IN THE SUPREME COURT OF THE STATE OF NEVADA

SANDRA RENEE MURPHY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45126

FILED

MAR 03 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of one count each of burglary, grand larceny, and conspiracy to commit burglary and/or larceny. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

In 2000, a jury convicted appellant Sandra Murphy of conspiracy to commit murder and/or robbery; first-degree murder; robbery (the Binion counts); conspiracy to commit burglary and/or grand larceny; burglary; and grand larceny (the silver counts). On appeal, this court reversed and remanded for a new trial on all counts.[1] Upon retrial, Murphy was acquitted of the Binion counts and convicted on the silver counts. Murphy now makes multiple assignments of error regarding the second trial. The parties are familiar with the facts, and we do not discuss them except as necessary for our disposition. We determine that all of Murphy's contentions are without merit. Therefore, we affirm the judgment of the conviction.

[1]Tabish v. State, 119 Nev. 293, 72 P.2d 584 (2003).

08-05226

Sufficiency of the evidence

Murphy contends that her convictions are not supported by substantial evidence, arguing that there was no evidence presented that she was either involved in a conspiracy to remove the silver from Binion's vault or that she had the specific intent that the purpose of the conspiracy be carried out. We reject this contention.

This court will not overturn a verdict on appeal if it is supported by sufficient evidence.[2] "There is sufficient evidence if the evidence, viewed in the light most favorable to the prosecution, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt."[3] Additionally, "'[i]t is for the jury to determine what weight and credibility to give various testimony.'"[4]

Preliminarily, we note that the State's contention that the law of the case doctrine[5] controls this issue is without merit. The State argues that this court, in Tabish v. State,[6] held that sufficient evidence supports Murphy's convictions for the silver counts. In Tabish, this court stated, "We reject appellants' claim that the State failed to prove criminal

---

[2]Buff v. State, 114 Nev. 1237, 1242, 970 P.2d 564, 567 (1998).

[3]Leonard v. State, 114 Nev. 1196, 1209-10, 969 P.2d 288, 297 (1998).

[4]Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (alteration in original) (quoting Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994)).

[5]State v. Dist. Ct. (Riker), 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005) ("[T]he law of a prior appeal is the law of the case in later proceedings in which the facts are substantially the same.").

[6]119 Nev. 293, 72 P.3d 584 (2003).

agency,"[7] and in a footnote continued, "To the extent that either appellant also generally challenges the sufficiency of the evidence supporting the jury's verdict, we conclude that contention lacks merit."[8] This court's statement in Tabish does not foreclose Murphy's sufficiency of the evidence argument in this appeal for three reasons.

First, Murphy and Tabish's criminal agency argument in Tabish, and this court's footnote, concerned the sufficiency of the evidence surrounding the murder charge,[9] and was not a comment on any claims regarding the sufficiency of the evidence supporting the silver counts. Second, the record does not reflect that Murphy argued in her first appeal that her silver convictions were not supported by sufficient evidence, so this court's footnote would not foreclose Murphy from arguing this issue in her second appeal. Third, even if Murphy did raise the argument in her first appeal, the issue was not fully adjudicated in Tabish, as this court's remand was based on the district court's failure to "sever the Casey counts from the remaining charges in the case and to give a crucial limiting instruction."[10] Accordingly, we now consider Murphy's argument that her convictions on the silver counts are not supported by sufficient evidence.

---

[7]Id. at 297, 72 P.3d at 586.

[8]Id. at 297 n.2, 72 P.3d at 586 n.2.

[9]Id. at 311, 72 P.3d at 596.

[10]Id. at 297, 72 P.3d at 586.

A conspiracy is "'an agreement between two or more persons for an unlawful purpose.'"[11] "'A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator.'"[12] "'Evidence of a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement and support a conspiracy conviction.'"[13] "'However, absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in, or approval of that purpose does not make one a party to conspiracy.'"[14] Finally, we have recently held that a conspirator may be held liable for the specific intent crimes of her co-conspirators when she possessed the requisite statutory intent,[15] and grand larceny and burglary are specific intent crimes.[16]

The State adduced evidence at trial establishing that, before Binion's death, Murphy told her beautician that Tabish and his associates intended to excavate silver from Binion's vault after Binion's death from a

---

[11]Bolden v. State, 121 Nev. 908, 912, 124 P.3d 191, 194 (2005) (quoting Doyle v. State, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004)).

