IN THE SUPREME COURT OF THE STATE OF NEVADA

LAILONI MORRISON,
Appellant,
v.
THE STATE OF NEVADA,
Respondent.

ORIGINAL

Case No. 40097

FILED

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RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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STATEMENT OF THE ISSUES

1. Whether the district court erred in denying the Defendant's motion to suppress statements he made to police.
2. Whether the district court improperly limited the Defendant's cross-examination of Pam Neal.
3. Whether the district court properly allowed Detective Bodnar to testify regarding statements made by State's witness Wayne Gantt.
4. Whether the district court erred in denying the Defendant's motion for a mistrial.
5. Whether the district court erred in giving instruction #10 and #11 which defined express malice, implied malice, and malice aforethought.

STATEMENT OF THE CASE

On June 7, 2001, Lailoni Deandre Morrison, hereinafter the Defendant, along with Ashley Bennett and Anthony Gantt, was charged by way of information with murder with use of a deadly weapon. (Volume 1, Appellant's Appendix, pg 4, hereinafter, 1 AA 4). On July 31, 2001, the district court granted the Defendant's motion to sever the Defendant's case from his co-defendant's. (1 AA 152). An

amended information, charging only the Defendant, was filed on May 28, 2002. (1 AA 79). On May 28, 2002, the Defendant's jury trial commenced. (1 AA 143). After an eight (8) day jury trial, the Defendant was convicted of murder of the second degree with use of a deadly weapon. (1 AA 149). The judgment of conviction was filed on August 8, 2002. (1 AA 131).

STATEMENT OF THE FACTS

On March 3, 2001, several members of the Gerson Park Kingsman (GPK) gang were attending a funeral for Mark Doyle. (Trial Transcript, hereinafter TT, 5/29/2002, 164). The Defendant along with Anthony Gantt (Wacky G), Ashley Bennett (Face), Fredrick Scheider (Henry), Antwon Owens (Glock), and Jermaine Webb (Wing) were in attendance. (TT, 5/30/2002, 24). While at the funeral for their friend who was murdered the day before, the Defendant and others started to get riled and wanted to go to the "Hunt" house, which was a known hang out for the rival gang, the Rolling 60s. (TT, 5/30/2002, 26).

On their way to the Hunt house, the group of men were turned away by security guards. (TT, 5/30/2002, 27). Instead of turning away, the group decided to approach the Hunt house from a different route. On their new route to the Hunt house, the Defendant and the others encountered Joseph Williams (Doughboy) leaving Monique Hunt's house. (TT, 5/30/2002, 30). Doughboy was known to be associated with the rival gang the Rolling 60s. (TT, 5/30/2002, 30). The group of men, coming from different angles, approached Doughboy as he was heading towards his car in the parking lot. Doughboy saw the men coming and raised his hands in the air. As he approached Doughboy, the Defendant raised his gun and started firing his super .38 caliber handgun. (TT, 5/30/2002, 34). This prompted at least two others (Gantt and Bennett) to start firing their weapon as well. The men emptied their guns into Doughboy. (TT, 5/30/2002, 35). When the Defendant started to fire, Doughboy attempted to turn and run away, however, Doughboy was shot so many times that he fell where he stood.

At this same time, Pam Neal was leaving her upstairs apartment to go down and take her neighbor to work. (TT, 5/30/2002, 129). As she was leaving the apartment she witnessed the encounter between the group of men and Doughboy. (TT, 5/30/2002, 131). She saw the men coming towards Doughboy in all different angles and she witnessed the Defendant shooting at Doughboy. (TT, 5/30/2002, 131). She saw the victim fall to the ground. Pam Neal was familiar with three of the men that were involved in the shooting. (TT, 5/30/2002, 133). She knew Anthony Gantt since he was a little boy. (TT, 5/30/2002, 135-36). She had met the Defendant on several occasions and was familiar with him. (TT, 5/30/2002, 134-5). In addition she was also familiar with Ashley Bennett.

Joseph Williams, Doughboy, was taken to University Medical Center suffering for multiple gun shot wounds, where he later died succumbing to his numerous bullet wounds.

ARGUMENT

I

THE DISTRICT COURT PROPERLY ALLOWED A PORTION OF THE DEFENDANT'S MIRANDIZED VOLUNTARY STATEMENT TO BE ADMITTED INTO EVIDENCE AND PROPERLY SUPPRESSED THE PORTION OF THE DEFENDANT'S STATEMENT AFTER HE ASKED FOR COUNSEL

The Defendant alleges that the district court erred by denying the Defendant's motion to suppress his voluntary statement to police. The Defendant contends that even though he was Mirandized and voluntarily waived his rights, that his confession was not voluntary because the police pressured him. After hearing argument on the Defendant's motion the district court determined that the Defendant freely and voluntarily waived his rights and his voluntary statement would be allowed to be admitted. (Trans. 9/13/2001, 5). However, the district court did suppress the Defendant's statements after he asked for a lawyer. (Trans. 9/13/2001, 5-6). The Defendant's claim lacks merit, as he knowingly and voluntarily waived his Miranda

rights and freely gave his statement to police.

