IN THE SUPREME COURT OF THE STATE OF NEVADA

FERRILL JOSEPH VOLPICELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43203

FILED

JUN 2 9 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 a jury verdict, of eight counts of burglary, one count of conspiracy, and one count of possession or making of counterfeit pricing labels. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge.

Appellant Ferrill Volpicelli asserts four errors on appeal of his indictment, conviction, and sentencing. First, Volpicelli claims that the district court erred in not quashing his indictment after the grand jury heard inadmissible evidence of his prior burglary conviction. Next, Volpicelli contends that the district court erred in finding him competent to stand trial. Volpicelli also argues that the jury had insufficient corroborating evidence of accomplice testimony to convict him. Finally, Volpicelli claims that the district court abused its discretion in enhancing his sentence after adjudicating him a habitual criminal. We disagree.

DISCUSSION

Grand jury indictment

Volpicelli cites no law, but contends that the district court erred in not quashing his indictment based on the improper admission of his prior conviction, claiming that the jurors were tainted by the prior conviction since they returned a true bill. The State cites State of Nevada

v. Logan[1] and contends the applicable standard is whether the evidence presented to the grand jury, without the disputed evidence, was sufficient to sustain the indictment. The State further argues that there was more than sufficient evidence presented to sustain the indictment.

NRS 172.155 calls for grand jury indictment "when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and that the defendant committed it." NRS 172.135 mandates that "the grand jury can receive none but legal evidence, and the best evidence in degree, to the exclusion of hearsay or secondary evidence." But an indictment is not automatically quashed if some of the evidence presented is not legal evidence.[2]

In Robertson v. State, this court held that although the grand jury may have heard inadmissible hearsay evidence, the indictment could be sustained where there was sufficient legal evidence.[3] This court affirmed the dismissal of an indictment in Sheriff v. Frank, a case where

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[1]1 Nev. 509 (1865) (republished as 1-2 Nev. 427, 431) ("[W]here there is the slightest legal evidence, the court cannot inquire into its sufficiency, or set it aside, because some illegal evidence was received with it.").

[2]Logan, 1-2 Nev. at 431:

> That a grand jury should receive none but legal proof, is an old and well-established rule, but that the admission of evidence not strictly legal will authorize a setting aside of an indictment, is a proposition which seems to have no authority to sanction it, and, if adopted, would only be an impediment to the execution of criminal justice[.]

[3]84 Nev. 559, 561-62, 445 P.2d 352, 353 (1968).

the grand jury heard inadmissible evidence.[4] However, contributing to this court's finding that the dismissal was proper was the omission by the prosecutor of important exculpatory evidence;[5] and this court specifically reiterated adherence "to the general rule announced in Robertson."

Here, there was testimony from many witnesses as to Volpicelli's involvement in the alleged burglary scheme. Additionally, the prosecutor advised the grand jury that the prior burglary conviction was being presented for a limited purpose,[6] and should not be considered in determining whether there was sufficient probable cause to indict Volpicelli. While the grand jury here heard inadmissible evidence, its effect does not rise to the level of "clearly destroying" the independence, and "irreparably impairing" the function, of the grand jury under Frank. We conclude that there was sufficient legal evidence presented to the grand jury to sustain the indictment; and that the district court did not err in refusing to dismiss the indictment.

Competency

Again citing no law, Volpicelli argues on appeal that he may not have been "competent during the crimes," citing as evidence the

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[4]103 Nev. 160, 734 P.2d 1241 (1987).

[5]Id. at 165-66, 734 P.2d at 1245 (finding that the omission of exculpatory evidence, along with the presentation of substantial inadmissible evidence, "clearly destroyed the existence of an independent and informed grand jury and irreparably impaired its function").

[6]We note that the prosecution incorrectly interpreted this court's holding in Lewis v. State, 109 Nev. 1013, 862 P.2d 1194 (1993) as mandating formal notice in the charging documents of the State's intention to seek an enhanced sentence based on prior convictions.

successful treatment of his "mental illness" since his incarceration. The State assumes that since Volpicelli's appeal brief refers to the competency hearing, the competency being appealed was actually Volpicelli's competency to stand trial.

This court will make the same assumption, in light of the fact that the record contains no evidence that the defense of insanity was considered or even mentioned. In Ogden v. State, this court noted that "[c]ompetency at the time of trial is not to be confused with the defense of insanity. Competency to stand trial is a judicial determination, whereas the defendant's sanity at time of commission of the act is a factual question."[7] The competency determination is based on "whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational and factual understanding of the proceedings against him."[8] In reviewing a district court's determination of competency, this court will sustain such a finding when substantial evidence exists to support it.[9]

Here, the judge reviewed evaluations from two different doctors, and allowed several different attorneys for Volpicelli to be heard on the matter of competency. The two evaluations both concluded that Volpicelli understood his legal situation, and had sufficient ability to consult with his attorneys. We therefore conclude that substantial

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[7]96 Nev. 697, 698, 615 P.2d 251, 252 (1980).

[8]Jones v. State, 107 Nev. 632, 637, 817 P.2d 1179, 1182 (1991) (citing Melchor-Gloria v. State, 99 Nev. 174, 178-80, 660 P.2d 109, 113 (1983)).

[9]Tanksley v. State, 113 Nev. 844, 847, 944 P.2d 240, 242 (1997) (citing Ogden v. State, 96 Nev. 697, 698, 615 P.2d 251, 252 (1980)).

evidence existed to support the district court's determination that Volpicelli was competent to stand trial.

Sufficiency of the evidence to corroborate accomplice testimony

Next Volpicelli contends that the jury had insufficient evidence to convict him on some of the charges, although which specific charges were not supported by sufficient evidence is not enumerated in his appeal. Volpicelli bases this contention on the State's failure to provide adequate corroboration of the testimony of Volpicelli's alleged accomplice. Volpicelli argues that with the exception of accomplice Brett Bowman, nobody else testified to seeing Volpicelli commit any crimes.

The State counters that there was ample corroboration to meet the statutory standard of independent evidence connecting the defendant to the crime.[10] The State argues that there was corroborative testimony as to the planning and execution of the crimes, as well as corroborative testimony connecting Volpicelli to physical evidence, including both the instruments of the crimes and the "booty" of the crimes.

This court will not disturb a conviction if it is supported by substantial evidence.[11] NRS 175.291 requires that accomplice testimony be corroborated:

> 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

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[10]NRS 175.291.

[11]Coffman v. State, 93 Nev. 32, 34, 559 P.2d 828, 829 (1977).

> 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.

"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."[12] However, such evidence must "independently connect the defendant with the offense; evidence does not suffice as corroborative if it merely supports the accomplice's testimony."[13]

Here, there was corroborative evidence that connected Volpicelli with both the commission of the crimes and the merchandise that was the object of the crimes. Volpicelli was placed at the scene of the crime the day of the arrest by the testimony of multiple police officers. Further, the State introduced independent testimony that Volpicelli (1) closely inspected the bike that was ultimately found in the van with the two suspects; (2) purchased one of the comforters found in the van; (3) owned both the van and the bag containing the label maker; and (4) was seen in stores where much of the recovered merchandise had been

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[12]Cheatham v. State, 104 Nev. 500, 504, 761 P.2d 419, 422 (1988) (citing LaPena v. State, 92 Nev. 1, 544 P.2d 1187 (1976)).

[13]Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995).

purchased, recording UPC codes. Additionally, there was ample testimony from various store representatives that supported the testimony of Bowman as to the value of the various merchandise recovered in the storage unit. Finally, there was independent testimony from both a police officer and the owner of the mini-storage business that connected Volpicelli, and not Bowman, to the storage unit where much of the merchandise was found.

We conclude, therefore, that there was sufficient corroboration of accomplice Bowman's testimony under NRS 175.291 to support all the jury's guilty verdicts against Volpicelli.

Habitual criminal status

Volpicelli contends that the district court abused its discretion when it found habitual criminal status and ran two of the enhanced sentences consecutively. Volpicelli's argument is based on the fact that none of his prior convictions were violent, and that he had untreated mental health problems. The State responds that the district court did not abuse its discretion, based on case law that permits such discretion, and the validity of the prior convictions.

NRS 207.010, the statute applied to Volpicelli's sentencing, provides several different levels of sentence enhancement against convicted criminals, depending on the offense committed and the offender's prior convictions. From the use of three prior felony convictions, along with the ten-to-life sentencing, we can make a reasonable assumption that it was NRS 207.010(1)(b)(2) that was used in Volpicelli's case, although the specific subsection is not cited in the record. That subsection reads in pertinent part:

> 1. Unless the person is prosecuted pursuant to NRS 207.012 or 207.014, a person convicted in this state of:
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> . . . .
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> (b) Any felony, who has previously been three times convicted, whether in this state or elsewhere, of any crime which under the laws of the situs of the crime or of this state would amount to a felony . . . is a habitual criminal and shall be punished for a category A felony by imprisonment in the state prison:
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> . . .
>
> (2) For life with the possibility of parole, with eligibility for parole beginning when a minimum of 10 years has been served . . .

"The decision to adjudicate a person as a habitual criminal is not an automatic one."[14] It may be an abuse of discretion for a court to adjudicate an offender a habitual criminal using convictions that are remote in time and non-violent.[15] However, the statute "makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court."[16] In exercising its discretion, a trial court considering habitual

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[14]Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

[15]Id. (citing Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990)).

[16]Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (citing French v. State, 98 Nev. 235, 645 P.2d 440 (1982)).

criminal status must make a judgment on the question of "whether it [i]s just and proper" for the offender to be adjudicated as a habitual criminal.[17]

Here, it is clear from the record that the district court considered the nature of Volpicelli's prior convictions, and considered the impact of Volpicelli's crimes on both law enforcement and society as a whole. We conclude that this meets the requirements of Clark as to "weigh[ing] the appropriate factors"[18] and making a judgment that Volpicelli "deserved to be declared a habitual criminal."[19] Accordingly we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Maupin

_____, J.
Douglas

_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Mary Lou Wilson
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[17]Clark, 109 Nev. at 428, 851 P.2d at 427.

[18]Id.

[19]Id. at 427, 851 P.2d at 427.