[12]Id.

[13]Id. at 912-13, 124 P.3d at 194 (quoting Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000), overruled in part by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002)).

[14]Id. at 913, 124 P.3d at 194.

[15]Id. at 922, 124 P.3d at 200-01.

[16]NRS 205.220; NRS 205.060.

drug overdose; Murphy indicated that Binion's death would occur soon and that she stood to inherit considerable assets upon his death. The State adduced testimony from Leo Casey regarding a conversation he had with Tabish during which Tabish claimed that his sexual relationship with Murphy would help him obtain Binion's silver. The State presented evidence that while Tabish was excavating the silver, there were four phone calls placed from a cellular phone belonging to Murphy to a cellular phone belonging to Tabish. Last, the State introduced evidence that Murphy posted a bond for Tabish and Mike Milot the day after they were arrested for excavating the silver from the vault, that Murphy was "pretty eager, energetic" to do so, and that she provided her Mercedes and valuable jewelry as collateral for the bond.

Based on this evidence, a rational trier of fact could have found the essential elements of conspiracy beyond a reasonable doubt. Specifically, a rational trier of fact could have found that Murphy actually entered into an agreement with at least one other person to commit burglary and larceny with respect to the vault and the silver. Her discussion with the beautician evidences her specific intent that the object of the conspiracy be carried out. Her actions in posting a bond for Tabish and Milot and her concern that Mattsen would speak to police if he remained in jail evidence that she undertook a coordinated series of acts in furtherance of the conspiracy's purpose by attempting to conceal evidence of the crime. Accordingly, we conclude that Murphy's convictions for conspiracy to commit burglary and/or larceny, burglary, and grand larceny are supported by sufficient evidence.

Propriety of joinder

Murphy argues that she was unfairly prejudiced by both the district court's joinder of the Binion counts with the silver counts and the

joinder of her trial with Tabish's trial. We reject both of Murphy's contentions.

"[T]he law of a prior appeal is the law of the case in later proceedings in which the facts are substantially the same."[17] The law of the case doctrine "cannot be avoided by more detailed and precisely focused argument."[18] Thus, "[a]fter a case is remanded, the Court on the second appeal will not consider those questions adjudicated on the first appeal."[19]

In Murphy's first appeal, she argued that the district court erred in failing to grant separate trials for her and Tabish.[20] In the same appeal, she and Tabish also argued that they were unfairly prejudiced by the district court's joinder of the Casey counts with the Binion and silver counts.[21] This court agreed with Murphy and Tabish as to the latter contention, holding that joinder of the Casey counts with the Binion and silver counts unfairly prejudiced Murphy and Tabish.[22] Accordingly, the

---

[17]State v. Dist. Ct. (Riker), 121 Nev. 225, 232, 112 P.3d 1070, 1075 (2005).

[18]Id. at 233, 112 P.3d at 1075.

[19]Sherman Gardens Co. v. Longley, 87 Nev. 558, 563, 491 P.2d 48, 51 (1971).

[20]Tabish v. State, 119 Nev. 293, 309, 72 P.3d 584, 594 (2003).

[21]Id. at 301-02, 72 P.3d at 589.

[22]Id. at 302, 72 P.3d at 590.

court reversed Murphy and Tabish's convictions on the Binion and silver counts and remanded for a new trial on those matters.[23]

However, this court rejected Murphy's contention that the district court should have severed her trial from Tabish's.[24] Additionally, this court approved of the joinder of the Binion and silver counts:

> [W]e conclude that [Tabish and Murphy] were properly tried together for the [Binion and silver counts] as co-defendants. The improper joinder of the Casey counts with the remaining charges does not foreclose a joint retrial of Tabish and Murphy on [the Binion and silver counts] on remand.[25]

Because this court previously adjudicated the issues that Murphy now raises, we conclude that the law of the case doctrine precludes Murphy from raising the issue of improper joinder in this appeal.

Cross-examination of Sheriff Wade Lieseke

Murphy argues that the district court erred by preventing her from impeaching Sheriff Lieseke, the Sheriff of Nye County, during his testimony at trial with inconsistent statements that he made during a September 19, 1998, interview.[26] Murphy argues that the district court

---

[23]Id.

[24]Id. at 309, 72 P.3d at 595.

[25]Id.

[26]Additionally, Murphy argues that the district court erred by refusing to permit her to cross-examine Sheriff Lieseke concerning inconsistent statements he made during the preliminary hearing. The record reveals, however, that the district court placed no limitation on Murphy's ability to cross-examine Sheriff Lieseke concerning his preliminary hearing testimony.

should have permitted the defense to introduce the transcript from the September 19, 1998, interview. In addition, Murphy argues that the district court erred by refusing to permit questions surrounding an argument Sheriff Lieseke had with Sergeant Steve Huggins of the Nye County Sheriff's Department, as it demonstrated Sheriff Lieseke's interest, motive, and bias. In this, Murphy argues that the district court prevented full and fair cross-examination and that, as a result, this court should vacate her convictions for the silver counts. We reject all of Murphy's arguments regarding her cross-examination of Sheriff Lieseke as meritless.

Murphy sought to cross-examine Sheriff Lieseke regarding alleged inconsistent statements that he made during the September 19, 1998, interview. To be able to impeach a witness with an inconsistent statement, the statement must be the witness's.[27] We conclude that the district court did not abuse its discretion by deciding that it was indeterminable, as a threshold issue of admissibility, which police officer was speaking in the September 19, 1998, interview and, therefore, that it was improper to use it for impeachment.

In an effort to demonstrate Sheriff Lieseke's interest, motive, and bias Murphy sought to cross-examine Lieseke regarding his argument with Sergeant Huggins. Under NRS 50.115(2), "[c]ross-examination is limited to the subject matter of the direct examination and matters affecting the credibility of the witness, unless the judge in the exercise of discretion permits inquiry into additional matters as if on direct

---

[27]See NRS 50.135 (allowing the examination of a witness regarding "a prior statement made by him").

examination." Under NRS 47.040(1)(b)(2), a party waives the right to assign error on appeal unless he or she makes an offer of proof at trial concerning the substance of the excluded evidence or the import of the excluded evidence is apparent from the context in which it was offered and the substantial rights of a party are affected.

It is not apparent, from the context in which Murphy sought to introduce the excluded evidence, how cross-examination of Sheriff Lieseke regarding an argument that he had with a detective in his office concerning phone calls that Tabish made to Lieseke would demonstrate interest, motive, or bias affecting Lieseke's credibility. Nor did Murphy, at trial, make an offer of proof concerning the substance of the excluded evidence. Because Murphy failed to preserve this matter for appeal, she must demonstrate plain error.[28] When conducting a plain-error analysis, we must consider whether error exists, if the error was plain or clear, and if the error affected the defendant's substantial rights.[29] We conclude that the district court did not err by refusing to admit the evidence at issue.

Motion for a new trial based on newly discovered evidence

After trial, Murphy moved for a new trial and requested an evidentiary hearing based on newly discovered evidence that Sheriff Lieseke committed perjury when testifying at the trial. In the motion, Murphy presented an affidavit from Sergeant Huggins containing assertions that Sheriff Lieseke committed perjury concerning his knowledge of the vault's location and contents, whether he gave Tabish

---

[28]See NRS 178.602.

[29]Anderson v. State, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

permission to enter the vault site, the degree to which he participated in a taped interview of Tabish, and whether he initially went to the incorrect site when he was summoned to the vault. The district court denied the motion and the request for an evidentiary hearing. Murphy argues that the district court erred by denying her motions because the newly discovered evidence could have been a basis for her acquittal. We reject Murphy's contention.

