

IN THE SUPREME COURT OF THE STATE OF NEVADA


ROBERT LILBURN NELSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46303

FILED

JUL 13 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of trafficking in a controlled substance (count I), unlawful use or being under the influence of a controlled substance (count III), burglary (count V), and possession of stolen property (count VI). Third Judicial District Court, Churchill County; Robert E. Estes, Judge. The district court sentenced appellant Robert Lilburn Nelson to serve a prison term of 18-72 months for count I, a concurrent prison term of 12-34 months for count III,¹ a consecutive prison term of 16-72 months for count VI, and a prison term of 12-36 months for count V to run concurrently with the sentences imposed for counts I and III. Nelson was ordered to pay \$1,040.00 in restitution jointly and severally with his accomplice.

¹Nelson pleaded guilty to count III prior to trial, and on this count, the district court suspended execution of the sentence and placed Nelson on probation for a period not to exceed 1 year.

First, Nelson contends that the district court erred in denying his motion for entry of a judgment of acquittal.² Prior to deliberations, the district court gave the jury an advisory instruction for acquittal on counts I and II,³ based on the allegedly insufficient evidence proffered by the State.⁴ Nevertheless, the jury found Nelson guilty on both counts. In his motion, Nelson claimed that the State failed to proffer sufficient evidence corroborating the testimony of his accomplice,⁵ and therefore, he should be acquitted on counts I and II. The district court apparently agreed with Nelson, however, it denied the motion based on a misinterpretation of case

²See NRS 175.381(2).

³See NRS 175.381(1).

⁴On count II, Nelson was charged with possession of a controlled substance for purpose of sale. The district court, however, eventually dismissed this count, finding that it merged with the drug trafficking count.

⁵NRS 175.291(1) provides:

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.

law. In its order denying the motion, the district court cited to State v. Wilson⁶ and State v. Walker⁷ for support and concluded:

[T]he Nevada Supreme Court's statement that it is the principle court for determining sufficiency of the evidence issues is still the preferred course of action in Nevada. Accordingly, this court will not grant Defendant's motion.

Notably, NRS 175.381(2) was amended in 1991 and now permits a district court to grant a judgment of acquittal if the evidence is insufficient to support a verdict. As our decision in Walker specifically noted, the holding in that decision does not apply to cases decided after the effective date of the statutory amendment.⁸

We nonetheless conclude that the district court reached the correct result, albeit for the wrong reason.⁹ Specifically, our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹⁰ In addition,

⁶104 Nev. 405, 760 P.2d 129 (1988).

⁷109 Nev. 683, 857 P.2d 1 (1993).

⁸Id.

⁹See Wyatt v. State, 86 Nev. 294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

¹⁰See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

there was sufficient corroborating evidence to sustain the drug trafficking conviction. After eliminating the inculpatory testimony of Nelson's accomplice, the evidence offered by the State specifically linked Nelson to the methamphetamine discovered after their arrest.¹¹ It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, sufficient evidence supports the verdict.¹² Moreover, we note that circumstantial evidence alone may sustain a conviction.¹³ Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Nelson contends that the district court erred in refusing to admit the preliminary hearing testimony of an unavailable defense witness at trial.¹⁴ We disagree. Nelson waited until the trial had started before seeking admission of the preliminary hearing transcript, despite knowing well in advance that the witness could not be found.

¹¹See Austin v. State, 87 Nev. 578, 585, 491 P.2d 724, 728 (1971) (in order to determine if there is sufficient corroborating evidence, this court "must eliminate from the case the evidence of the accomplice, and then examine the evidence of the remaining witness or witnesses with the view to ascertain if there be inculpatory evidence") (quoting People v. Shaw, 112 P.2d 241, 255 (Cal. 1941)).

¹²See 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).

¹³See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

¹⁴See NRS 51.055(1)(d); NRS 51.325; see also NRS 171.198(6); Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997).

Therefore, Nelson's motion was untimely.¹⁵ In hearing the motion, the district court noted that defense counsel made "some" efforts to locate the witness, nevertheless, the court admonished counsel, stating, "you got to start more than a few days before trial." The district court compared defense counsel's conduct to "trial by ambush," and denied the motion. We conclude that the district court did not abuse its discretion in denying Nelson's motion.¹⁶

Third, Nelson contends that the district court erred in rejecting his proffered jury instruction regarding the accomplice's motive to provide false testimony. Nelson argues that he was entitled to a cautionary instruction because the defense theory of the case was that the accomplice was a liar. We disagree.

"The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error."¹⁷ The district court may refuse to give a proposed jury instruction if the content is substantially covered by other jury instructions.¹⁸ Here, the instruction offered by Nelson was

¹⁵See NRS 174.125(3)(a).

¹⁶See Dawson v. State, 108 Nev. 112, 120, 825 P.2d 593, 598 (1992) ("The decision to admit preliminary hearing testimony after balancing the prejudicial effect against its probative value is one addressed to the sound discretion of the trial court.").


¹⁷Crawford v. State, 121 Nev. ____, ____, 121 P.3d 582, 585 (2005).

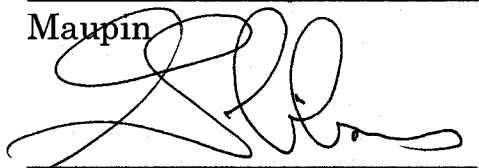
¹⁸See Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002).

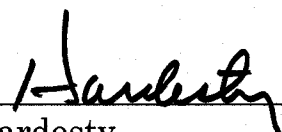
substantially covered by another jury instruction. In fact, in rejecting the proposed instruction, the district court stated that it was cumulative, and advised counsel "that they have the right during closing to comment however they wish regarding any agreement between the government and the [accomplice]." Accordingly, we conclude that the district court did not abuse its discretion.

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

ORDER the judgment of conviction AFFIRMED.


_____, J.
Maupin


_____, J.
Gibbons


_____, J.
Hardesty

cc: Hon. Robert E. Estes, District Judge
Paul G. Yohey
Attorney General George Chanos/Carson City
Churchill County District Attorney
Churchill County Clerk