, by a church, a second cartridge case in the eastbound travel lanes of Carey, and a third cartridge case in the north gutter just south of 4060 East Carey. 4 AA 593, 596, 600-1, 605. All three cartridge cases had head stamps that read “Speer 45 Auto.” 4 AA 596, 604, 608. Those three cartridge cases were identified as having been fired from the Colt .45. 6 AA 771.

Two unfired .45 caliber cartridges with head stamps of “Speer 45 Auto” were located on the ground by the maroon Dodge parked on the corner of the intersection of Carey and Dolly. 4 AA 619-21. Another unfired .45 cartridge was located on the sidewalk west of Dolly with a head stamp of “Winchester 45 Auto”, which was still the same caliber but different manufacturer. 4 AA 623-25.

Crime Scene Analysts located an AK-style rifle, wrapped in a white shirt in the back seat of the Dodge Intrepid. 4 AA 662. A Colt .25 caliber firearm, with an obliterated serial number, was recovered from a black bag on the front driver’s side floorboard of the Dodge. 5 AA 664; 6 AA 774. A rifle magazine was also recovered from that black bag. 5 AA 665. Bacharach’s DNA was located on the Dodge Intrepid’s steering wheel cover. 6 AA 747.

7. Issue(s) on appeal.

I. WHETHER THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON FLIGHT

II. WHETHER THE DISTRICT COURT PROPERLY DENIED BACHARACH’S MOTION FOR MISTRIAL

8. Legal Argument, including authorities:

**I.
THE DISTRICT COURT PROPERLY INSTRUCTED
THE JURY ON FLIGHT**

Barcharach erroneously claims the District Court erred in instructing the jurors on flight because there was no evidence to support the conclusion that Bacharach's going away was not just a mere leaving and constituted flight. Fast Track Statement "FTS" 8. This Court has held that "[d]istrict courts have broad discretion to settle jury instructions." Cortinas v. State, 124 Nev. 1013, 195 P.3d 315, 319 (2008). The standard of review for a district court's decision to give a particular instruction is for an abuse of discretion or judicial error. Howard v. State, 102 Nev. 572, 578, 729 P.2d 1341, 1345 (1986). Further, this Court has held that "[f]light instructions are valid only if there is evidence sufficient to support a chain of unbroken inferences from the defendant's behavior to the defendant's guilt of the crime charged." Jackson v. State, 117 Nev. 116, 17 P.3d 998 (2001); United States v. Feldman, 788 F.2d 544, 555 (9th Cir. 1986). "A defendant's conduct, such as flight from a scene of the crime, generally is considered a party admission, and will be admitted if the actions have probative value." Turner v. State, 98 Nev. 103, 106, 641 P.2d 1062, 1064 (1982). The giving of a flight instruction is not reversible error if evidence of flight has been admitted. Potter v. State, 96 Nev. 875, 619 P.2d 1222 (1980).

During the settling of jury instructions, defense counsel took issue with the State's proposed instruction on flight. 6 AA 708. Bacharach's counsel argued that this instruction is only applicable when there is something more than a mere going away, and argued there was no evidence that Bacharach fled the scene with any consciousness of guilt to avoid arrest. 6 AA 711. The State argued that the definition of flight included no timeline and pointed to the fact that Bacharach was hiding in the dark in a backyard and did not submit to the officer's commands when located. Id. The District Court further noted that Bacharach had left the firearm and bullet-proof vest under a truck and ultimately allowed the flight instruction to be read to the jury. 6 AA 712.

Bacharach now contends that the State and the District Court miscomprehend flight because 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. FTA 8. In Miles v. State, 97 Nev. 82, 84-85, 624 P.2d 494, 495-96 (1981), this Court held that an employee who left work with missing money was sufficient for a flight instruction to be given. Similarly in Hutchins v. State, 110 Nev. 103, 113, 867 P.2d 1136, 1142-43 (1994), this Court decided that the defendant calling his wife to ask her to take him to their home, when he was not staying there at the time, in the hours after the crime occurred, warranted a flight instruction. As such Defendant's contention lacks merit.