The district court received the Defendant's motion to suppress his statements. The district court determined that in order to make its ruling it needed to observe the videotape of the confession. After observing the videotape and hearing counsel's argument the district court determined that the voluntary statements were admissible up to the point the Defendant asked for an attorney. (Trans. 9/13/2001, 5-6).

The Supreme Court of Nevada has stated that it will "uphold the district court's decision regarding suppression unless this [C]ourt is 'left with the definite and firm conviction that a mistake has been committed.'" State v. McKellips, 118 Nev. Adv. Op. No. 50, p. 3 , 49 P.3d 655 (2002); *Citing* United States v. Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948). Unless the Defendant is able to show that the district court did not base its suppression ruling on substantial evidence, the district court ruling will be upheld. McKellips, 118 Nev. Adv. Op. No. 50, p. 3. This Court has stated that the question of the admissibility of a confession is primarily a factual question addressed to the District Court and where that determination is supported by substantial evidence it should not be disturbed on appeal. Echavarria v. State, 108 Nev. 734, 742, 839 P.2d 589, 595 (1992).

The Due Process Clause of the Fourteenth Amendment requires that a confession must be voluntary to be admissible. Rowbottom v. State, 105 Nev. 472, 482, 779 P.2d 934 (1989); Passama v. State, 103 Nev. 212, 214, 735 P.2d 321 (1987); Miller v. Fenton, 474 U.S. 104, 106 S. Ct. 445 (1985). In order to be voluntary, a confession must be the product of a "rational intellect and a free will." Rowbottom, supra, citing Blackburn v. Alabama, 361 U.S. 199, 208, 80 S. Ct. 274 (1960). A confession is involuntary whether coerced by physical intimidation or psychological pressure. Passama, supra, citing Townsend v. Sain, 372 U.S. 293, 307, 83 S. Ct. 745 (1963).

The United States Supreme Court has reiterated that certain interrogation techniques are so offensive to a civilized system of justice that they violate due

process. Passama, supra; Miller, supra. A confession may also be rendered inadmissible if it is the result of promises which impermissibly induce the confession. Passama, supra; Franklin v. State, 96 Nev. 417, 421, 610 P.2d 732 (1980). To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. Passama, supra, *citing* Schneckloth v. Bustamonte, 412 U.S. 218, 226-227, 93 S. Ct. 2041 (1973).

In addressing the voluntariness standard, the Nevada Supreme Court has adopted the "totality of the circumstances" test. Passama v. State, 103 Nev. 212, 214, 735 P.2d 321 (1987). The Passama Court stated:

> The Court must consider the effect of the totality of the circumstances on the will of the Defendant, the question in each case is whether the Defendant's will was overborne when he confessed. Factors to be considered include: the youth of the accused; his lack of education or his low intelligence; the lack of any advise of Constitutional Rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the depravation of food or sleep.

103 Nev. 212, 214, 735 P.2d 321, 323 (citations omitted)

Upon reviewing the factors to be considered as set forth in Passama, it is clear that the Defendant's statement was the product of a free will. Clearly, as noted above, the Defendant was advised of his Constitutional rights prior to questioning.

The Defendant's experiences during his life also give insight into his maturity and ability to make decisions regarding statements to the authorities. The Defendant stated that he is twenty-one years of age and lives with his girlfriend. (1 AA 36). During the interview, the Defendant even mentions that he has children. (1 AA 55). It should also be noted that the Defendant has 11 aliases, has been arrested numerous times as a juvenile, and has over a dozen arrests as an adult. (1 AA 60). This Defendant, therefore, is an adult functioning within our society who has had to make decisions regarding relationships, raising children, and evading the criminal justice system.

Contrary to the Defendant's allegation, there is absolutely no indication of any

physical punishment. In fact, the Detectives conducting the interview catered to the physical needs of the Defendant. As both the video and audio tapes reveal, upon Detective Bodnar's entrance to the interview room, the Defendant is on the floor. The following conversation ensues:

> BODNAR: What's up, dude? Try and get up. Have a seat. You all right? You need some help? You didn't fall, did you?
>
> DEFENDANT: I couldn't sit in this chair like that.
>
> BODNAR: How do those feel? Are they all right? (referring to the Defendant's handcuffs)
>
> DEFENDANT: They're so tight.
>
> BODNAR: Here stand up. Let's loosen them a little bit.

(1 AA 35)

Once the handcuffs are adjusted, the Defendant begins to complain about his legs hurting. (1 AA 35). Again, the Detectives accommodate him. When asked about the adjustment, the Defendant responds by saying, "That's cool." (1 AA 35).

Detective Rodrigues even asks the Defendant whether he would like something to drink during the interview (1 AA 44). That question is followed up by the Detective's offer to adjust the room temperature. (1 AA 44). Clearly, the Detective is attempting to make the Defendant as physically comfortable as possible. It should further be noted that the entire interview is just under two hours. (1 AA 29).

When considering the circumstances under which the interview was conducted, it would be hard to believe that a 21-year old Defendant with a live-in girlfriend, children, 11 A.K.A.s, with an interview of less than 2 hours had a will that was "overborne." The detectives did interrogate the Defendant, but it was not so oppressive and overbearing to believe that this Defendant's psychological and physical capacity was reduced to a degree that his statement was no longer voluntary. The Defendant's statement was voluntarily made and was not coerced.

