IN THE SUPREME COURT OF THE STATE OF NEVADA

MELONIE LYNN SHEPPARD,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43129

FILED

DEC 20 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon jury verdict, of first-degree murder with the use of a deadly weapon, robbery with the use of a deadly weapon, and conspiracy to commit robbery. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Appellant Melonie Sheppard asserts several errors on appeal of her conviction. First, Sheppard claims that there was insufficient corroboration of accomplice testimony. Additionally, Sheppard claims that the jury was not properly instructed as to the requirements for corroboration of accomplice testimony. Next, Sheppard claims that the facts of the case did not support a felony murder conviction. Finally, Sheppard claims that the jury was not properly instructed as to the requirements for a felony murder conviction. Finding no error, we affirm the conviction.

Corroboration of accomplice testimony

Sheppard contends that the district court erred by failing to instruct the jury that under NRS 175.291, the testimony of accomplices Woolfe, Belvin and Yescas needed to be corroborated. Sheppard further argues that the testimony of those accomplices was not sufficiently corroborated to justify her conviction.

The State counters first that Yescas was not an accomplice, and that therefore his testimony was sufficient to corroborate the testimony of Woolfe and Belvin.

Next, the State argues that even assuming Yescas could be considered an accomplice, sufficient independent evidence was produced at trial to corroborate the accomplice testimony and support Sheppard's conviction.

Finally, the State claims that based on the independent corroboration, a jury instruction about accomplice testimony was not required, nor did Sheppard request one.

NRS 175.291 reads as follows:

> 1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.
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> 2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

We first address the issue of whether or not Yescas can be considered an accomplice. If Yescas is determined to be an accomplice, then other independent corroboration of the testimony of all of the accomplices is required to support the conviction of Sheppard, since this court has held that accomplice testimony cannot be corroborated by the

testimony of other accomplices.[1] If he is not an accomplice, then his testimony alone is sufficient to corroborate the testimony of Woolfe and Belvin.

Sheppard argues simply that Yescas was an accomplice since he was liable to prosecution. The State counters that none of the evidence at trial established that Yescas was liable to prosecution on any of the crimes with which Sheppard was charged. The State claims that Yescas was at worst an accessory after the fact in that he drove Woolfe away from the crime scene. The State further argues that since accessory after the fact is not the "identical offense charged" as stated in NRS 175.291(2), Yescas should not be considered an accomplice.

In addition to the statutory definition of accomplice from NRS 175.291(2), this court has held that an accomplice can be one "who is culpably implicated in, or unlawfully cooperates, aids or abets in the commission of the crime charged."[2] This court further held "'that conduct, to be criminal, must consist of something more than mere action (or non-action where there is a legal duty to act); some sort of bad state of mind is required as well.'"[3]

In Orfield v. State,[4] this court analyzed the acts of an alleged accomplice to determine his status. This court held he was not an

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[1]Sheriff v. Gordon, 96 Nev. 205, 206-07, 606 P.2d 533, 534 (1980) ("Witnesses whose testimony requires corroboration may not corroborate each other.").

[2]Orfield v. State, 105 Nev. 107, 109, 771 P.2d 148, 149 (1989).

[3]Id. (quoting W. LaFave, A. Scott, Criminal Law, 176 (1972)).

[4]105 Nev. 107, 771 P.2d 148 (1989).

accomplice, finding persuasive the facts that he "abandoned the group at the first opportunity after the attack and immediately led the police to [the victim] so she could be treated, [and h]e implicated appellant and the others with his statements and actions before his arrest."[5]

Based on the facts as established in trial testimony, there was some evidence of a "bad state of mind" since Yescas indicated he was aware that the group intended to take money from Johnson. Whether he actually aided, abetted, or unlawfully cooperated in the commission of the crime is a closer call. Yescas had ample opportunity to abandon the group prior to the crime, but he did not; he also had ample opportunity to contact the police about the crime, but did not. Under this court's precedent in Orfield, we conclude that Yescas should be considered an accomplice.

As to corroboration of accomplice testimony, this court provided a standard for the nature of evidence required to corroborate accomplice testimony in Cheatham v. State:

> Corroboration evidence need not be found in a single fact or circumstance and can, instead, be taken from the circumstances and evidence as a whole. Corroboration evidence also need not in itself be sufficient to establish guilt, and it will satisfy the statute if it merely tends to connect the accused to the offense.
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> An accomplice's testimony is not sufficiently corroborated merely by showing that the defendant was near the scene of the crime at the time the accomplice testified that they committed the crime in concert.[6]

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[5]Id. at 109, 771 P.2d at 149.

[6]104 Nev. 500, 504-05, 761 P.2d 419, 422 (internal citations omitted).

This court in Cheatham went on to analyze the corroborating evidence in a case remarkably similar to the instant case.[7] Independent or corroborated evidence showed the defendant was with the others in the hotel room just prior to a robbery and murder being committed; that the defendant was with the others just after the crimes were committed; and that he went from being broke before the crime to having enough money for a motel room after the crime.[8] This court found sufficient corroboration, summarizing as follows:

> Independent evidence tells us where the crime was committed and approximately when. Cheatham's own testimony has him in the presence of the murderers at the scene of the crime immediately before the crime was committed. Cheatham is still with them after the robbery and murder, but now Cheatham has some money. All of this evidence, taken together, is "supplementary to that already given and tending to strengthen or confirm it."[9]

Here, there was independent corroboration or testimony by Sheppard herself that she was with the others prior to and during the crime; that she fled the scene after the crime; that she had in her possession the "booty" of the robbery; that she cashed in the parlay tickets,

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[7]Id. at 502, 761 P.2d at 420 (three men and one woman were accused of robbery and murder in a hotel room during a drug deal gone wrong; two of the men and the one woman pleaded guilty and testified against the third man, who claimed he did not participate in the crimes).

[8]Id. at 505, 761 P.2d at 422.

[9]Id. at 505, 761 P.2d at 422-23 (quoting Black's Law Dictionary 311 (5th ed. 1979)).

spent the money and discarded the pouch; and that she did not contact authorities to report the crime.

One element of the event, disputed in the testimony of Sheppard and the others, was whether or not Sheppard knew about, planned, or participated in the robbery. However, there was independent evidence that prior to the robbery she knew that Johnson had lots of money and parlay tickets; there was undisputed evidence that Sheppard knew that Belvin owned a gun; and there was independent evidence that Sheppard told people after the crime that Johnson owed her money.

We conclude that this case turned on whether or not the jury believed Sheppard's version of the events. We find that there was sufficient evidence presented, aside from the testimony of the accomplices, to call her credibility into question. It was reasonable, therefore, for the jury to disregard Sheppard's testimony as to her participation in the robbery. We conclude that there was sufficient corroboration of the accomplice testimony to support Sheppard's convictions.

Accomplice corroboration jury instructions

Neither party in this case requested a jury instruction as to corroboration of accomplice testimony. Under Gebert v. State, since the requirement for corroboration of accomplice testimony "is statutory in nature and does not arise from any constitutional mandate,"[10] the onus is on the defendant to request such an instruction.

> H[er] failure to do so amounts to a waiver of h[er] right to now complain unless the instruction was so necessary to h[er] case that the court sua

[10]85 Nev. 331, 333, 454 P.2d 897, 899 (1969).

> sponte was required to give it. Appellate consideration is precluded unless the instruction is so necessary to the case that the failure to give it is patently prejudicial.[11]

However, in Buckley v. State, this court held that a cautionary instruction regarding the credibility of an informant, arguably analogous to accomplice testimony, "is required when an informant's testimony is uncorroborated and favored when the testimony is corroborated in critical respects."[12] In that case, however, this court determined that the failure to give the requested instruction was harmless error where there was substantial corroboration of the testimony of the informant, there was substantial evidence of the defendant's guilt, and there was an instruction given about weighing the credibility of witnesses.[13]

In the instant case, the court gave three jury instructions about credibility. Jury Instruction No. 23 read in pertinent part:

> Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. In weighing the affect of a discrepancy, consider whether it pertains to a matter of importance, or an unimportant detail, and whether the discrepancy results from innocent error or willful falsehood.
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> Jury Instruction No. 28 read as follows:
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> In deciding the facts of this case, you may have to decide which witnesses to believe and which witnesses not to believe. You may believe

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[11]Id. at 333-34, 454 P.2d at 899 (internal citations omitted).

[12]95 Nev. 602, 604, 600 P.2d 227, 228 (1979).

[13]Id. at 604-05, 600 P.2d at 228-29.

everything a witness says, or only part of it, or none of it.

In deciding what to believe, you may consider a number of factors, including the following: (1) the witness' ability to see or hear or know the things the witness testified to; (2) the quality of the witness' memory; (3) the witness' manner while testifying; (4) whether the witness had an interest in the outcome of the case or any motive, bias, or prejudice; and (5) how reasonable was the witness' testimony when considered in light of other evidence which you believe.

Finally, Jury Instruction No. 30:

To the jury alone belongs the duty of weighing the evidence and determining the credibility of the witnesses. The degree of credit due a witness should be determined by his or her character, conduct, manner upon the stand, fears, bias, impartiality, reasonableness or unreasonableness of the statements he or she makes, and the strength or weakness of his or her recollections, viewed in the light of all the other facts in evidence.

If the jury believes that any witness has willfully sworn falsely, they may disregard the whole of the evidence of any such witness.

We conclude that the lack of a jury instruction about corroboration of accomplice testimony was not error under this court's precedents in Buckley and Gebert. First, an instruction was not requested, and the court had no duty to suggest it sua sponte. Next, there were adequate jury instructions given as to the jury's duty to determine and weigh credibility. Finally, there was sufficient independent corroboration of the testimony of accomplices to render such an instruction unnecessary.

Felony murder

Sheppard claims that felony murder requires proof of a direct causal connection between a defendant's felonious act and the resulting death. Sheppard further claims that a simple "but-for" relationship is not enough to establish criminal causation, and that a prosecutor must also prove a defendant's conduct was the legal or proximate cause of the criminal result. Finally, Sheppard argues that Woolfe's possession of the gun, as well as his use of it to rob and kill Johnson, was an intervening cause and unforeseeable result that broke the chain of causation.

This argument seemingly depends on there being insufficient evidence to show that Sheppard knew about the planned robbery. In such cases, "[t]he relevant inquiry for this Court 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 the crime beyond a reasonable doubt.'"[14]

Sheppard primarily cites this court's 1965 decision in Payne v. State[15] for her arguments. However, this court in Payne specifically disavowed the more limited definition of felony murder that some states had enacted. This court instead held that felony murder is appropriate "[w]hen the homicide is within the res gestae of the initial crime, and is an emanation thereof."[16]

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[14]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

[15]81 Nev. 503, 406 P.2d 922 (1965).

[16]Payne, 81 Nev. at 507, 406 P.2d at 924-25 (quoting State v. Fouquette, 67 Nev. 505, 528, 221 P.2d 404, 416 (1950)).

In McKinney v. State, this court affirmed the first degree felony murder conviction of a defendant who participated in a car theft that resulted in the killing of the driver of the car, even though the defendant did not actually kill, or intend to kill, the victim.[17] Since the defendant participated in the theft, and the killing of the victim was a "natural and probable consequence of the planned robbery,"[18] the defendant was properly found "criminally liable for the acts of his cohorts."[19]

NRS 200.030(1)(b) defines felony murder as murder which is "[c]ommitted in the perpetration or attempted perpetration of" a list of enumerated felonies, including robbery, the underlying felony here. Robbery is a general intent crime, so a lack of specific intent to commit robbery or murder will not preclude culpability for either the robbery or the resultant felony murder.[20] This court has also noted that "[r]obbery . . . is not confined to a fixed locus, but is frequently spread over considerable distance and varying periods of time."[21]

We first note that the issue of the gun is a red herring. The underlying felony here is robbery, which is one of the enumerated felonies in Nevada's felony murder statute.[22] Whether or not a robbery is

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[17]95 Nev. 494, 494-95, 596 P.2d 503, 503 (1979).

[18]Id.

[19]Id. at 495, 596 P.2d at 503.

[20]Daniels v. State, 114 Nev. 261, 269, 956 P.2d 111, 116 (1998).

[21]Fouquette, 67 Nev. at 527, 221 P.2d at 416.

[22]NRS 200.030(1)(b).

undertaken with a gun, robbery remains an appropriate predicate felony for felony murder.[23]

The record reveals that there was evidence presented by more than one witness that Sheppard participated in the planning of the robbery, and participated in the robbery itself. Further, there was evidence that Sheppard was in possession of Johnson's property after the crime, and that she cashed in his parley tickets and gambled the money as if it were her own.

NRS 195.020 states in pertinent part:

> Every person concerned in the commission of a felony . . . whether he directly commits the act constituting the offense, or aids and abets in its commission . . . is a principal . . . . The fact that the person aided, abetted, counseled, encouraged, hired, commanded, induced or procured, could not or did not entertain a criminal intent shall not be a defense to any person aiding, abetting, counseling, encouraging, hiring, commanding, inducing or procuring him.

Although Sheppard is correct in asserting that there was little evidence that she knew in advance that Woolfe had a gun, we conclude that there was sufficient evidence for a jury to find Sheppard knew about, and participated in, the robbery.

Although the killing of the robbery victim did not occur as part of the initial stage of the robbery, it happened shortly thereafter as the

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[23]See State v. Contreras, 118 Nev. 332, 338, 46 P.3d 661, 664-65 (2002) (Maupin, J., concurring) ("[T]he fundamental purpose of the felony-murder rule is to prevent innocent deaths likely to occur during the commission of inherently dangerous felonies. Indeed, each predicate crime specifically enumerated in Nevada's felony-murder statute . . . is inherently dangerous to human life.") (internal citations omitted).

robbers attempted to escape. We find that the killing of Johnson was an emanation of the robbery, as it occurred while the robbers were attempting to escape. Such an act was a "natural and probable consequence" of a dangerous felony such as robbery. We find that a rational trier of fact could have found, beyond a reasonable doubt, the essential elements of the crimes charged. Therefore, we conclude that Sheppard was properly convicted of first degree murder under the felony murder rule.

Felony murder jury instructions

Sheppard argues that the jury instruction on felony murder minimized the causation requirement.

Jury Instruction No. 14 defined felony murder as follows:

> Nevada law defines first-degree felony murder as a murder that is committed in the perpetration or attempted perpetration of certain enumerated crimes, including robbery or attempted robbery. The felonious intent involved in the underlying felony, in this case robbery, is deemed, by law, to supply the intent necessary to characterize the killing as murder. Felony murder is defined by statute as first-degree murder.
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> Where a killing takes place in the course of an unbroken chain of events leading from a robbery to the killing and is committed for the purpose of obtaining or retaining possession of the property; prevent or overcome resistance to the taking; or facilitate escape, the killing is to be deemed a murder committed during the perpetration of a robbery. Felony murder does not require that the defendant intend the resulting harm; on the contrary, it addresses accidental or unintentional killing.

Jury Instruction No. 15 defined robbery as follows:

> Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or of anyone in his company at the time of the robbery. A taking is by means of force or fear if force or fear is used to:
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> A) Obtain or retain possession of the property;
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> B) Prevent or overcome resistance to the taking; or
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> C) Facilitate escape.
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> The degree of force used is immaterial if it is used to compel acquiescence to the taking of or escaping with the property. A taking constitutes robbery whenever it appears that, although the taking was fully contemplated without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Jury Instruction No. 18 defined aiding and abetting as follows:

> Nevada law does not distinguish between an aider and abettor to a crime and an actual perpetrator of a crime; both are equally culpable. Every person concerned in the commission of a crime, whether he directly commits the act constituting the offense or abets in its commission is guilty as a principal.
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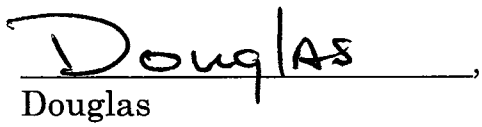
> In order to find the defendant guilty of the charged offenses, you must find that the defendant voluntarily participated in the robbery with the intent to violate the law.

First, it is important to note that Sheppard's counsel had no objection to any of the jury instructions given, nor did he request or propose any additional instructions. The general rule is that "'failure to object or to request special instruction to the jury precludes appellate

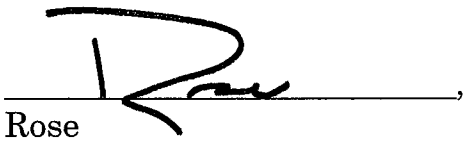
consideration.'"[24] However, this court may address plain error sua sponte.[25]

The instructions shown above are based on both statutory and case law. We find that the jury instructions given were correct statements of the law. Therefore, we conclude that there was no error as to the felony-murder jury instruction, the jury instruction as to the underlying felony of robbery, or the jury instruction on liability of aiders and abettors. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
Douglas



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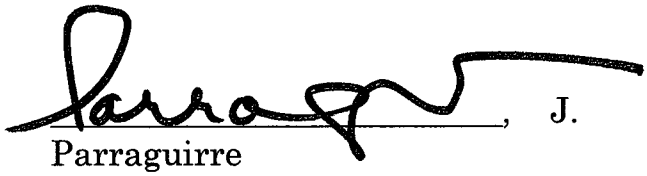

_____, J.
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cc: Hon. Janet J. Berry, District Judge
Scott W. Edwards
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[24]Etcheverry v. State, 107 Nev. 782, 784-85, 821 P.2d 350, 351 (1991) (quoting McCall v. State, 91 Nev. 556, 557, 540 P.2d 95, 95 (1975)).

[25]Buff v. State, 114 Nev. 1237, 1244 n.4, 970 P.2d 564, 568 n.4 (1998) (citing Pertgen v. State, 110 Nev. 554, 560, 875 P.2d 361, 364 (1994)).