Here, the District Court instructed the jury regarding flight as follows:

The flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in light of all other proved facts in deciding the question of his guilt or innocence. Whether or not evidence of flight shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your deliberation.

6 AA 865.

In Miles and Hutchins, there was a sufficient factual basis for a flight instruction in this case. As the State argued, there was “flight over and over again.”

6 AA 711. First, Officer McNabb testified that he noticed a vehicle with its high beams on and was preparing to perform a car stop but Bacharach failed to pull over even though Officer McNabb had activated his lights. 4 AA 430, 434. What unfolded next was a dangerous car chase while Bacharach discharged a firearm multiple times out of his vehicle. 4 AA 440, 441, 443. Officer McNabb stated that Bacharach accelerated after the first shot in the air and then after shooting two more shots towards him and the patrol vehicle. 4 AA 440, 443. During the chase Bacharach ran through a four-way stop and a red light. Id. Further, when Bacharach finally halted his vehicle, after having shot more rounds at Officer McNabb, he took off running southbound on Dolly. 4 AA 445-448. Bacharach then proceeded to discard the firearm and bullet-proof vest under a truck, and then hid in the backyard of 4586 El Tovar. 4 AA 453, 527, 529, 553, 575-76, 644. These actions by Bacharach evidence

a consciousness of guilt after the commission of a crime and the jury reasonably inferred, based on the testimony and evidence, that Bacharach had fled to avoid arrest. Thus the District Court did not err in giving this flight instruction.

In the event this Court finds any error with the District Court's ruling on the flight instruction, any such error was harmless. For nonconstitutional errors, evidentiary or otherwise, an error is harmless unless there was a "substantial and injurious effect or influence in determining the jury's verdict." Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001); (quoting Kotteakos v. United States, 328 U.S. 750, 776, 66 S. Ct. 1239 (1946)). As stated above, given that the evidence in this case overwhelmingly pointed toward Bacharach's guilt, there was no substantial, injurious effect or influence on the jury in giving this flight instruction, as there was a sufficient factual basis for it, and the jury could infer from the facts whether or not Bacharach fled the scene. Thus, there was no error in the admission of this instruction by the court, and therefore, Bacharach's conviction should be affirmed.

II. THE DISTRICT COURT PROPERLY DENIED BACHARACH'S MOTION FOR MISTRIAL

Bacharach alleges that the District Court erred by not granting a mistrial after Eufrasia testified that she spoke with the Gang Unit. FTS 9. A "denial of a motion for a mistrial is within the trial court's sound discretion. The court's determination

will not be disturbed on appeal in the absence of a clear showing of abuse.” Parker v. State, 109 Nev. 383, 388-89, 849 P.2d 1062, 1066 (1993). “Denial of a motion for mistrial can only be reversed where there is a clear showing of an abuse of discretion.” Cramer v. Peavy, 116 Nev. 575, 580, 3 P.3d 665, 669 (2000) (quoting Mortensen v. State, 115 Nev. 273, 281, 986 P.2d 1105, 1111 (1999)).

Here, Bacharach fails to make a clear showing of abuse of discretion. At the time of the testimony, Eufrasia had been asked the following by the State: “[t]he guns that you described seeing him with, did you describe those for the police?” 4 AA 372. To which she responded: “[n]o, she the police had shown me on his Facebook because - - I mean, they can get into Facebooks, you know, and that’s what the police was showing me, the gang unit. So.” 4 AA 372-373.

At the bench conference the State pointed out that it was an unsolicited statement by Eufrasia and that it was an inaccurate statement because firearms detectives had spoken to her not Gang Unit detectives. 2 AA 373. The District Court stated that the motion for mistrial would be discussed outside of the presence of the jury. Id. Outside the presence of the jury, defense argued that the testimony was prejudicial, as Eufrasia had made the statement “very loud and deliberate” and that the jury was now aware of it. 4 AA 428. The State offered that her testimony had been in the same tone as her other responses and the court noted that Eufrasia was an adverse witness to the State and it was clear that she did not want to answer some

questions, was hesitant in answering other questions, and the mention of the gang detectives was “quick enough said that no one went into it, no one highlighted it, or talked about it.” 4 AA 429.

Additionally, Bacharach alleges that this testimony falls under NRS 48.045(2) prior bad act evidence and that this Court should review the District Court’s decision to admit it as such. FTS 9. However, Eufrasia’s statement was not elicited by the State. This statement was not evidence presented or argued at trial by the state to prove propensity, nor did the State continue to question Eufrasia with regards to gangs. See Fields v. State, 125 Nev. 785, 790, 220 P.3d 709, 713 (2009). The State, not defense, made the court aware that Eufrasia was a witness that had knowledge about “all kinds of things that she’s not allowed to talk about,” and specifically requested she be admonished by the court. 2 AA 296. Further, Eufrasia’s statement only related to the detectives who spoke to her and in no way made mention that Bacharach had criminal history relating to gangs. As such, a jury could not reasonably infer from that single statement that Bacharach was engaged in prior criminal gang activity. See Homick v. State, 108 Nev. 127, 140, 825 P.2d 600, 608 (1992). Accordingly, there was no abuse of discretion.

If the Court finds any error with the district court’s denial, any such error was harmless. The law in Nevada clearly established that the denial of a defendant’s motion for mistrial will be deemed harmless error where the prejudicial effect of the

statement is not strong and there is otherwise strong evidence of the defendant's guilt. Parker v. State, 109 Nev. 383, 849 P.2d 1062, 1066 (1993) (*citing* Emmons v. State, 107 Nev. 53, 60, 807 P.2d 718 (1991)). Here, the jury heard testimony that Bacharach failed to stop when signaled by Officer McNabb and failed to respond to the commands of officers prior to his apprehension. 4 AA 436-37, 535. The jury was presented with overwhelming evidence that Bacharach had discharged his firearm multiple times from his vehicle, had fired that firearm at Officer McNabb on several occasions during the pursuit, was in possession of a firearm with an obliterated serial number, and through a bifurcated trial, had prior felony convictions while in possession of the three firearms. 4 AA 438-39, 443, 445-47; 5 AA 664; 6 AA 774; 7 AA 924. Further, Officer McNabb's testimony was corroborated by his body camera, several residents in the area, and physical evidence collected by crime scene analysts. 2 AA 312-314, 327, 379, 391, 402; 4 AA 548, 575, 593, 596, 600-01, 605, 604, 608, 619-21, 623-25, 644; 6 AA 747, 852. Thus, any possible error in the denial of the motion for mistrial did not influence the jury's verdict and as such Bacharach's claim should be denied.

9. Preservation of the Issue.

The issues were properly preserved.

VERIFICATION

1. I hereby certify that this Fast Track Response 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 Response has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14 point and Times New Roman style.
2. I further certify that this Fast Track Response complies with the type-volume limitations of NRAP 32(a)(8)(B) because it is proportionately spaced, has a typeface of 14 points and contains 3,420 words.
3. Finally, I recognize that pursuant to NRAP 3C I am responsible for filing a timely fast track response and the Supreme Court of Nevada may sanction an attorney for failing to file a timely fast track response, 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 response is true and complete to the best of my knowledge, information and belief.

Dated this 28th day of June, 2016.

Respectfully submitted,

STEVEN B. WOLFSON
Clark County District Attorney

BY */s/ Jonathan E. VanBoskerck*

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CERTIFICATE OF SERVICE

I hereby certify and affirm that this document was filed electronically with the Nevada Supreme Court on June 28, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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