Defendant alleges in opening brief that because Detectives lied to him about the strength of the case against him, the Defendant was "induced" to change his story.

The Detectives did not lie to the Defendant about the information from the witnesses who had come forward. The only falsehood was that the witnesses did not know the Defendant. That falsehood is completely inadequate to find that the Defendant was coerced.

The employment of falsehoods is acceptable. In Sheriff v. Bessey, 112 Nev. 332, 914 P.2d 618 (1996), the defendant was a suspect in several sexual assaults on young girls. During his interview with police, Bessey denied engaging in any sexual acts with the minor until the officer asked him if he could explain why his semen was present at the location where the acts occurred. The actual analysis was negative, but the officer presented Bessey with a false crime lab report, which the officer had prepared. Bessey then made a number of inculpatory statements.

Speaking for the court, Chief Justice Shearing upheld the admissibility of Bessey's statements. The Court's decision states:

> To determine the voluntariness of a confession, the court must consider the effect of the totality of the circumstances on the will of the defendant. The question in each case is whether the defendant's will was overborne when he confessed.

Id at 324-325, citing Passama v. State, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987).

The Nevada Supreme Court's discussion in Bessey echoes and is in complete harmony with the decision of the United States Supreme Court in Colorado v. Connelly, 479 U.S. 157, 107 S.Ct. 515 (1986). In Connelly, the United States Supreme Court said that the primary factor in assessing voluntariness was an examination of what if anything the police had done to either directly or subtly coerce the defendant into making statements. In Bessey, the Court noted that employment by police of falsehoods extrinsic to the facts of the alleged offense was coercive because falsehoods are likely to produce untrue statements or to influence the accused to make a confession regardless of guilt. Extrinsic falsehoods include assurances of divine salvation upon confession, promises of mental health treatment in exchange for

confession, assurances of more favorable treatment in exchange for confession, misrepresenting consequences of a conviction, and representation that welfare benefits would be withdrawn or children taken away unless there was a confession. These are the kinds of misrepresentation and deceit which are examples of police intimidation or coercion. Intrinsic falsehoods do not constitute coercion. Even the intentional use of false statements to Bessey which were clearly designed to get him to confess did not persuade the Nevada Supreme Court that his confession was involuntary.

In the instant case, the Defendant makes the argument that Detectives lied to Defendant "telling him that there are people that don't even know him that picked him and the other guys out of a photo line-up and drew diagrams showing where everybody was located." (1 AA 17). The only falsehood in this statement is that the people didn't know the Defendant. In fact, the Detectives had met with witness Pam Neal on May 1, 2001 and she had identified Defendant as one of the shooters. She also had picked him out of a line-up and drawn a diagram showing where each shooter was located. (1 AA 60). On May 7, 2001, the Detectives interviewed co-Defendant Anthony Gantt who also identified Defendant as being present at the shooting. Therefore, the only "lie" is that the witnesses didn't know the Defendant. The falsehood used by Detectives Bodnar and Rodrigues were intrinsic falsehoods of the type used in Bessey and actually less deceitful. Therefore, they do not constitute police coercion. There are no misrepresentations regarding the consequences of a conviction or assurances of more favorable treatment. There is merely an exaggeration of the nature of witnesses who have identified the Defendant.

Because the Detectives, at this point, know that the Defendant was present and involved in the shooting, the suggestions to the Defendant about being a lousy shot, etcetera are not falsehoods, but an opportunity for Defendant to explain his presence. Though some deceit was used in not telling the Defendant who the witnesses against him were, the deceit clearly does not rise to coercion as articulated in Bessey and Connelly.

II

THE DISTRICT COURT DID NOT ERR BY LIMITING THE DEFENDANT'S CROSS-EXAMINATION OF PAM NEAL BY NOT ALLOWING THE DEFENDANT TO USE EXTRINSIC EVIDENCE

The Defendant complains that the district court erred when it limited the Defendant from using extrinsic evidence to cross-examine the State's witness Pam Neal. In a motion before the district court the Defendant wanted to use evidence of an incident in which Pam Neal was arrested and charged with several felonies.[1] (2 AA 5). The Defendant believed that Pam Neal had motivation to not testify truthfully because Pam Neal believed that the Defendant was responsible for her cousin's death. (2 AA 5-8). The Defendant contended that this belief caused the witness to go to a house where she believed the Defendant to be located and shoot a gun into the house. The district court ruled that although the Defendant could cross-examine the witness regarding her being arrested for the felonies and what those felonies involved, the Defendant was not allowed to talk about the specific facts and details of the alleged crimes involved. (2 AA 13-20). The Defendant is now asking this Court to overturn his conviction based on the fact that he was unable to introduce extrinsic evidence when he cross-examined the witness. (Defendant's Opening Brief, 27-29). Pursuant to the Nevada Revised Statutes and case law, the answer is clear---the defense may not do so.