When a defendant moves for a new trial based on alleged newly discovered evidence, this court has held:

> To establish a claim for a new trial based on newly discovered evidence, the defendant must show that the evidence is
>
> > newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; such as to render a different result probable upon retrial; not only an attempt to contradict, impeach, or discredit a former witness, unless the witness is so important that a different result would be reasonably probable; and the best evidence the case admits.[30]

We conclude that any additional evidence suggesting that Sheriff Lieseke had given anyone permission to enter the vault site would be unlikely to render a different result reasonably probable because Tabish claimed at trial that Sheriff Lieseke gave him permission to enter the vault and Sheriff Lieseke denied it; for the same reason, such evidence

---

[30]Mortensen v. State, 115 Nev. 273, 286, 986 P.2d 1105, 1114 (1999).

is merely an attempt to contradict a former witness. To the extent that Sergeant Huggins asserted that Sheriff Lieseke lied regarding his knowledge of the vault's location and contents, the degree to which he participated in a taped interview of Tabish, and whether he initially went to the incorrect site when he was summoned to the vault, we conclude that Murphy has not established that this evidence is more than merely an attempt to discredit a former witness. To the extent that Sheriff Huggins asserted that Binion told Sheriff Lieseke the vault's location, such evidence is cumulative because Sheriff Lieseke was questioned on cross-examination concerning his knowledge of the vault's location. We conclude that the district court did not abuse its discretion by denying Murphy's motion for a new trial and an evidentiary hearing.

Prosecutorial misconduct under Brady

Murphy argues that the district court erred by permitting bail bondsman Dario Costantino to testify to a conversation he allegedly overheard between Tabish and Milot because the State failed to disclose Costantino's statement as required by Brady v. Maryland.[31] Moreover, Murphy argues that the State had a duty to disclose Costantino's information because it concerned statements Tabish allegedly made. She further argues that the State's failure to disclose the statements hindered her preparation for cross-examination of Costantino and constituted a Brady violation. We disagree with both of Murphy's contentions.

"Determining whether the State adequately disclosed information under Brady v. Maryland involves both factual and legal

---

[31]373 U.S. 83 (1963).

questions and requires de novo review by this court."[32] Also, "'[t]he trial court is vested with broad discretion in determining the admissibility of evidence. The exercise of such discretion will not be interfered with on appeal in the absence of a showing of palpable abuse.'"[33]

"Brady and its progeny require a prosecutor to disclose evidence favorable to the defense when that evidence is material either to guilt or to punishment."[34] "[E]vidence is material if there is a reasonable probability that the result would have been different if the evidence had been disclosed."[35] Further, "[e]vidence also must be disclosed if it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or to bolster the defense case against prosecutorial attacks.[36]

First, we conclude that the evidence at issue was not exculpatory and, therefore, Brady did not require its disclosure. Costantino's testimony was that he overheard Tabish and Milot "talking about we need to get this bond posted right away. We got to get [Mattsen] out because we don't want him to talk." This testimony supported the

---

[32]Lay v. State, 116 Nev. 1185, 1193, 14 P.3d 1256, 1262 (2000) (citation omitted).

[33]Sheehan & Sheehan v. Nelson Malley & Co., 121 Nev. 481, 492, 117 P.3d 219, 226 (2005) (alteration in original) (quoting State ex rel. Dep't Hwys. v. Nev. Aggregates, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976)).

[34]Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000).

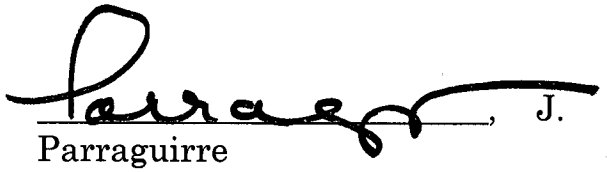
[35]Id.

[36]Id. at 67, 993 P.2d at 37.

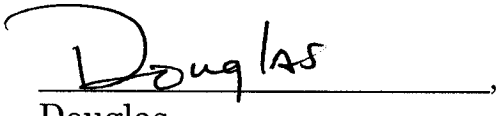
State's theory that a conspiracy existed to steal the silver and was, thus, unfavorable to Murphy's defense.

