

IN THE SUPREME COURT OF THE STATE OF NEVADA

EVAN EUGENE MOORE,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 51583

**FILED**

FEB 25 2010

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Deborah A. Agosti, Judge.

Appellant Evan Moore was charged with the shooting death of Julian Robinson at a hotel room in Reno, Nevada. The shooting allegedly took place when Robinson refused Moore's requests to send Moore's estranged girlfriend, Kellymae Watts, out of the hotel room. Following a jury trial, Moore was convicted of first-degree murder with the use of a deadly weapon and was sentenced to life with the possibility of parole after 20 years with a like consecutive sentence for the use of a deadly weapon.<sup>1</sup> This appeal followed.

In this appeal, Moore alleges that the district court erred in: (1) permitting Watts to testify about her jail visits with Moore and in providing a corresponding limiting instruction that placed more weight upon this evidence, (2) failing to question Moore about his request to relieve trial counsel, (3) permitting the jury to view his interrogation DVD,

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<sup>1</sup>The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

(4) failing to advise Moore of his right to testify, (5) permitting the jury to review a letter allegedly written by Moore, (6) permitting a flight instruction, (7) admitting an improper identification of Moore as the shooter, and (8) determining that sufficient evidence supported the jury's determination. For the following reasons, we affirm the district court's judgment of conviction.

Watts's testimony and the limiting instruction

Moore argues that while there was a hearing outside the presence of the jury before admitting Watts's testimony, the district court erred in admitting the testimony because it was not supported by clear and convincing evidence. See Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1131 (2001). Moore also argues that the limiting jury instruction regarding Watts's testimony actually placed more weight upon the evidence and assumed facts not in evidence.<sup>2</sup> We disagree.

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<sup>2</sup>The jury instruction at issue stated that:

Witness Kelly Watts testified that the defendant offered her money or a place to stay. Witness Watts also testified that the defendant asked her to alter her testimony regarding hearing the defendant laughing in a phone call he made to Room 531, shortly before the murder. The evidence was offered by the State for the limited purpose of proving the defendant's consciousness of guilt. You should consider the evidence for this limited purpose, and for no other purpose. The weight to be given to this evidence is for you, the jury, to decide.

### Standard of review

“A district court’s decision to admit or exclude [prior bad act] evidence under NRS 48.045(2)<sup>[3]</sup> rests within its sound discretion and will not be reversed on appeal absent manifest error.” Ledbetter v. State, 122 Nev. 252, 259, 129 P.3d 671, 676 (2006). For evidence of a prior bad act of a defendant to be deemed admissible, the trial court must determine, outside the presence of the jury, that the bad act is relevant to the crime charged, that the act is proven by clear and convincing evidence, and that 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); see also Tavares, 117 Nev. at 731, 30 P.3d at 1131.

In assessing “unfair prejudice,” we review how the evidence was actually used—whether, having been admitted for a permissible limited purpose, the evidence was presented or argued at trial for its forbidden tendency to prove propensity. See Rosky v. State, 121 Nev. 184, 197-98, 111 P.3d 690, 699 (2005). Also key is “the nature and quantity of the evidence supporting the defendant’s conviction beyond the prior act evidence itself.” Ledbetter, 122 Nev. at 262 n.16, 129 P.3d at 678 n.16. The trial court has discretion in striking a balance between prejudice and probative weight. See, e.g., State v. Nystedt, 79 Nev. 24, 27, 377 P.2d 929, 931 (1963).

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<sup>3</sup>NRS 48.045(2) prohibits the use of “[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that he acted in conformity therewith.” Such evidence “may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

The district court properly admitted the testimony

We conclude that the district court did not abuse its discretion when it allowed Watts to testify about her jail visits with Moore because Watts's testimony was relevant to the crime charged and was proven by clear and convincing evidence. Further, Watts's testimony about her jail visits with Moore was probative of Moore's intent and knowledge for the present charge because it was relevant to show his attempt to cover up the crime. We conclude that the probative value of Watts's testimony was not substantially outweighed by the danger of unfair prejudice; it was not used to show propensity, it was used to show consciousness of guilt. As such, we conclude that the district court did not abuse its discretion in admitting the prior bad acts evidence.

We further conclude that the limiting jury instruction was properly given and tailored pursuant to our holding in Tavares "that the trial court should give the jury a specific instruction explaining the purposes for which the [prior bad acts] evidence is admitted." 117 Nev. at 733, 30 P.3d at 1133. While Moore may not agree with Watts's testimony, the jury instruction was tailored to her actual testimony and, as such, was not prejudicial and did not assume facts not in evidence. Accordingly, we conclude that the district court did not err in giving this jury instruction.

Failure to question Moore regarding his request to relieve trial counsel

Moore contends that in denying his requests to have his attorney removed from his case, the district court erred in failing to hold an evidentiary hearing to inquire into his grounds for the requests. See Young v. State, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004).

### Standard of review

We review a district court's denial of a motion to substitute counsel for an abuse of discretion. Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005). Where a defendant moves for new counsel considerably in advance of trial, "the [district] court may not summarily deny the motion but must adequately inquire into the defendant's grounds for it." Id. at 337, 113 P.3d at 842 (alteration in original) (quoting Young, 120 Nev. at 968, 102 P.3d at 576).

When we review a denial of a motion to substitute counsel, we consider 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. Generally, a district court's inquiry into a motion for replacement counsel should balance potential procedural delay against the extent of attorney-client conflict. See Young, 120 Nev. at 971, 102 P.3d at 577. This does not require, however, that the district court hold hearings on such motions or explicitly balance the required considerations. See Garcia, 121 Nev. at 339, 113 P.3d at 844.

### The district court did not abuse its discretion

Here, the district court filed an order denying Moore's request because the trial was rapidly approaching and Moore failed to make the requisite showing of good cause under Washoe District Court Rule 23(4).<sup>4</sup>

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<sup>4</sup>WDCR 23(4) states that:

4. Except for good cause shown, no application for withdrawal or substitution shall be

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After analyzing the three Garcia factors, we conclude that the district court was correct in denying Moore's motion to substitute counsel. While Moore did file two motions, they both were procedurally deficient as they lacked service of process and the second motion was not timely because it would have caused a delay in the trial.

More importantly, the district court held a hearing regarding Moore's attorney's motion to withdraw in which the issues raised by Moore and the ultimate delay that would result from the appointment of new counsel were discussed. After the discussion, the breakdown between Moore and his attorney appeared to be resolved and Moore explicitly stated that he no longer had a problem with his counsel's continued representation of him. Therefore, we conclude that the district court did not abuse its discretion when it denied Moore's motion because it properly considered the extent of the attorney-client conflict and determined that conflict did not justify replacement of counsel.

#### The interrogation DVD

Moore argues that while his counsel stipulated to the admission of the DVD of his interview with the police, the district court erred in admitting it because a hearing pursuant to Jackson v. Denno, 378 U.S. 368 (1964), was not conducted. Moore contends that he was bullied and double-teamed during the "one and one-half hour marathon"

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*... continued*

granted if a delay of the trial or of the hearing of any other matter in the case would result. Discharge of an attorney may not be grounds to delay a trial or other hearing.

interrogation and that “his elderly counsel was overwhelmed and not helpful.” We disagree.

We have made it clear that a Jackson hearing is required only when the defendant challenges the voluntariness of his confession in the trial court. Guynes v. State, 92 Nev. 693, 695, 558 P.2d 626, 627 (1976). Here, Moore failed to make this required voluntariness challenge and never contended that his admission was involuntary during trial. Additionally, upon review of the DVD, it does not appear that any of Moore’s contentions are accurate. Thus, we conclude that the district court did not err in allowing the DVD into evidence without first conducting a Jackson hearing.

Moore’s right to testify

Moore argues that the district court violated his Fifth Amendment rights in failing to advise him of his right to testify on his own behalf when he was the only person who could present his theory of the case and his counsel failed to call any witnesses. As such, Moore contends that Phillips v. State, 105 Nev. 631, 633, 782 P. 2d 381, 382 (1989), is distinguishable on its facts.

In Phillips, we considered and rejected a rule requiring reversal of a criminal conviction if the district court failed to expressly admonish a defendant on the record regarding his right to testify. 105 Nev. at 633, 782 P. 2d at 382. We concluded that due to the importance of the right to testify, it is “good practice” that “every defendant should be advised on the record, but outside the presence of the jury, by the [district] court of his right to testify at or near the end of the State’s case-in-chief.” Id. at 633, 782 P.2d at 382. However, we also concluded that failure to

advise the defendant of his right to testify on the record is not absolute proof that a defendant did not voluntarily waive his right to testify. Id.

We conclude that the language in Phillips that every defendant should be advised on the record is a recommendation from this court, not a mandatory requirement. We thus conclude that here, like in Phillips, the record does not reflect that Moore was unaware of his right to testify or that he felt that he would not be allowed to testify if he so chose. Id. Therefore, we conclude that the district court did not err in failing to advise Moore about his right to testify.