The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be overturned unless it is manifestly wrong. Sherman v. State, 114 Nev. 998, 965 P.2d 903, 909 (1998). NRS 50.085 states in relevant part:

> 1. Opinion evidence as to the character of a witness is admissible to attack or support his credibility...
> 2. Evidence of the reputation of a witness for truthfulness or untruthfulness is inadmissible.
> 3. Specific instances of the conduct of a witness, for the

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[1] Those felonies were later dismissed by the State as there was not enough evidence to prosecute.

> purpose of attacking or supporting his credibility, other than conviction of crime, may not be proved by extrinsic evidence. They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to an opinion of his character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090.

When determining the admissibility of character evidence, the plain language of the statute clearly commands that opinion evidence is admissible subject to certain criteria, reputation evidence is never admissible, and specific instances of conduct of a witness may not be proven by extrinsic evidence. In other words, while a witness may be asked about a specific incident if relevant to truthfulness, the questioning lawyer may not then attempt to impeach the witness with either physical evidence or another witness.

In a variety of cases, the Nevada Supreme Court has held that evidence of specific conduct of a witness may not be proved by extrinsic evidence. *See* Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000) (proper to impeach a witness by inquiring into specific acts relating to truthfulness or untruthfulness and by not using extrinsic evidence); Sherman v. State, 114 Nev. 998, 965 P.2d 903 (1998) ("[e]xtrinsic evidence of specific instances of conduct may not be used to attack the credibility of a witness; however, such instances are properly the subject of cross-examination"); Roever v. State, 114 Nev. 867, 963 P.2d 503 (1998) (specific acts regarding truthfulness or untruthfulness "...cannot be raised through extrinsic evidence"); Rowbottom v. State, 105 Nev. 472, 779 P.2d 934 (1989) (if defendant denied specific instances of conduct, the State could not prove such acts by extrinsic evidence); Moore v. State, 96 Nev. 220, 607 P.2d 105 (1980) (when defendant denied ever filling out a false check, the trial court erred by allowing other witnesses to testify that they had seen the defendant do so as it violated NRS 50.085(3)---"[h]aving received a negative answer to his question, the prosecutor was foreclosed from proving otherwise").

In McKee v. State, 112 Nev. 642, 917 P.2d 940 (1996), the Nevada Supreme Court found that use by the State of extrinsic evidence to impeach the defendant's credibility regarding a collateral matter to be error. In McKee, the defendant, when asked whether he had used drugs on July 12, 1994, testified that he had not. The State then produced a photograph of the defendant dated July 12, 1994 which showed the defendant holding a straw and a baggy in his hand. At that point, the defendant admitted that he had used drugs on that specific date. On appeal, the Court ruled the district court erred by allowing the use of the photograph to impeach the defendant's testimony:

> Impeachment on a collateral matter is clearly not allowed. ...[T]he prosecution is allowed to inquire into specific instances of conduct on cross-examination, but must accept the witness' answer. The prosecution is not allowed to prove up the conduct through extrinsic evidence.

Id. at 647.

In Patterson v. State, 111 Nev. 1525, 907 P.2d 984 (1995), the defendant was charged with numerous acts of lewdness with a child under 14 years of age. During the defense's case-in-chief, the defendant called a neighbor of the victim, Mrs. Jewett. The defendant asked Mrs. Jewett:

> Q. Mrs. Jewett, have you ever been present when [the victim] has been untruthful in any specific instance?
> A. Yes, I have.
> Q. Can you relate that instance to use (sic) when she was untruthful?

Id at 1529. The State objected based upon NRS 50.085(3) and that objection was sustained by the trial court. On appeal, the Nevada Supreme Court made it absolutely clear that NRS 50.085(3) is unambiguous:

> While a witness may, under certain conditions give an opinion of another witness' truthfulness, NRS 50.085(1), a witness may not testify of another witness' reputation for truthfulness. NRS 50.085(2). Moreover, the admission of specific instances of a witness' conduct, other than criminal convictions, may not be proved by extrinsic evidence. *See* NRS 50.085(3). Specific instances of a witness' conduct may only be inquired into "on cross-examination of the witness himself or on cross-examination of a witness who

> testifies to an opinion of his character for truthfulness or untruthfulness..." Defense counsel's questioning of Mrs. Jewett violated these rules of evidence.

Id. at 1534.

Furthermore, in a death penalty case, Greene v. State, 113 Nev. 157, 931 P.2d 54 (1997), receded from on other grounds by Byford v. State, 994 P.2d 700 (2000), the Nevada Supreme Court held that the use of extrinsic evidence to show a specific instance regarding untruthfulness of a witness was improper. In Greene, the defendant sought to impeach a witness because she was proved to have perjured herself in another unrelated case. In the unrelated case, the witness had been asked whether she had taken any drugs before giving testimony, to which she answered no. That trial court thereafter ordered a drug test which proved positive for a controlled substance. The defendant wanted to introduce the prior testimony as well as the drug test to establish that she perjured herself in the prior trial. The Nevada Supreme Court ruled that the evidence was properly excluded on numerous grounds. One of those grounds was based upon its decision in Rembert v. State, 104 Nev. 680, 683, 766 P.2d 890, 892 (1988), in which the Court held it was error to allow the State to attempt to impeach a defendant's credibility with extrinsic evidence relating to a collateral matter. *See* NRS 50.085(3).

The only exception to the dictates of NRS 50.085(3) is in sexual assault cases where there is a claim of a prior false allegation of sexual assault. Miller v. State, 105 Nev. 497, 779 P.2d 87 (1989); Efrain v. State, 107 Nev. 947, 823 P.2d 264 (1991). In Efrain, *supra*, the Nevada Supreme Court affirmed this exception carved out in its holding in Miller, *supra*:

> In Miller, we also noted that the introduction of extrinsic evidence of prior false accusations encroaches on Nevada's collateral evidence rule, NRS 50.085(3). NRS 50.085(3) allows questions, on cross-examination, of a witness' past conduct. If, however, the witness denies the past conduct, extrinsic evidence contradicting the denial is generally inadmissible. In Miller, we explained that "t[o] the extent that our holding transcends the limitations of NRS 50.085(3), we carve out an exception for sexual assault

> cases." Thus, in a sexual assault case, defense counsel may ask the complaining witness about prior false sexual assault charges, and if the witness denies this behavior, defense counsel may introduce extrinsic evidence of the false charges.

Id at 949 (citations omitted). Thereafter, the Court established a strict test whereby a hearing must be held outside the presence of the jury and the court must determine by a preponderance of the evidence that the (1) the accusations were made; (2) the accusations were false; and (3) the extrinsic evidence is more probative than prejudicial. The Court also established that the defense is required in sexual assault cases to notice the State concerning the evidence so that the State has sufficient time to respond.

In the instant matter, the Defendant believes that the district court should have allowed him to inquire further into the specifics of the witness' arrest. The Defendant believes that it would show the witness' bias towards the Defendant, causing her testimony not to be truthful. The district court was correct to limit the Defendant's cross-examination of the witness. The Defendant informed the court that he wanted to attack the witness using the specific details of the crime of which she was charged. The court ruled that the Defendant could talk about the instance and the arrest but could not go into specifics about the facts regarding the arrest.

However, despite the fact that the district court did indicate that the Defendant's cross-examination would be limited, the Defendant was still able to portray the witness' bias in cross-examination. Despite the small limitation the district court placed on the Defendant, the Defendant was still more than able to introduce relevant testimony from Pam Neal that supported the Defendant's theory. The Defendant cross-examined the witness on whether she was arrested for felonies on the day of the murder of her cousin (2 AA 158), whether she believed the Defendant to be responsible for the murder (2 AA 160-61), whether she went into house looking for persons involved in her cousins murder (2 AA 158-59), and whether the witness

received benefits from the State regarding her testimony (2 AA 155).[2]

The district court was proper to limit the Defendant's cross-examination into specific details of the witness' arrest, as it would be a violation of NRS 50.085. Even if the district court erred the Defendant was not prejudiced. Despite the limitation the Defendant was still able to elicit testimony from the witness that supported his theory that the witness has a bias towards the Defendant.

A. The Defendant's Cross-Examination Was Properly Limited As The Evidence In Question Was More Prejudicial Than Probative And Would Have Caused Confusion.

Although the district court properly ruled that the cross-examination of the witness was to be limited, the district court's reasoning was based on NRS 50.085, which can be argued was not the proper reasoning but the right result. "If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon the wrong reasons." Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981), *See also* Rosenstein v. Steele, 103 Nev. 571, 747 P.2d 230 (1987).

Within the district court's ruling, the court limited the Defendant's cross-examination of Pam Neal's crimes based on the fact that the Defendant would not be allowed to use extrinsic evidence to bring in that issue. However, it appears that the district court was really relying on NRS 48.035 indicating that the issue although relevant would be more prejudicial than probative and would cause confusion and waste of time for the jury.

The threshold question for the admissibility of evidence is relevance. Brown v. State, 107 Nev. 164, 168, 807 P.2d 1379, 1382 (1991). All relevant evidence is admissible, unless its probative value is substantially outweighed by the danger of unfair prejudice. NRS 48.025, NRS 48.035(1). NRS 48.015 states "'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

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[2] The State dismissed her charges on the same day that the Defendant's preliminary hearing was conducted.

would be without the evidence." It is within the district court's discretion to determine whether evidence is relevant and whether that evidence is substantially prejudicial. Brown v. State, 107 Nev. 164, 168, 807 P.2d 1379, 1382 (1991). "Absent an abuse of discretion by the trial court, the decision will not be overturned on appeal." Robins v. State, 106 Nev. 611, 622, 798 P.2d 558, 565 (1990); *citing* Turpen v. State, 94 Nev. 576, 577, 583 P.2d 1083, 1084 (1978); *See* Browne v. State, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997); *citing to* Domingues v. State, 112 Nev. 683, 695, 917 P.2d 1364, 1367 (1996).

In the instant case, it is clear that the facts that were before the court presented an issue of whether the relevant evidence was more probative than prejudicial. Although the court relies on NRS 50.085 as its reasoning, the court makes basic indications that its reasoning was geared more towards preventing prejudicial testimony and evidence from coming in. The court did not want to waste time or confuse the jury by going into a separate crime that the witness was allegedly involved with.

> THE COURT: ...And the ultimate issue for the Court in most of these things, you do have a right to attempt to impeach, but prejudicial versus probative and a waste of time.
>
> We are not going to put on that other trial that was not put on. This is just clear. We're not going to do that. The law does not require that we do that. The law specifically says that you can't use extrinsic information.
>
> ...I think the jury should know that she was charged. The jury should know that there was a feeling or bad blood between the parties because the jury, the, can conclude whatever they wish to conclude reference her testimony. But trying to go into the specific acts and who shot or didn't shoot, we don't have that information, and that would be totally inappropriate.

(2 AA 13-14).

The Defendant was properly limited on cross-examining Pam Neal regarding her involvement with shooting a weapon into a building which injured a little girl. The Defendant was able to get in relevant testimony regarding her involvement of crimes which involved her belief that the Defendant was responsible for the death of

her cousin. The Defendant was able to bring to the jury that the witness was charged with crimes, which may have been dismissed in return for her favorable testimony. It is clear despite the limitation that the Defendant was able to present a damaging cross-examination that brought forward the witness' creditability.

The district court's limitation of the Defendant's cross-examination was proper as the introduction of the specific details of the alleged crime would be more prejudicial than probative.

III

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING STATEMENTS MADE BY ANTHONY GANTT TO THE POLICE

The Defendant argues that Detective Bodnar's testimony regarding what Anthony Gantt had told him was a prior consistent statement that should not have been admitted. The Defendant's claim lacks merit as the Defendant impeached the witness regarding his testimony being a fabrication. In addition, the defendant relied on a portion of the witness' statement to which the State was appropriately allowed to rely on the same statement. Finally, the detective's testimony regarding Gantt's interview was brief and resulted in nothing more than harmless error.

Anthony Gantt was a co-defendant who, as part of a plea agreement, agreed to testify against the Defendant. In cross-examination, Gantt was impeached regarding statements he made to police on November 21, 2001 and May 7, 2001. The Defendant used the witness's statements to imply that Gantt was lying in order to preserve favor with the State. The Defendant relied on the fact that the witness's statements were somewhat inconsistent and that the District Attorney retained the right to argue when the witness would be sentenced. Later in the trial, Detective Bodnar testified. During the Detective's testimony he was asked by the State what Anthony Gantt had told him when he interviewed him on May 7, 2001. The Detective gave a brief description of Gantt's statement.

District courts are vested with considerable discretion in determining the

relevance and admissibility of evidence. Castillo v. State, 114 Nev. 271, 956 P.2d 103, 107 (1998) (citing Atkins v. State, 112 Nev. 1122, 1127, 923 P. 2d 1119, 1123 (1996)). It is clear that the District Court's decision admitting statements made by Gantt was a proper exercise of discretion.

Hearsay is "a statement offered in evidence to prove the truth of the matter asserted." NRS 51.035. NRS 51.065 provides that "Hearsay is inadmissible except as provided in this chapter, Title 14 of NRS and the Nevada Rules of Civil Procedure." NRS 51.035(2)(b) excludes from the definition of hearsay a statement made by a declarant who testifies at trial and is subject to cross-examination and the statement is "consistent with his testimony and offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive." This Court has interpreted NRS 51.035(2)(b) as requiring prior consistent statements to have been made at a time when there was no motive on the part of the declarant to fabricate. See e.g., Daly v. State, 99 Nev. 564, 665 P.2d 798 (1983); Gibbons v. State, 97 Nev. 299, 629 P.2d 1196 (1981); Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984). However, this Court has stated that, "the fact that there was another motivation to fabricate, which happened to arise before the prior consistent statement had been made, does not diminish the rehabilitative value of the statement." Cunningham v. State, 100 Nev. 396, 399, 683 P.2d 500, 502 (1984).

At trial the Defense contended that Anthony Gantt was not telling the truth because the State was able to argue for a harsher sentence if the witness did not testify the way the State wanted him to testify. (2 AA 63-64).

> Q. But you understand the prosecution has the right to make arguments to the judge when you're sentenced?
>
> A. Yes.
>
> Q. And the State could come in here and say, Judge give him an additional ten years because he turned us around or didn't say what we wanted him to say when he testified?
>
> MS. DELAGARZA: Objection, your honor.

THE COURT: Question stands.

THE WITNESS: Yes.

BY MR. SHIECK:

Q. So you've got a reason to try to make the State happy because you're still facing sentencing?

A. Yes.

(2 AA 63-64).

The Defendant has expressly indicated through cross-examination of the witness that the witness has a motivation to fabricate his testimony. The Defendant has specifically charged the witness with fabrication or improper motive. NRS 51.035(2)(b) states that a prior consistent statement can be admitted when it is used to "rebut an express or implied charge against him of recent fabrication or improper influence or motive." The Defendant then used the witness's prior statements in order to impeach the witness. The Defendant used both Gantt's May 7, 2001, statement to police, and Gantt's November 21, 2001 statement to police to impeach the witness. (2 AA 82, 92).

It is clear that the Defendant charged the witness with fabrication. This Court has interpreted NRS 51.035(2)(b) as requiring prior consistent statements to have been made at a time when there was no motive on the part of the declarant to fabricate. See e.g., Daly v. State, 99 Nev. 564, 665 P.2d 798 (1983); Gibbons v. State, 97 Nev. 299, 629 P.2d 1196 (1981); Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984). However, this Court has also stated that if the reason for fabrication at the time the statement was made is different from the reason for fabrication at the time the testimony, it does not diminish the rehabilitative value of the statement." Cunningham v. State, 100 Nev. 396, 399, 683 P.2d 500, 502 (1984); See Crew v. State, 100 Nev. 38, 675 P.2d 986 (1984) (statement used to rehabilitate a witness is properly used even when at the time the statement is made the witness had motive to fabricate). In Cunningham, the victim had two possible motivations to fabricate, one which arose before she made the

prior consistent statement and which arose shortly thereafter. 100 Nev. at 399, 683 P.2d at 502. The Cunningham Court stated that because the charges of fabrication arose after the prior consistent statement was made, the purpose behind NRS 51.035 was served by the introduction of the prior consistent statement to rebut the motivation for fabrication that arose after the prior consistent statement was made. Id. In essence the Court believed that the statement was reliable to be used for the purpose of rehabilitation of any motive for fabrication that may have arose after the statement was made; indicating that when the witness made the statement the witness did not have that particular motivation to fabricate the statement at the time the statement was made.

In the instant case, the witness did have a motivation to fabricate his statements on May 7th and November 21st, as the witness was a co-defendant in the case. However, at the time Gantt made his statements his motivation to fabricate was that he did not want to implicate himself in the murder. At trial, the Defendant indicated that Gantt's motivation for fabrication was that he needed to gain favor with the State in order to gain a lighter sentence. Therefore, at the time Gantt made his statements he did not have the same reason to fabricate his statement as he did after his statement was made.

The testimony of Detective Bodnar regarding Gantt's statements corroborated Gantt's testimony and therefore rebutted the inference of recent fabrication. The State questioned Detective Bodnar regarding what Gantt told him on May 7th, in order to rehabilitate the Defendant's implication that Gantt is lying on the stand in order to gain favor with the District Attorney's office. By offering Gantt's prior consistent statement the State was able to show that the witness has not changed his story in order to gain favor with the District Attorney's office.

In addition, the Defendant impeached the witness using the witness's statements, however the Defendant is now arguing before this Court that the Defendant was harmed by the State alluding to those same statements made by Gantt.

The Defendant "cannot be permitted to use parts of a prior statement to impeach the declarant's testimony and then to withhold that same statement from the jury on the grounds of unreliability." Crew v. State, 100 Nev. 38 , 45, 675 P.2d 986, 990 (1984). During his impeachment of Gantt, the Defendant used Gantt's May 7th and November 21st statements to police in order to show that the witness was not being truthful or was unable to clearly say what happened. It would be fundamentally unfair to allow the Defendant to use a statement to which he has indicated to the jury, through impeachment, to be truthful, and then prohibit the State from using that same statement to show that the witness is truthful.

Finally, hearsay errors are subject to harmless error analysis. Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993). Even if the District Court erred by admitting the statements Defendant alleges are inadmissible hearsay, such error was harmless and does not warrant reversal. The Defendant is asking this Court to reverse his conviction based on testimony made by Detective Bodnar which was a prior consistent statement made by another state's witness. The Defendant was not harmed by those statements as the Detective made a cursory response as to what Gantt had told him. Out of Detective Bodnar's forty-seven (47) pages of testimony Gantt's prior consistent statement was referred to in just two (2) pages. Any error that may have occurred by allowing the statement in was nothing more than harmless error.

IV

COURT DID NOT ERR IN DENYING THE DEFENDANT'S MOTION FOR A MISTRIAL

The Defendant contends that the district court erred in denying his motion for a mistrial, where a State's witness testified regarding the Defendant's statement to police. Contained in that statement was a comment that the Defendant choked on a blunt. The Defendant contends that this is a prior bad act that should not have been admitted. The district court properly denied the Defendant's motion for a mistrial as the Defendant's claim lacks merit.

NRS 48.045 states: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The admissibility of evidence is within the sound discretion of the trial court and will not be disturbed unless manifestly wrong. Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985); citing Brown v. State, 81 Nev. 397, 400, 404 P.2d 428, 430 (1965); See also Kazalyn v. State, 108 Nev. 67, 825 P.2d 578 (1992). When admitting prior bad act evidence, the district court should conduct a recorded hearing that allows a meaningful opportunity to review the district court's exercise of discretion. Armstrong v. State, 110 Nev. 1322, 1324, 885 P.2d 600, 601 (1994); see also Petrocelli, 101 Nev. at 51, 692 P.2d at 508.

NRS 48.035(3) provides:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded . . . .

It is well established law in Nevada that all facts necessary to prove a crime charged, when linked to a chain of events, are admissible. In Brackeen v. State, 104 Nev. 547, 763 P.2d 59 (1988), this Court adopted this general rule and held that evidence of prior bad acts was admissible because ". . . the State is entitled to present a full and accurate account of the circumstances surrounding the commission of a crime, and such evidence is admissible even if it implicates the accused in the commission of other crimes for which he has not been charged." See Shults v. State, 96 Nev. 742, 616 P.2d 388 (1980); Dutton v. State, 94 Nev. 461, 581 P.2d 856 (1978), overruled on other grounds, Gray v. State, 100 Nev. 556, 688 P.2d 313 (1984). Moreover, the decision of the district court to admit such prior bad act evidence rests within the sound discretion of the trial court and will not be disturbed on appeal

absent a showing that the ruling was manifestly wrong. Brinkley v. State, 101 Nev. 676, 708 P.2d 1026 (1985); Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), *cert. denied*, Gallego v. Nevada, 479 U.S. 871, 107 S.Ct. 246 (1986).

In the instant case, while on direct examination Detective Bodnar summarized what the Defendant had confessed to him. During that summary of the Defendant's statement the Detective indicated that the Defendant had mentioned choking on a blunt.

> Later on in the interview, he started to say how he was in the are; that he was walking through the back of the apartments; that he had a gun on him; that he heard the shots. He went to run, choked on a blunt, as he put it.

(4 AA 89).

The Defendant believes that the district court erred when it denied the Defendant's motion for a mistrial based on this one statement. The district court immediately stated that the comment was a harmless error and provided an opportunity for the Defendant to poll the jury after the trial in order to determine even if they knew what a blunt was. Although the Detective's statement may have indicated to the jury a prior bad act that the Defendant has performed, the statement did not amount to anything more than harmless error.

V

THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY ON MALICE

The Defendant argues that jury instructions ten (10) and eleven (11) were unconstitutionally vague and denied the Defendant due process. The Defendant attacks the phrase "abandoned and malignant heart" within the definition of implied malice[3], stating that the phrase is, "devoid of rational content and are merely

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[3] Jury instruction eleven (11) defining express and implied malice is the exact same language as NRS 200.020. (1 AA 93). NRS 200.020 states:

> 1. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstance capable of proof.

pejorative." (Defendant's Opening Brief, 37). In addition, the Defendant states that the phrase "a heart fatally bent on mischief," within the malice aforethought instruction "has no meaning in the definition of malice aforethought." (Defendant's Opening Brief, 39). The Defendant's claim that the malice instructions are constitutionally vague and ambiguous has been rejected by the Supreme Court of Nevada and continues to lack merit.

The Defendant's arguments have been directly addressed by this court in Leonard v. State, 117 Nev. 53, 17 P.3d 397, 413 (2001). The Defendant uses the exact same argument that the defendant in Leonard used, claiming that the definitions of malice aforethought and implied malice are unconstitutionally vague and ambiguous. This Court in Leonard stated that, although the statutory language "abandoned and malignant heart" is archaic, it is essential. Leonard v. State, 117 Nev. 53, 17 P.3d 397, 413 (2001); *citing* Keys v. State, 104 Nev. 736, 740, 766 P.2d 270, 272 (1988). The Leonard Court continued:

> Further, this court has held that language in the **malice aforethought instruction is constitutional that refers to "a heart fatally bent on mischief"** and acts done "in contradistinction to accident or mischance." *See* Leonard, 114 Nev. at 1208, 969 P.2d at 296. This court concluded that "[a]lthough these phrases are not common in today's general parlance, ... their use did not deprive appellant of a fair trial." Id. Absent some indication that the jury was confused by the malice instructions (including the instruction on malice aforethought and express malice), a defendant's claim that the instructions were confusing is merely "speculative." *See* Guy, 108 Nev. at 777, 839 P.2d at 583. Leonard has not shown that the jury was confused in the instant case.

Leonard v. State, 117 Nev. 53, 17 P.3d 397, 413 (2001) (emphasis added).

Similarly to the defendant in Leonard, the Defendant in the instant case has failed to show how the jury was confused by any instruction that was presented to

---

2. Malice shall be implied when no considerable provocation appears, or when all the circumstance of the killing show an abandoned and malignant heart.

them, especially the malice instructions. The Defendant's claim lacks merit and should be denied.

CONCLUSION

Based on the aforementioned reasons, the State respectfully request that this Honorable Court deny the Defendant's appeal and affirm the district court's rulings.

Dated this 21st day of May 2003.

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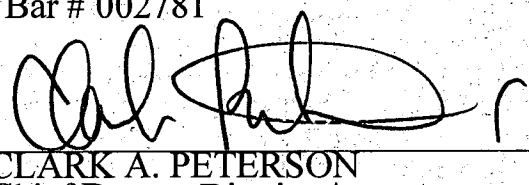
BY 
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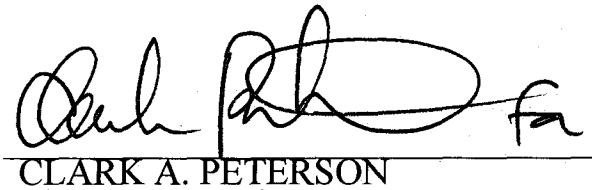
CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 21st day of May 2003.

Respectfully submitted,

DAVID ROGER
Clark County District Attorney
Nevada Bar # 002781

BY 

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 21st day of May 2003.

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