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5-26-2005

### Summary of *Viray v. State*, 121 Nev. Adv. Op. 19

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*Nevada Law Journal*

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## *Viray v. State*, 121 Nev. Adv. Op. 19 (05/26/2005)<sup>1</sup>

### CRIMINAL LAW—HABEUS CORPUS/JURY ELIGIBILITY

#### Summary

A jury convicted Benjardi Batucan Viray for lewdness with a minor. He appealed claiming that there was an improper inclusion of new information at a preliminary hearing and that this inclusion was sufficient to declare a mistrial. The Nevada Supreme Court held that a change in the factual situation is not sufficient to declare a mistrial if the inclusion of new information does not affect the defendant's substantial rights and the charged offense remained the same. The second issue was whether a court should declare a mistrial when a juror disregards the admonishment of the court to not speak about the case. The Court held that a district court has discretion to remove a juror mid-trial for violation of the court's admonishment rather than declaring a mistrial.

#### Disposition/Outcome

The Nevada Supreme Court affirmed the district court's decision to allow the trial to continue regardless of the inclusion of new information and minor juror impropriety.

#### Factual and Procedural History

During Viray's trial, the victim testified that Viray forced *her* to massage his legs and feet. The State, however, argued at the preliminary hearing that Viray forced the victim to let *him* massage her legs and feet. After the inconsistency became apparent, Viray filed a writ of habeas corpus which was denied.

In addition to the factual discrepancy, during the trial Juror #4 became unsettled about his ability to be a part of the jury. In fact, contrary to the court's admonishment, Juror #4 spoke to Juror #5 about his personal concerns of serving on the jury. Upon discovering that Juror #4 had disobeyed the court's admonishment, the judge held a special hearing to address the situation. Because Juror #5 felt confident that he could remain impartial, the court allowed Juror #5 to remain on the jury. The court, however, substituted Juror #4 with an alternate juror.

Viray appealed the conviction and contended that the district court erred by refusing to grant a continuance when the State amended the information on the first day of trial, and to order a mistrial instead of substituting an alternate juror mid-trial for a juror who violated the court's admonishment not to discuss the case.

#### Discussion

A criminal defendant has a substantial and fundamental right to be informed of the charges against him so that he can prepare an adequate defense. The Nevada Supreme Court, however, citing *Shannon v. State*,<sup>2</sup> decided that as long as Viray's substantial rights were not

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<sup>1</sup> By Chris Orme

<sup>2</sup> 105 Nev. 782, 783 P.2d 942 (1989).

disrupted and that the charges against him remained the same, there was no reason for a mistrial. The court also held that although jurors are admonished not to speak with one another about anything pertaining to the trial,<sup>3</sup> minor juror improprieties are within the purview of the district court's discretion. However, the court also hinted that a mistrial would be appropriate in a case where a juror violated the court's admonishment in front of the other jurors.

### **Conclusion**

The Nevada Supreme Court affirmed the district court's decision to allow the trial to continue regardless of the inclusion of new information and minor juror impropriety.

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<sup>3</sup> NEV. REV. STAT. 175.401(1) (2004).