IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLETON ELIJAH JOHNSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50009

FILED

DEC 16 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of second-degree murder with the use of a deadly weapon and one count of robbery. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. This case involves a triple homicide with no direct witnesses in which appellant Carleton Johnson's brother, son, and niece were shot to death with a shotgun. Johnson challenges his convictions of these murders[1] based on the sufficiency of the evidence and the admission of his police statement. Separately, he challenges his sentence, claiming that certain amendments to the deadly weapon enhancement statute should have been retroactively applied to him. For the following reasons, we conclude that these arguments fail and we affirm the judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Sufficiency of the evidence

Johnson asserts that there is insufficient evidence to support his second-degree murder convictions for the killing of his brother, son,

[1]Johnson did not assert a defense to the robbery charge at trial and does not challenge his conviction of that offense on appeal.

and niece. We disagree. While largely circumstantial, the following evidence is sufficient for a rational juror to conclude that Johnson committed these murders beyond a reasonable doubt.[2]

Kimberly Kuivinen, Johnson's brother's girlfriend, and Robert Brewer, who lived in a neighboring apartment, both place Johnson at the apartment during the time of the murders. According to Kuivinen, as she was returning from work, she saw Johnson exit the apartment and shut the front door behind him. He then walked by her without acknowledgment, gripping a white t-shirt. When Kuivinen entered the apartment, she discovered Johnson's brother shot, lying face down in the kitchen.[3]

Approximately five minutes before Kuivinen arrived at the apartment, she spoke with Johnson's brother over the phone. In the roughly five-minute period between this conversation and Kuivinen's arrival, Brewer overheard three loud bangs. When he investigated these sounds, Brewer observed Johnson pacing outside of the apartment. Though Brewer inquired what happened, Johnson was nonresponsive. Minutes later, Kuivinen arrived and saw Johnson leaving. Thus, despite

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[2]See Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006) ("The standard of review [when analyzing the sufficiency of evidence] . . . is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (internal quotation marks omitted)); Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002) ("[C]ircumstantial evidence alone may support a conviction.").

[3]After discovering Johnson's brother, Kuivinen immediately left the apartment and then re-entered with a neighbor. She then discovered the bodies of her daughter and Johnson's son in the bedroom.

Johnson's claim that he was not at the apartment during the murders, Brewer's and Kuivinen's testimony more than reasonably suggests the contrary.

Other evidence suggests that Johnson was not only present but perpetrated these murders. Johnson's shotgun, which was normally stored in a case kept in a closet, was lying on the apartment floor when Kuivinen arrived home. The smell of smoke in the air, as well as the three loud bangs, suggests that the shotgun was recently discharged. While gunpowder residue was not detected on Johnson's hands, Johnson's palm print was found on the shotgun. No other prints were found on the shotgun, suggesting that Johnson was its only handler.

Finally, Johnson concedes that he robbed a woman of her purse after the murders because he "needed some money."[4] According to an eyewitness, Johnson used another shotgun during the robbery, which he had wrapped in a white t-shirt that would have shielded his skin from any gunpowder residue. Although this shotgun was not discharged during the robbery, unfired shells were recovered from the scene. Based on forensic testing, these shells matched the spent shells that were found at the murder scene, suggesting a common identity. In light of the above, we conclude that a rational juror could conclude that Johnson committed these murders beyond a reasonable doubt.

Voluntariness—Johnson's police statements

After his arrest, Johnson gave a 32-minute taped interview to police. Nearly a year later, Johnson was found incompetent to stand trial

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[4]At this time, Johnson was also seen punching car windows.

due to certain persistent mental illnesses that pre-dated his police interview. Based on his incompetence to stand trial, Johnson argues that he was not competent to validly waive his Miranda rights and therefore his police statement was improperly admitted. We disagree.

Contrary to Johnson's suggestion, a finding of incompetency is not conclusive of whether a valid waiver exists.[5] Rather, in determining whether a waiver is voluntary, knowing, and intelligent,[6] a defendant's mental condition is but one factor evaluated among the totality of the circumstances.[7] At the time of his brief interview, Johnson was sober,

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[5]See, e.g., Lyons v. Luebbers, 403 F.3d 585, 597 (8th Cir. 2005) (concluding that a finding of incompetency, "regardless of when the finding was made . . . , does not overcome the evidence . . . which shows [the defendant] was competent, [and] gave a voluntary, knowing, and intelligent waiver"); People v. Posey, 343 N.Y.S.2d 532, 534 (County Ct. 1973) (recognizing that "[t]he test applied in determining competency to stand trial is not the same as that applied to ascertain . . . competency to intelligently waive [one's Miranda] rights").

[6]Although Johnson conflates the two inquiries, we address the voluntariness of his waiver separate from whether it was given knowingly and intelligently. See Cox v. Del Papa, ___ F.3d ___, ___ (9th Cir. 2008) (the validity of a waiver requires a two-pronged analysis to determine the lack of coercion—voluntariness—and the requisite level of comprehension—i.e., whether it was given knowingly and intelligently).