Second, we conclude that the evidence did provide grounds for impeaching Costantino's credibility but that any Brady violation that may have occurred by the State's failure to disclose the evidence was harmless because Murphy conducted an effective cross-examination of Costantino based on the evidence. On cross-examination, Murphy attacked Costantino's credibility and impeached him by pointing out that he had not testified during the preliminary hearing or at the first trial to overhearing the conversation. Additionally, Costantino conceded that Murphy had not been a party to the conversation. Therefore, we conclude that although the State may have committed misconduct under Brady, any resulting error was harmless and the district court's decision to admit the testimony was not an abuse of discretion. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Parraguirre



_____, J.
Douglas

HARDESTY, J., dissenting:

I dissent from the majority's decision because I conclude that insufficient evidence exists to support Murphy's convictions on the silver counts. As the majority stated, "absent an agreement to cooperate in achieving the purpose of a conspiracy, mere knowledge of, acquiescence in,

or approval of that purpose does not make one a party to conspiracy.'"[37] Further, a defendant is criminally liable for the specific intent crimes committed by his or her co-conspirators only if the defendant possessed the requisite statutory intent.[38] Grand larceny and burglary are specific intent crimes.[39]

The State adduced insufficient evidence to support its contention that Murphy conspired with Tabish to steal Binion's silver or that she possessed the specific intent to commit grand larceny and burglary. The majority points to four pieces of evidence for its decision: a conversation that Murphy allegedly had with her beautician, a conversation that Tabish allegedly had with Leo Casey, calls that Murphy allegedly made to Tabish during the theft, and Murphy's act of posting bail for Tabish. While Murphy's statement to her beautician that Tabish and his associates intended to excavate silver from Binion's vault indicates without question that she had knowledge of the conspiracy between Tabish and his associates and that she had knowledge of the purpose of that conspiracy, it does not establish that Murphy agreed to cooperate in the conspiracy or possessed the specific intent that the purpose of the conspiracy be carried out. This is the strongest piece of evidence adduced by the State, and it does not establish that Murphy was a party to the conspiracy according to the standard set by this court.

---

[37]Bolden v. State, 121 Nev. 908, 913, 124 P.3d 191, 194 (2005) (quoting Garner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000), overruled in part by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002)).

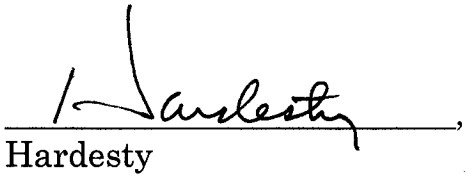
[38]Id. at 922, 124 P.3d at 200-01.

[39]NRS 205.220; NRS 205.060.

The remaining evidence on which the majority relies fails to even establish that Murphy had knowledge of the conspiracy. Murphy's statement to her beautician concerning her potential inheritance upon Binion's death made no mention of the silver or valuable coins contained in the vault. She stated that if Binion died, she stood to receive three million dollars, her car, Binion's home, and a jewelry store in Oregon. Nothing in Murphy's statement establishes her knowledge of or participation in a conspiracy to steal Binion's silver. Tabish's statement to Casey that Tabish's sexual relationship with Murphy would aid him in his plan to steal Binion's silver does not establish that Murphy was a part of or was involved in that plan. Calls were made from one of Tabish's cellular phone numbers to another of Tabish's cellular phone numbers during the silver theft. The State alleged that Murphy made those calls; however, the telephone records expert testified that he could not positively identify Murphy as the person who made the calls. Furthermore, calling a person while they are in the process of committing a crime does not establish the caller's knowledge or approval of the commission of the crime. Murphy also concedes that she posted bail for Tabish and Milot and placed numerous of her expensive items of jewelry as collateral for the bond; however, she and Tabish were involved in a romantic relationship at the time. Her actions do not establish that she had knowledge of the conspiracy or the specific intent to carry out its purpose.

In sum, the evidence that the majority deems sufficient to support Murphy's convictions on the silver counts does not establish that Murphy was a party to the conspiracy or possessed the requisite statutory intent to commit the specific intent crimes of grand larceny and burglary. At most, the State's evidence establishes that Murphy knew of the

conspiracy and its purpose and that she stood to inherit considerable funds and property upon Binion's death. Under Nevada law, mere knowledge of the purpose of a conspiracy does not make one a party to that conspiracy and conspirators are only liable for the specific intent crimes of their co-conspirators if they themselves possess the requisite statutory intent. I would hold that sufficient evidence did not exist to support Murphy's convictions on the silver counts, and I would therefore reverse her convictions on that ground.



_____, J.
Hardesty

cc: Eighth Judicial District Court Dept. 6, District Judge
Cristalli & Saggese, Ltd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk