IN THE SUPREME COURT OF THE STATE OF NEVADA

BRET D. MCNABOE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46109

FILED

APR 07 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of assault with a deadly weapon. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. The district court sentenced appellant Bret D. McNaboe to a prison term of 12-30 months, suspended execution of the sentence, and placed him on probation for an indeterminate period not to exceed 3 years.

First, McNaboe contends that the district court erred by denying his pretrial petition for a writ of habeas corpus. McNaboe claims that the State failed to present sufficient evidence at the preliminary hearing to establish probable cause to bind him over to the district court on the count of assault with a deadly weapon.[1] Specifically, McNaboe argues that (1) the investigating police officer failed to identify himself as a police officer before forcibly entering his home; (2) the police officer used excessive force; and (3) the State failed to prove that the weapon he

[1]At the preliminary hearing, the justice court dismissed, due to a lack of probable cause, one count of resisting a public officer. See NRS 199.280(1).

admittedly possessed, a BB gun, was a deadly weapon, or alternatively, "was loaded or operable." We disagree with McNaboe's contention.[2]

The probable cause determination has two components: (1) that an offense has been committed; and (2) that the accused committed the offense.[3] Probable cause to support a criminal charge "may be based on slight, even 'marginal' evidence, because it does not involve a determination of the guilt or innocence of an accused."[4] "To commit an accused for trial, the State is not required to negate all inferences which might explain his conduct, but only to present enough evidence to support a reasonable inference that the accused committed the offense."[5] "Although the [S]tate's burden at the preliminary examination is slight, it

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[2]The appendix submitted by McNaboe in this appeal does not include his pretrial habeas petition, the State's opposition, and the district court order denying the petition. See NRAP 30(b) (requiring inclusion in appellant's appendix of matters essential to the decision of issues presented on appeal). Counsel is cautioned that failure to comply with the requirements for appendices in the future may result in the appendix being returned, unfiled, to be correctly prepared. See NRAP 32(c). Failure to comply may also result in the imposition of sanctions by this court. NRAP 3C(n). We also note that McNaboe has not sought to provide this court with transcripts of the hearings on the petition. See Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

[3]NRS 171.206.

[4]Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980) (citations omitted).

[5]Kinsey v. Sheriff, 87 Nev. 361, 363, 487 P.2d 340, 341 (1971).

remains incumbent upon the [S]tate to produce some evidence that the offense charged was committed by the accused."[6]

Based on our review of the record, we conclude that the State presented enough evidence to support a reasonable inference that McNaboe committed the crime of assault with a deadly weapon.[7] In particular, we note that Patrol Officer Robert Swales testified at the preliminary hearing that he went to McNaboe's home in the course of his investigation into a battery complaint involving McNaboe and neighbors. Officer Swales knocked on McNaboe's front door, then rang the doorbell. Officer Swales could see McNaboe inside the house, then rapidly approaching the front door, carrying what he believed was a "long-barreled handgun." Officer Swales yelled through the door window at McNaboe to drop the gun. As McNaboe grabbed the doorknob, Officer Swales also grabbed the doorknob from outside, attempting to keep the door shut, while continuing to yell at McNaboe to drop the gun. The door came open and a brief struggle ensued. McNaboe yelled and cursed at Officer Swales, and at one point, "raised the weapon and pointed." Officer Swales stated, "I was standing right in front of it, and I thought I was

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[6]Woodall v. Sheriff, 95 Nev. 218, 220, 591 P.2d 1144, 1144-45 (1979).

[7]See NRS 200.471(1)(a) ("'Assault' means intentionally placing another person in reasonable apprehension of immediate bodily harm."). Pursuant to statute, the criminal complaint alleged that McNaboe "did . . . intentionally place another person, to-wit: Officer R. Swales, in reasonable apprehension of immediate bodily harm with the use of a deadly weapon, to-wit: a firearm, by the said Defendant point what the said Officer R. Swales believed to be a firearm."

about to get shot in the chest, so I fired one round from my duty weapon that struck [McNaboe] in the upper left chest." Officer Swales testified that he was outside when the shooting occurred, and McNaboe "was still on his side of the door, inside the house." After he was shot and on the ground, McNaboe informed Officer Swales that his weapon was "just a BB gun."

Based on all of the above, we conclude that the district court did not err in denying McNaboe's pretrial petition for a writ of habeas corpus. According to the district court criminal minutes, the district court found that the State presented the requisite slight or marginal evidence that McNaboe intentionally placed Officer Swales in reasonable apprehension of immediate bodily harm, in violation of NRS 200.471(1)(a). We agree. Further, McNaboe fails to demonstrate how the issue of excessive force or forcible entry is relevant to the probable cause determination. Nevertheless, the district court also found that Officer Swales did not use excessive force, and did not enter the residence prior to the shooting. Alternatively, the district court found that if Officer Swales entered the residence before the shooting, exigent circumstances existed for the warrantless entry. And finally, we note that McNaboe has not provided this court with any relevant authority indicating that a BB gun cannot be a deadly weapon,[8] and he relies on an outdated version of NRS 200.471 for the proposition that the State must prove that the BB gun was

[8]See NRS 193.165(5)(c); NRS 202.265(4)(a)(2) ("Firearm' includes . . . [a]ny device from which a metallic projectile, including any ball bearing or pellet, may be expelled by means of spring, gas, air or other force.").

loaded and/or operable to sustain a conviction for assault with a deadly weapon.[9]

Second, McNaboe contends that the district court erred by admitting evidence of an uncharged bad act at trial, specifically, information regarding an altercation between McNaboe and neighbors occurring approximately one hour prior to his encounter with Officer Swales.[10] McNaboe filed a motion for a mistrial after the State's opening argument, and then a presentence motion for a new trial challenging admission of the evidence. According to the district court criminal minutes, the district court denied both motions, finding that the evidence was admissible under the complete story of the crime doctrine.[11] We disagree with McNaboe's contention.

This court has stated that "[t]he decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."[12] Nevertheless, the

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[9]See 1971 Nev. Stat., ch. 612, § 2, at 1384 ("'assault' means an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another") (emphasis added), amended by 2001 Nev. Stat., ch. 216, § 1, at 986.

[10]See NRS 48.045(2).

[11]Although rough draft transcripts of the trial were prepared prior to the filing of McNaboe's notice of appeal, he elected not to provide this court with the transcripts for review on appeal. We also note that the appendix submitted by McNaboe does not contain a file-stamped criminal information.

[12]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

admission of uncharged bad acts evidence is heavily disfavored.[13] In the instant case, the district court admitted the evidence under the res gestae doctrine – the complete story of the crime – under NRS 48.035(3).[14] We have explained that the doctrine allows the State to present a complete picture of the facts surrounding the commission of a crime:

> [T]he State is entitled to present a full and accurate account of the circumstances surrounding the commission of a crime, and such evidence is admissible even if it implicates the accused in the commission of other crimes for which he has not been charged.[15]

Under NRS 48.035(3), "a witness may only testify to another uncharged act or crime if it is so closely related to the act in controversy that the witness cannot describe the act without referring to the other uncharged act or crime."[16]

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[13]Braunstein v. State, 118 Nev. 68, 73, 40 P.3d 413, 417 (2002).

[14]NRS 48.035(3) states:

> Evidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded, but at the request of an interested party, a cautionary instruction shall be given explaining the reason for its admission.

[15]Brackeen v. State, 104 Nev. 547, 553, 763 P.2d 59, 63 (1988).

[16]Bellon v. State, 121 Nev. ___, ___, 117 P.3d 176, 181 (2005); see also Bletcher v. State, 111 Nev. 1477, 1480, 907 P.2d 978, 980 (1995).

In this case, we conclude that the district court did not commit manifest error in admitting the evidence as part of the complete story of the crime. McNaboe's confrontation with his neighbors was the reason that police officers were called to the scene, and the sole reason that Officer Swales and his partner went to McNaboe's residence. Moreover, even assuming, without deciding, that any of the evidence was improperly admitted, due to the overwhelming evidence of McNaboe's guilt, it was harmless beyond a reasonable doubt.[17]

Finally, McNaboe contends that the district court improperly instructed the jury on the doctrine of transferred intent. McNaboe apparently claims that a proposed amended criminal information that was never filed or presented to the jury changed the theory of the prosecution in violation of his right to due process, and that the transferred intent instruction misrepresented the elements of assault with a deadly weapon. McNaboe fails to cite any relevant legal authority or articulate a cogent argument in support of his contention.[18] Moreover, McNaboe's contention is belied by the record.[19]

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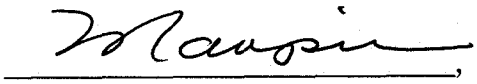
[17]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) ("When the evidence of guilt is overwhelming, even a constitutional error can be comparatively insignificant.").

[18]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

[19]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

Having considered McNaboe's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Maupin

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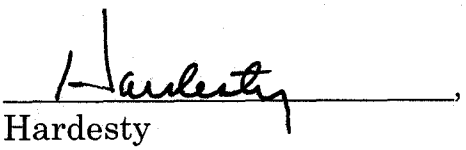
Gibbons



_____, J.
Hardesty

cc: Hon. Lee A. Gates, District Judge
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