

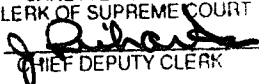
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL J. MCINERNEY A/K/A
MICHAEL JOSEPH MCINERNEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 43251

FILED

DEC 02 2004

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of robbery of a victim 65 years of age or older and attempted murder of a victim 65 years of age or older with use of a deadly weapon. Eighth Judicial District Court, Clark County; Ronald D. Parraguirre, Judge. The district court sentenced appellant Michael J. McNerney to serve a prison term of 35 to 156 months for the robbery count and a consecutive prison term of 96 to 240 months for the attempted murder count, with an equal and consecutive term for the use of a deadly weapon.

McInerney challenges the sufficiency of the evidence in support of his conviction. In particular, McNerney contends that there was insufficient evidence for the jury to find that: (1) he was capable of forming the requisite criminal intent to be convicted of robbery and attempted murder;¹ (2) he was guilty of robbery because the victim's

¹In a related argument, citing to Finger v. State, 117 Nev. 548, 27 P.3d 66 (2001), McNerney contends that his conviction is unconstitutional because he was insane at the time of the commission of the crimes. We decline to consider McNerney's argument because it is raised for the first time on direct appeal. See generally McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998). McNerney neither pleaded not guilty by

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walking stick, which was the basis for the robbery charge, was left at the scene; and (3) he used a deadly weapon because the thin wooden walking stick used in the attack was not a deadly weapon as a matter of law.² We conclude that McInerney's contentions lack merit.

The jury could reasonably infer from the evidence presented, including the testimony of the victim and the eyewitnesses, that McInerney committed robbery of an elderly person by taking the 81-year-old victim's hand carved wooden walking stick.³ Likewise, the jury could reasonably infer that McInerney attempted to kill the elderly victim with the use of a deadly weapon by repeatedly striking him in the head with the walking stick.⁴ Although McInerney presented testimony that he was suffering from methamphetamine-induced psychosis during the attack and, thus, was too intoxicated to form the intent to kill, the State presented evidence to the contrary. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict

. . . continued

reason of insanity nor presented an insanity defense at trial pursuant to NRS 174.035(4).

²In support of his argument that the walking stick was not a deadly weapon, McInerney cites to Knight v. State, 116 Nev. 140, 993 P.2d 67 (2000). Knight, however, is inapposite because it discusses the definition of a weapon under a different statute, namely NRS 202.350, the concealed weapons provision.

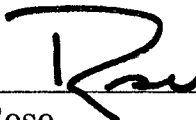
³See NRS 200.380(1); Litteral v. State, 97 Nev. 503, 634 P.2d 1226 (1981) (holding that robbery only requires a taking by means of force or violence, and that the defendant need not have the specific intent to permanently deprive the victim of property), overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986).

⁴See NRS 200.010; NRS 193.330; see also NRS 193.165(5)(b).

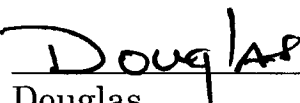
will not be disturbed on appeal where, as here, substantial evidence supports the verdict.⁵

Having considered McNerney's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Rose


_____, J.
Maupin


_____, J.
Douglas

cc: Hon. Ronald D. Parraguirre, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

⁵See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).