#### Un-objected to assertions

##### Standard of review

“Failure to object during trial generally precludes appellate consideration of an issue.” Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001). Nonetheless, “an error that is plain from a review of the record does not require reversal unless the defendant demonstrates that the error affected his or her substantial rights, by causing ‘actual prejudice or a miscarriage of justice.’” Valdez v. State, 124 Nev. \_\_\_, \_\_\_, 196 P.3d 465, 477 (2008) (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003)).

##### Moore’s letter

Moore argues that while his counsel did not object to the admission of the letter allegedly written by him while he was incarcerated, the district court erred because the letter was obtained in violation of Moore’s Fourth Amendment right against unreasonable searches and seizures.

In challenging the letter, we conclude that Moore failed to demonstrate how the alleged error affected his substantial rights by



causing actual prejudice or a miscarriage of justice. Thus, we conclude that Moore's argument is without merit.

Flight jury instruction

Moore argues that even though his counsel did not object, the district court improperly instructed the jury on flight for the limited purpose of showing consciousness of guilt. Moore contends that the instruction was misleading because Moore cooperated with the police.

We conclude that the flight instruction was proper as there was sufficient evidence that Moore fled the scene. See Carter v. State, 121 Nev. 759, 770, 121 P.3d 592, 599 (2005). In this case, Moore admits to running from the scene of the crime, fleeing to California, and initially lying to the police about being at the scene. While Moore willingly returned the police's phone call and returned to Reno for questioning, the jury could reasonably infer that he had fled the apartment complex because of consciousness of guilt. Accordingly, we conclude that no error occurred.

Carzelle Reese's identification of Moore

Moore contends that the district court erred in admitting Carzelle Reese's identification of him from an overtly suggestive photograph and not a proper lineup. However, at trial, the defense did not object to Reese's identification.

In challenging Reese's identification, we conclude that Moore failed to demonstrate how the alleged error affected his substantial rights by causing actual prejudice or a miscarriage of justice.

The standard for reviewing an out-of-court identification is whether, upon review "of the totality of the circumstances, the identification was so unnecessarily suggestive and conducive to

irreparable mistaken identification that the defendant was denied due process of law.” Bolin v. State, 114 Nev. 503, 522, 960 P.2d 784, 796 (1998) (abrogated by Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002)). “[T]he key question is whether the identification was reliable.” Gehrke v. State, 96 Nev. 581, 584, 613 P.2d 1028, 1030 (1980). Specifically, this court considers five factors: (1) the witness’ opportunity to view the criminal at the time of the crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the criminal; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and confrontation. See id. (citing Neil v. Biggers, 409 U.S. 188, 199-200 (1972)).

During the shooting, Reese was standing just behind Robinson and had the opportunity to view the shooter for the entire duration of the incident. Also, when shown the picture of Moore just two days after the shooting, Reese testified that he immediately recognized Moore from the two prior encounters and from the night of the shooting. Accordingly, we conclude that Reese’s identification was highly reliable despite only being shown one photo and thus did not violate Moore’s due process rights. Thus, we conclude that Moore’s argument is without merit.

#### Sufficiency of the evidence

Moore argues that the prosecution failed to present sufficient evidence to sustain his first-degree murder conviction and, as such, the district court erred in giving a first-degree murder instruction to the jury. We disagree.

#### Standard of review

The Due Process Clause of the Fourteenth Amendment requires that to convict a defendant of a crime, all elements of that crime

must be proved beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970). In reviewing a claim of insufficient evidence, “[t]he relevant inquiry is ‘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 a crime beyond a reasonable doubt.’” Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)).

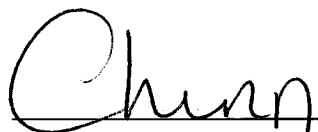
Sufficient evidence was presented

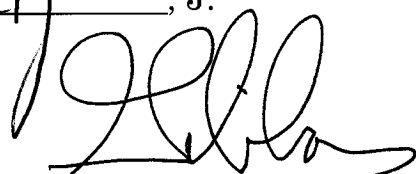
We conclude that there was sufficient evidence presented to the jury to support Moore’s conviction of first-degree murder. The State presented evidence that Moore made phone calls to the room before the murder, that he was present at the scene, that he lied about his presence, that he was the shooter, that he fled from the scene, and that he attempted to obtain an alibi while in prison. Under these circumstances, a rational trier of fact could have reasoned from the evidence presented that all the elements of first-degree murder were proved beyond a reasonable doubt. Therefore, we affirm Moore’s conviction and conclude that the district court did not err in giving the first-degree murder jury instruction.

In light of the foregoing, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Gibbons

cc: Chief Judge, Second Judicial District  
Hon. Deborah A. Agosti, Senior Justice  
Mary Lou Wilson  
Attorney General/Carson City  
Washoe County District Attorney  
Washoe District Court Clerk