[7]See Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006) ("A valid waiver of rights under Miranda must be voluntary, knowing, and intelligent" based on the totality of the circumstances); Moran v. Burbine, 475 U.S. 412, 421 (1986) (applying the totality of the circumstances test to both prongs of the validity analysis); cf. Colorado v. Connelly, 479 U.S. 157, 164 (1986) ("[A] defendant's mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional 'voluntariness.'").

thirty-five years old, college-educated in the field of criminal justice, and working as a substitute high school teacher and football coach. According to the detective conducting the interview, Johnson appeared composed, even polite, and prior to the interview engaged with the detective in casual conversation. Before the interview, Johnson was offered water and soda, which he refused. He was then given a card containing his Miranda rights, which he read and recited, and claimed he understood before signing. Based on our review of these circumstances,[8] Johnson's statements were un-coerced and therefore voluntarily made.

Moreover, Johnson fails to demonstrate that the various psychotic disorders that rendered him incompetent to stand trial necessarily affected his cognitive abilities during his interview.[9] In addition to stating that he understood his Miranda rights, Johnson requested an attorney, thus terminating the interview, at the very point when his interests became compromised—when detectives indicated that they did not believe his story. Thus, since Johnson understood his rights to silence and an attorney, and the significance of waiving them,[10]

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[8]Mendoza, 122 Nev. at 276, 130 P.3d at 181 (the voluntariness of a waiver—a mixed question of law and fact—is reviewed de novo).

[9]Additionally, we note that Johnson was found competent to stand trial.

[10]Moran, 475 U.S. at 421 (a waiver is knowing and intelligent if it is made "with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it").

substantial evidence supports the district court's finding that Johnson's waiver was knowing and intelligent.[11]

Sentencing—retroactivity of deadly weapon amendments

The murders and robbery in this case occurred on June 18, 2005. In May 2007, Johnson was tried and convicted of three counts of second-degree murder and one count of robbery. On July 23, 2007, Johnson was sentenced to serve three consecutive prison terms of 10 years to life on the murder counts, together with three equal and consecutive terms for the use of a deadly weapon, to run consecutive with a prison term of 35 to 150 months on the robbery count.

Three weeks before Johnson's sentencing, on July 1, 2007, legislative amendments to NRS 193.165 took effect, allowing district courts the discretion to impose a consecutive sentence between one and twenty years for the use of a deadly weapon, thereby decoupling a determination of the amount of time imposed for the use of a deadly weapon from the amount of time imposed for the primary offense.[12] Nevertheless, because the murders in this case pre-dated the effective date of these amendments, Johnson was sentenced under the former version of NRS 193.165 to serve three "equal and consecutive" prison terms of 10 years to life for the use of the shotgun.

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[11]Mendoza, 122 Nev. at 276, 130 P.3d at 181 ("[W]hether a waiver is knowing and intelligent is a question of fact, which is reviewed for clear error.").

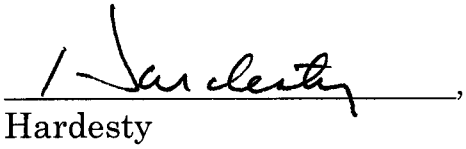
[12]See 1995 Nev. Stat., ch. 455, § 1, at 1431 (mandating that a defendant serve an equal and consecutive sentence for the use of a deadly weapon in the commission of the primary offense).

We disagree with Johnson's assertion that his sentence under former NRS 193.165 should be adjusted to give him the benefit of these ameliorative amendments. In State v. Dist. Ct. (Pullin), for reasons of legislative intent, prior precedent, and public policy, we concluded that the newly enacted amendments to NRS 193.165 did not apply to offenders who committed their crimes prior to—but were sentenced after—these amendments became effective. Instead, we reaffirmed that an offender will be subject to the sentencing scheme in effect at the time that a crime is committed.[13] Accordingly, since Johnson was sentenced under the version of NRS 193.165 that was in effect at the time that these murders occurred, we decline to disturb his sentence.[14]

Conclusion

Based on the above, we conclude that each of Johnson's arguments on appeal fails. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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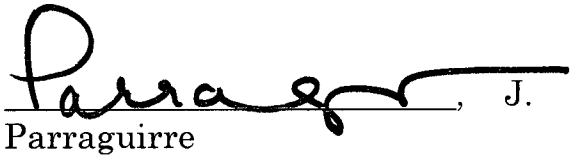

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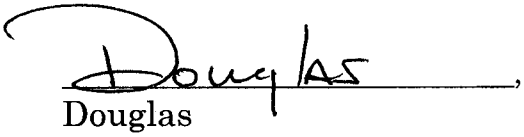

_____, J.
Douglas

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[13]124 Nev. ___, 188 P.3d 1079 (2008).

[14]Id. at ___, 188 P.3d at 1084.

cc: Hon. Lee A. Gates, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk