IN THE SUPREME COURT OF THE STATE OF NEVADA

CLIFFORD MILLER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48590

FILED

FEB 26 2009

TRACIE K. LINDEMAN
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of first-degree murder with the use of a deadly weapon. Sixth Judicial District Court, Humboldt County; John M. Iroz, Judge.

Appellant Clifford Miller shot and killed two victims, Lisa Jenkins and Leon Carlson. Miller was sentenced to two consecutive life terms without the possibility of parole. On appeal, Miller challenges (1) the district court's denial of his two motions to substitute counsel, (2) the admission of various hearsay statements, (3) previously transcribed testimony, (4) the introduction of prior bad act evidence, (5) the legality of certain jury instructions, (6) the appropriateness of the State's closing arguments, (7) the handling of certain written jury questions during deliberation, (8) the sufficiency of the evidence, and (9) the fairness of the sentencing phase, and (9) the presence of cumulative error. For the following reasons, we conclude that each of Miller's arguments fails, and therefore we affirm the district court's judgment of conviction. The parties are familiar with the facts and we do not recount them except as necessary to our disposition.

Standard of Review

This court reviews legal determinations de novo and factual determinations for sufficient evidence. Camacho v. State, 119 Nev. 395,

399, 75 P.3d 370, 373 (2003). A defendant's failure to object to an issue at trial generally precludes appellate review of that issue unless there is plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Under plain error review, the asserted error must affect the petitioner's substantial rights, and "the burden is on the defendant to show actual prejudice or a miscarriage of justice." Id.

Motions to substitute counsel

Miller contends that the district court abused its discretion when it (1) did not provide him with an adequate hearing on his request for new counsel, (2) did not provide him with new counsel, and (3) allowed the State to appear and present evidence during his hearing to substitute counsel. We disagree because the district court's hearings adequately addressed Miller's concerns.

This court reviews a district court's denial of a motion to substitute counsel for abuse of discretion. Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005). In Garcia, this court noted that "a defendant in a criminal trial does not have an unlimited right to the substitution of counsel." Id. at 337, 113 P.3d at 842. To demonstrate a Sixth Amendment violation, a defendant must show sufficient cause. Id. When this court reviews a denial of a motion to substitute counsel, it considers the following three factors: "(1) the extent of the conflict between the defendant and his or her counsel, (2) the timeliness of the motion and the extent to which it will result in inconvenience or delay, and (3) the adequacy of the court's inquiry into the defendant's complaints." Id. at 337, 113 P.3d at 842-43.

With reference to Miller's first motion to dismiss counsel, the Garcia factors support the district court's denial. As to the first Garcia factor, Miller did not allege any conflict with his present counsel, Steven

McGuire, and instead simply stated that he preferred his former attorney, Andrew Myers. The fact that Miller wanted the public defender assigned to his first trial because the two had established rapport was not an adequate ground for substituting counsel. Regarding the second factor, the record reveals that Miller moved to substitute counsel approximately six months before the trial was scheduled, which does not suggest intent to delay the proceedings. Under the third factor, the district court's inquiry into Miller's complaints about McGuire was adequate because the district court canvassed Miller and inquired into retaining Myers for Miller. Under these circumstances, we conclude that the district court did not err when it denied Miller's first motion to dismiss counsel.

As to Miller's second motion to dismiss counsel, the district court did not abuse its discretion under the three Garcia factors. First, there was no genuine conflict, despite McGuire's inappropriate comment, because Miller and McGuire met on several occasions to discuss the case. Second, Miller made his motion two months before the upcoming trial, causing an unreasonable delay. Third, the district court adequately inquired into Miller's complaints by questioning both Miller and McGuire. In addition, the court correctly stated that Miller could hire an attorney of his choice, but he could not personally pick the public defender assigned to the case. Young v. State, 120 Nev. 963, 968-69, 102 P.3d 572, 576 (2004).

We also reject Miller's argument that the district court should have conducted an in camera proceeding outside of the State's presence. The district court did not need to hold an in camera proceeding because McGuire directly and adequately answered the court's questions, met with Miller multiple times to discuss trial preparation, and agreed to attempt to resolve the conflict in due course. See Garcia, 121 Nev. at 339, 113 P.3d at 844 (concluding that the district court did not abuse its discretion when

it did not conduct an in camera inquiry into the defendant's motion for substitution of counsel because the defendant's attorney directly addressed the court on the motion and agreed to resolve the issues causing the purported conflict). Accordingly, we conclude that the district court did not err when it denied Miller's motions to substitute counsel.

Hearsay statements

Miller contends that the district court erred when it permitted Clint Valentine and Robert Peterson, friends of the victims, to testify about statements that the victims made prior to their deaths. We disagree.

Since Miller did not object at trial to the introduction of the testimony, we review the district court's decision for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Under plain error review, Valentine and Peterson's testimony about the victims' statements were admissible hearsay statements. Valentine testified that Carlson had acquired a baseball bat for protection. The purpose of the statement was not to prove that Carlson actually acquired a baseball bat for protection; rather, the State introduced the statement to show that the victims were aware of Miller's stalking and afraid of his intentions. Thus, we conclude that the statement was admissible under the state of mind exception to the hearsay rule. NRS 51.105.

In addition, Peterson testified about comments Jenkins had made regarding her desire to seek a divorce from Miller. The defense opened the door to the conversation in its cross-examination, and the State elicited the statement on redirect examination. Since the purpose of the statement was to show Jenkins' future intent or plan, in response to the defense's questions, we conclude that the statement was admissible under

the state of mind exception to the hearsay rule. NRS 51.105. In sum, we find no plain error in the admission of either hearsay statement.

Previously transcribed testimony

Miller contends that the district court abused its discretion when it denied his objection and admitted Jack Bergstrom's previously transcribed testimony. We disagree because the prior testimony satisfied both Drummond v. State, 86 Nev. 4, 462 P.2d 1012, (1970), and NRS 51.325.

A district court has discretion to exclude evidence "if its probative value is substantially outweighed by considerations of undue delay, waste of time or needless presentation of cumulative evidence." NRS 48.035(2). The district court did not err when it admitted Bergstrom's previously transcribed testimony because its probative value was not substantially outweighed by considerations of needless presentation of cumulative evidence. Further, Bergstrom's testimony was not cumulative because he was the only person who could corroborate Molly Sexton's version of the events that occurred just prior to the murder and testify that Miller had twice threatened to kill Jenkins, with one of those threats occurring just a few days before the murder.

In addition, the testimony was not impermissible hearsay. In Drummond v. State, this court concluded that a district court may allow a declarant's prior testimony into evidence if the following requirements are satisfied: "first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial." 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970). Pursuant to NRS 51.325, prior testimony may be admitted without violating the hearsay rule if the following two requirements are satisfied: "(1) The declarant is unavailable

as a witness; and (2) if the proceeding was different, the party against whom the former testimony is offered was a party or is in privity with one of the former parties and the issues are substantially the same."

Here, Bergstrom's previously transcribed testimony did not violate Drummond or NRS 51.325. The State satisfied the three requirements of Drummond because (1) Miller had counsel at the first trial, (2) Miller's counsel cross-examined Bergstrom, and (3) Bergstrom was unavailable for the second trial. Drummond, 86 Nev. at 7, 462 P.2d at 1014. We also conclude that the State satisfied NRS 51.325 because the State demonstrated that Bergstrom was unavailable for the second trial, Miller was a party in both trials, and the issues were substantially the same.

Prior bad act evidence

Miller contends that the district court erred when it admitted witness testimony about his prior bad acts and his statements concerning the victims. We disagree.

Since Miller did not object at trial, we review the district court's decision for plain error. Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). As a general rule, "proof of a distinct independent offense is inadmissible" during a criminal trial. Nester v. State of Nevada, 75 Nev. 41, 46, 334 P.2d 524, 526 (1959). However, prior bad act evidence is admissible under NRS 48.045(2) to show the defendant's motive, intent, or absence of mistake or accident. But before a district court may admit bad act evidence under NRS 48.045(2), the district court is generally required to prescreen the evidence under Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985). Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 598-99 (2005). In the Petrocelli prescreening process, "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." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). The State bears the burden of proving the admissibility of prior bad act evidence. Rhymes v. State, 121 Nev. 17, 21, 107 P.3d 1278, 1281 (2005).

We conclude that the district court did not err when it allowed the witnesses to testify that Miller stalked and threatened the victims. As this court previously concluded with respect to Miller's first trial, the testimony was relevant to show that Miller premeditated the killings, that he made preparations to carry out his plans, and the State proved the acts by clear and convincing evidence. Miller v. State, Docket No. 38802 (Order of Reversal and Remand, February 18, 2004). This same reasoning applies here because the second trial involved essentially the same issues, evidence, and factual background.

Jury Instructions

Miller also challenges Jury Instruction Nos. 11 and 15 and the district court's failure to sua sponte issue instructions on the law of accident or misfortune. We conclude that all three of Miller's challenges fail because Jury Instruction No. 11 was an accurate transition instruction, Jury Instruction No. 15 properly stated the law of involuntary manslaughter, and the district court did not have an obligation to sua sponte instruct the jury on the law of accident or misfortune.

In reviewing jury instructions, this court grants district courts broad discretion in settling jury instructions and will affirm unless there was an abuse of discretion. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Only an arbitrary or capricious decision, or a ruling that goes outside of the law or reason, constitutes an abuse of discretion. Id.

Jury Instruction No. 11

Miller argues that the district court's transition statement in Jury Instruction No. 11 was an inaccurate statement of the law. This court reviews de novo whether a jury instruction is a correct statement of the law. Nay v. State, 123 Nev. ___, ___, 167 P.3d 430, 433 (2007).

NRS 175.201 governs the presumption of innocence and the law regarding when a jury must convict a defendant of a lesser degree of an offense. NRS 175.201 states:

> Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against him, and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest.

In Green v. State, this court explained that "[a] 'transition' instruction guides jurors in proceeding from the consideration of a primary charged offense to the consideration of a lesser-included offense." 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). This court further concluded that:

> [W]hen a transition instruction is warranted, the district court must instruct the jury that it may consider a lesser-included offense if, after first fully and carefully considering the primary or charged offense, it either (1) finds the defendant not guilty, or (2) is unable to agree whether to acquit or convict on that charge.

Id. at 548, 80 P.3d at 97.

Reviewing Jury Instruction No. 11 de novo, we conclude that it was an accurate transition instruction. The first paragraph complied with Green because it instructed the jury to consider first-degree murder, and instructed it to select first-degree murder if they determined that it applied beyond a reasonable doubt. It also instructed the jury that it may

find the defendant guilty of second-degree murder if it concluded that first-degree murder did not apply and determined that second-degree murder applied beyond a reasonable doubt. Further, the second paragraph of Jury Instruction No. 11 properly tracked NRS 175.201.

Jury Instruction No. 15

Miller contends that the district court erred by reading Jury Instruction No. 15, regarding the law of involuntary manslaughter.

NRS 200.070 defines, in pertinent part, the law of involuntary manslaughter as follows:

> [I]nvoluntary manslaughter is the killing of a human being, without any intent to do so, in the commission of an unlawful act, or a lawful act which probably might produce such a consequence in an unlawful manner, but where the involuntary killing occurs in the commission of an unlawful act, which, in its consequences, naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense is murder.

In the context of whether the deadly weapon enhancement applies to an involuntary manslaughter conviction, this court concluded in Buschauer v. State that the "crime of involuntary manslaughter does not involve use of the weapon in conscious furtherance of a crime." 106 Nev. 890, 896, 804 P.2d 1046, 1050 (1990). In Buschauer, the defendant pleaded guilty to involuntary manslaughter with the use of a deadly weapon. Id. at 891, 804 P.2d at 1047. The district court applied NRS 193.165 (the deadly weapon enhancement statute) to increase the defendant's sentence. Id. at 895, 804 P.2d at 1049. This court concluded that under NRS 193.165, a defendant must consciously use a deadly weapon in furtherance of a crime. Id. In addition, a conviction of involuntary manslaughter expressly negates the

conscious use of a deadly weapon in furtherance of a crime. Id. at 896, 804 P.2d at 1050.

Since this court reviews proffered jury instructions de novo, we conclude that the district court properly stated the law of involuntary manslaughter. Except for the last sentence, Jury Instruction No. 15 properly tracked NRS 200.070. The last sentence, however, stated: "Involuntary manslaughter does not involve the conscious use of a deadly weapon in the commission of a crime." This statement accurately reflects the relationship between the deadly weapon enhancement and involuntary manslaughter, as stated in Buschauer. Thus, the district court correctly stated the law of involuntary manslaughter.

Jury instructions regarding the law of accident or misfortune

If the defense presents evidence to support a theory, "no matter how weak or incredible that evidence may be," the district court may not refuse to give a proffered jury instruction on that theory. McCraney v. State, 110 Nev. 250, 254, 871 P.2d 922, 925 (1994). In McCraney, this court concluded that the district court erroneously failed to instruct the jury on accidental homicide, where the defendant had offered such an instruction and he had presented evidence that "could have allowed the jury to find that [the defendant] might have shot and killed [the victim] accidentally." Id. at 254, 871 P.2d at 925. There, two medical examiners and an identification specialist presented evidence from which the jury could have inferred that the defendant had shot the victim by accident. Id. at 254, 871 P.2d at 925.

In contrast to the defendant in McCraney, Miller did not offer any jury instruction regarding mistake or accident, and he failed to present any evidence, other than his own uncorroborated testimony, that he killed the victims accidentally. Miller admitted that his "mind was

screaming, No, No, No, this is not supposed to be happening," but he continued to fire two more shots, killing Carlson and Jenkins. We conclude that Miller failed to show that any error was patently prejudicial and impinged his right to a fair trial. We also conclude that the district court had no obligation to sua sponte instruct the jury on the law of accident or misfortune because Miller did not request the jury instruction and there was little evidence to support it. See Graham v. State, 116 Nev. 23, 30-31, 992 P.2d 255, 259 (2000) (holding that a district court should not give an involuntary manslaughter instruction when the defendant's proofs are inconsistent with the theory of involuntary manslaughter).

The State's closing arguments

Miller contends that the State committed misconduct three times during its closing and rebuttal arguments. First, Miller asserts that the State incorrectly defined involuntary manslaughter during closing argument and erroneously instructed the jury that they could not consider it as an option. Second, Miller asserts that the State erroneously instructed the jury that they could not consider his defense of accident or mistake. Third, Miller argues that the State erroneously instructed the jury that they should not follow the law. We disagree because the State was merely asking the jury to draw a reasonable inference from the evidence.

In order to receive appellate consideration, the defense must object to the alleged prosecutorial misconduct. Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002). If a party fails to properly object, this court reviews for plain error. Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). The defendant's substantial rights are affected if the "prosecutor's statements so infected the proceedings with unfairness as to result in a denial of due process." Anderson v. State, 121 Nev. 511, 516,

118 P.3d 184, 187 (2005). In closing argument, "[t]he State is free to comment on testimony, to express its views on what the evidence shows, and to ask the jury to draw reasonable inferences from the evidence." Randolph v. State, 117 Nev. 970, 984, 36 P.3d 424, 433 (2001).

We conclude that the State did not commit prosecutorial misconduct in its closing remarks regarding the law of involuntary manslaughter. The State asserted that Miller's actions were voluntary because he walked into an individual's residence with a pistol, fired it three times at two individuals, and aimed it at sensitive areas of their bodies, and therefore the State was merely asking the jury to draw a reasonable inference from the evidence.

Similarly, the State did not commit prosecutorial misconduct in its closing remarks regarding the use of a deadly weapon because Miller testified that he used a pistol, and therefore the State was merely asking the jury to draw a reasonable inference that the killings involved the use of a deadly weapon.

In addition, the State did not commit prosecutorial misconduct in its closing remarks regarding accident or mistake. The State asserted that an accident, mistake, or justifiable killing occurs in instances such as when an individual shoots in self-defense or splits a log and the ax head flies off, killing someone. Regarding Miller's testimony, the State argued that (1) he testified that he consciously pointed the gun at both victims; (2) he testified that, after accidentally shooting Carlson in the leg, he consciously raised his arm and fired the pistol at Carlson's head; (3) he testified that he also aimed the pistol at Jenkins and fired it at her head. Thus, we conclude the State permissibly asked the jury to draw a reasonable inference from the evidence that Miller did not accidentally kill either victim.

Finally, the State did not commit misconduct during its rebuttal arguments. The State did not instruct the jury to disregard the law, but to keep in mind the big picture in light of the sometimes arcane legal terminology. Further, the State instructed the jury to follow the law inside their jury instruction packets in reaching their verdict. In sum, the State did not commit prosecutorial misconduct in its closing arguments.

The jury's written questions during deliberation

Miller contends that the district court erred when it refused to answer one of the jury's written questions and directed the jury to Jury Instruction No. 4. We disagree.

"The trial judge has wide discretion in the manner and extent he answers a jury's questions during deliberation." Tellis v. State, 84 Nev. 587, 591, 445 P.2d 938, 941 (1968). If the district court believes the instructions "are adequate, correctly state the law and fully advise the jury on the procedures they are to follow in their deliberation," then the court can properly refuse to answer a question already addressed in the instructions. Id.

We conclude that the district court did not err when it refused to answer the jury's question about whether Jury Instruction No. 4 guaranteed a sentence of at least 40 years before the defendant was eligible for parole. The plain language of Jury Instruction No. 4 indicated that a defendant would be eligible for parole only after serving a minimum of 40 years imprisonment and, thus the district court justifiably refused to supplement the instruction on this basis. Further, both parties stipulated to the district court judge's written response without objecting, which supports the response.

Sufficiency of the evidence

Miller argues that the State did not present sufficient evidence at trial for a rational trier of fact to find him guilty beyond a reasonable doubt of two counts of first-degree murder with a deadly weapon. We disagree.

When determining whether a jury based its verdict on sufficient evidence to meet due process requirements, this court will inquire "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

To support a guilty verdict under NRS 193.165 (use of a deadly weapon), 200.010 (murder), and 200.030(1) (first-degree murder), the State must prove beyond a reasonable doubt that the defendant killed another person with malice aforethought, premeditation, and deliberation and that the defendant used a deadly weapon in the commission of the crime. "Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof." NRS 200.020(1). First-degree murder is a "willful, deliberate and premeditated killing." NRS 200.030(1)(a).

After viewing the evidence in the light most favorable to the prosecution, we conclude there is sufficient evidence in the record for a rational trier of fact to find that Miller is guilty of first-degree murder with a deadly weapon. The State proved express malice, deliberation, and premeditation, after presenting testimony that Miller (1) stalked Jenkins

and Carlson, (2) drove by Jenkins' apartment every day in the week leading up to the killings as well as approximately two hours before the shootings, (3) threatened to assault both victims, (4) twice threatened to kill Jenkins, (5) solicited various individuals to assault Carlson, (6) lied about a vehicle malfunction so he could lure his father out of his home and steal his father's pistol, (7) fired two shots at Carlson and paused between the shots, and (8) shot Jenkins in the forehead at pointblank range.

The State also proved the deadly weapon enhancement beyond a reasonable doubt because (1) the police discovered a magazine in Miller's rear pocket that matched the pistol used to kill the victims, and (2) Miller acknowledged that he stole a pistol from his father's residence and shot the victims with it. Thus, there was sufficient evidence to support the jury's convictions.

The fairness of the sentencing phase

Miller challenges the fairness of the sentencing phase for two reasons. First, Miller contends that the district court violated his right to an impartial and fair jury because his family members shouted at each other in the parking lot outside of the courthouse, a juror overheard the argument, and then that juror recounted the argument to the other jury members. Second, Miller contends that the district court erred when it admitted improper victim impact statements from four individuals who were not victims or relatives of the victims. We conclude that both of Miller's challenges fail because Miller was not prejudiced by his family's comments and the impact statements were relevant to the charges and Miller's prior conduct.

Although not every contact between a juror and a witness necessitates a new trial, a new trial is required "unless it appears, beyond a reasonable doubt, that no prejudice resulted." Leonard v. State, 114 Nev.

1196, 1207, 969 P.2d 288, 295 (1998). Generally, this court reviews a district court's decision as to whether prejudice occurred for abuse of discretion, but Miller failed to object and, therefore, this court reviews for plain error. Id.

We conclude that the district court did not violate Miller's right to a fair and impartial jury when it did not sua sponte dismiss the jury and empanel a new one. Miller was not prejudiced because the record indicates that the conversation did not affect the jurors' ability to fairly deliberate for the following reasons: (1) the shouts were not directed at a juror, (2) the jurors stated that they were not affected by the incident, and (3) the court instructed the jury to disregard the incident.

Miller did not object so this court reviews the district court's decision for plain error. "Questions of admissibility of testimony during the penalty phase of a capital murder trial are largely left to the discretion of the trial judge." Smith v. State, 110 Nev. 1094, 1106, 881 P.2d 649, 656 (1994). NRS 175.552 governs the admissibility of victim impact statements during penalty hearing of first-degree murder case, and the statute "provides that during the penalty hearing of a first[-]degree murder case, 'evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible.'" Id.

We conclude that the district court did not err when it admitted the victim impact statements from Sheila Nuttal, Victoria Black, Robert Peterson, and Carrie Valentine during the penalty hearing in this first-degree murder case. The statements were relevant because they concerned the murder charges, Miller's prior conduct toward Jenkins, and

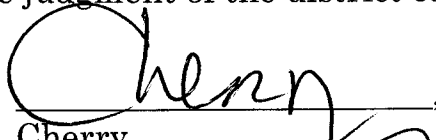
the effect of the deaths on the speakers. Accordingly, the district court did not violate NRS 175.552 when it allowed these victim impact statements.

Cumulative error

This court will reverse a conviction when the cumulative effect of errors violates a defendant's right to a fair trial. Rose v. State, 123 Nev. ____, ____, 163 P.3d 408, 419 (2007). Since we conclude no errors occurred in the district court's proceeding, there are no grounds for reversal under cumulative error.

Based on the above, we conclude that each of Miller's arguments fails. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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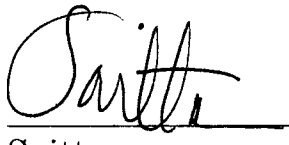

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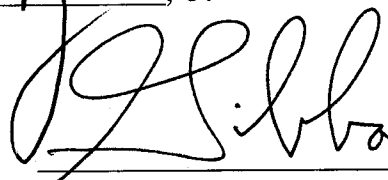

_____, J.
Gibbons

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