IN THE SUPREME COURT OF THE STATE OF NEVADA

CASSIO LATAURIUS BENNETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50827

FILED

NOV 23 2009

TRACIE K. LINDEMAN
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ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a controlled substance and allowing a child to be present during certain violations of NRS Chapter 453. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

After surveilling an apartment for several months, the Las Vegas Metropolitan Police Department obtained a search warrant for drugs and narcotics paraphernalia and raided the residence. Appellant Cassio Lataurius Bennett was found inside, along with Dijeanette Gupton, Wendy Brown, and two minor children, D.B. and R.R. Bennett is not related to either of the minor children. Bennett and Gupton were arrested. Bennett was charged by amended information with trafficking in a controlled substance in violation of NRS 453.3385, and allowing a child to be present during certain violations of NRS Chapter 453, in violation of NRS 453.3325. Following a two-day trial, Bennett was convicted of and sentenced on both counts.

On appeal, Bennett argues that: (1) NRS 453.3325 is unconstitutionally vague, (2) count two of the amended information did not contain all of the essential elements of NRS 453.3325, (3) the district court abused its discretion when it allowed the testimony of Wendy Brown

because she was an incompetent witness, (4) there was insufficient evidence to support the verdict, (5) two of the jury instructions were improper, and (6) his conviction and sentencing for violating both NRS 453.3385 and NRS 453.3325 constituted double jeopardy because NRS 453.3385 is a lesser-included offense of NRS 453.3325.

For the reasons set forth below, we affirm the district court's judgment of conviction in part, reverse in part, and remand this matter to the district court for further proceedings consistent with this order. We conclude that Bennett's double jeopardy argument has merit, but Bennett's other contentions are without merit. As the parties are familiar with the facts of this case, we do not recount them except as necessary to our disposition.

DISCUSSION

NRS 453.3325 is not unconstitutionally vague

NRS 453.3325 prohibits allowing a child to be present during the commission of certain violations of NRS Chapter 453 that involve controlled substances other than marijuana. Bennett argues that the statute is unconstitutionally vague because it does not adequately define three terms, making it unclear what constitutes allowing "a child to be present . . . upon any premises wherein a controlled substance other than marijuana . . . [i]s being sold."[1] NRS 453.3325(1)(b) (emphases added).

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[1]As pertinent to this appeal, NRS 453.3325 states:

> 1. A person shall not intentionally allow a child to be present in any conveyance or upon any premises wherein a controlled substance other than marijuana:

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(a) Is being used in violation of the provisions of NRS 453.011 to 453.552, inclusive, if the person in any manner knowingly engages in or conspires with, aids or abets another person to engage in such activity;

(b) Is being sold, exchanged, bartered, supplied, prescribed, dispensed, given away or administered in violation of the provisions of NRS 453.011 to 453.552, inclusive, if the person in any manner knowingly engages in or conspires with, aids or abets another person to engage in such activity; or

(c) Is being or has been manufactured or compounded in violation of the provisions of NRS 453.011 to 453.552, inclusive, if the person in any manner knowingly engages in or conspires with, aids or abets another person to engage in such activity.

. . . .

4. As used in this section:

(a) "Child" means a person who is less than 18 years of age.

(b) "Conveyance" means any vessel, boat, vehicle, airplane, glider, house trailer, travel trailer, motor home or railroad car, or other means of conveyance.

(c) "Premises" means any temporary or permanent structure, including, without limitation, any building, house, room, apartment, tenement, shed, carport, garage, shop, warehouse, store, mill, barn, stable, outhouse or tent, whether

continued on next page . . .

Bennett asserts that NRS 453.3325 (1) fails to provide sufficient notice to enable an ordinary person to understand what conduct is prohibited, and (2) encourages arbitrary and discriminatory enforcement because it does not sufficiently explain the specific acts that constitute a violation of the statute. The State asserts that Bennett does not have standing to challenge the statute and that a plain reading of the statute makes clear the meaning of each word Bennett contests. We conclude that Bennett has standing and also determine that NRS 453.3325 is not unconstitutionally vague.

A statute's constitutionality is a question of law that this court reviews de novo. Nelson v. State, 123 Nev. 534, 540, 170 P.3d 517, 522 (2007). Statutes are presumed valid and the challenger of the law has the burden of proving its unconstitutionality. Id.

A law is unconstitutionally vague if it: "(1) fails to provide notice sufficient to enable ordinary people to understand what conduct is prohibited; and (2) authorizes or encourages arbitrary and discriminatory enforcement." City of Las Vegas v. Dist. Ct., 118 Nev. 859, 862, 59 P.3d 477, 480 (2002). "'[A] statute will be deemed to have given sufficient warning as to proscribed conduct when the words utilized have a well settled and ordinarily understood meaning when viewed in the context of the entire statute.'" Nelson, 123 Nev. at 540-41, 170 P.3d at 522 (quoting Williams v. State, 118 Nev. 536, 546, 50 P.3d 1116, 1122 (2002)).

. . . continued

> located aboveground or underground and whether inhabited or not.

"Although 'there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls,' such a limitation is not sufficient to determine that a criminal statute is unconstitutional." Id. at 541, 170 P.3d at 522 (quoting United States v. Petrillo, 332 U.S. 1, 7 (1947)). Further, one who engages in clearly proscribed conduct cannot complain of the law's vagueness as applied to the conduct of others. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 495 (1982).

Bennett has standing to challenge NRS 453.3325 because it is clear that he is challenging the statute as it applies to him. See id. Bennett contends that the words "present," "upon," and "wherein" are vague. The words that Bennett contests all have well settled and ordinarily understood meanings when viewed in the context of the entire statute. See Nelson, 123 Nev. at 541, 170 P.3d at 522. To be "present" means to be at a "specified or understood place." Webster's College Dictionary 1029 (2d ed. 1997). To be "upon" any premises means to be in contact with the premises. See id. at 1411 (emphasis added). The term "premises" is defined in NRS 453.3325 as being "any temporary or permanent structure." NRS 453.3325(4)(c). Further, "wherein" means "in what or in which." See id. at 1463.

A person violates NRS 453.3325 if he allows a child to be either in the same room where the NRS Chapter 453 violation is happening or merely in the same residence when the violation occurs. We conclude that NRS 453.3325 is not unconstitutionally vague because it (1) "provide[s] notice sufficient to enable ordinary people to understand what conduct is prohibited," and (2) adequately defines the forbidden conduct so

that it does not "authorize[ ] or encourage[ ] arbitrary and discriminatory enforcement." See City of Las Vegas, 118 Nev. at 862, 59 P.3d at 480.

The amended information was proper

Bennett contends that count two of the amended information omitted two essential elements of NRS 453.3325.[2] First, Bennett asserts that the information did not notify him of which specific proscribed action he was being charged with committing while a child was present on the premises. Second, Bennett contends that the information did not notify him of whether he participated in the proscribed action as a principal, conspirator, or aider and abettor.

Where a defendant raises a question of the sufficiency of an information for the first time on appeal, the information "'will not be held insufficient to support the judgment, unless it is so defective that by no construction, within the reasonable limits of the language used, can it be said to charge the offense for which the defendant was convicted.'" Laney

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[2]Count two of the amended information read:

> Defendants did then and there willfully, unlawfully, and feloniously, allow a child, to wit: [D.B.], being approximately five (5) years of age and/or [R.R.], being approximately six (6) years of age, to be present in any conveyance, or upon any premises, to-wit: 311 East Tonopah, Apartment No. 206 wherein the controlled substance, to-wit: Cocaine is being used, sold, exchanged, bartered, supplied, dispensed, given away, manufactured or compounded in violation of the provisions of NRS 453.011 to NRS 453.552, inclusive.

v. State, 86 Nev. 173, 178, 466 P.2d 666, 670 (1970) (quoting State v. Hughes, 31 Nev. 270, 272-73, 102 P. 562, 562 (1909)).

The purpose of an information is to put the defendant on notice of the crimes with which he is being charged. Id. at 178, 466 P.2d at 669. An "information must be a plain, concise and definite written statement of the essential facts constituting the offense charged." NRS 173.075(1). It is permissible for a single count to allege that the defendant committed the crime "by one or more specified means." NRS 173.075(2). Further, an information's sufficiency is determined by practical, not technical, standards and will not be deemed defective if it could have been "more definite and certain." Laney, 86 Nev. at 178, 466 P.2d at 669.

While the amended information lists multiple means by which he may have violated NRS 453.3325, pursuant to NRS 173.075(2), this was not improper. The State may set forth more than one manner by which Bennett may have violated NRS 453.3325. See NRS 173.075(2). Therefore, even if count two of the amended information could have been more precise, the manner in which it was pled is proper. Bennett also claims that it was error for the State to fail to notify him whether he was being charged as a principal, conspirator, or aider and abettor. The amended information clearly charges Bennett with violating NRS 453.3325. See Laney, 86 Nev. at 178, 466 P.2d at 669. Therefore, we

conclude that count two of the amended information sufficiently put Bennett on notice of the crime that he was being charged with violating.[3]

Wendy Brown was a competent witness

Bennett contends that the district court abused its discretion when it permitted Wendy Brown to testify because she was an incompetent witness who based her testimony on unfounded suspicion and speculation, rather than on personal knowledge. We disagree.

A "trial court's [decision] to admit or exclude evidence is given great deference and will not be reversed absent manifest error." Baltazar-Monterrosa v. State, 122 Nev. 606, 613-14, 137 P.3d 1137, 1142 (2006).

A witness is competent to testify to a fact if there is evidence that he has personal knowledge of the matter. NRS 50.025(1)(a). A person has personal knowledge of a fact that "he has personally observed." State v. Vaughn, 682 P.2d 878, 882 (Wash. 1984); cf. Lane v. District Court, 104 Nev. 427, 446, 760 P.2d 1245, 1257 (1988) (noting that the witness was incompetent to testify because she was not present at the time in question). A lay witness may testify as to his opinion or inferences if they are rationally based on the witness's perception and if the testimony is helpful to a "clear understanding of his testimony or the determination of a fact in issue." NRS 50.265; see Collins v. State, 113 Nev. 1177, 1184, 946 P.2d 1055, 1060 (1997).

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[3]To the extent that Bennett challenges jury instruction number three on the basis of count two being erroneous, we conclude his argument is without merit because we hold that the amended information was proper.

At trial, Brown testified about what she observed in the apartment, such as the foot traffic, Bennett occasionally staying the night, and seeing Bennett with money. See NRS 50.025(1)(a). Further, Brown's opinion that Bennett was selling drugs was a proper lay witness opinion pursuant to NRS 50.265. The evidence shows that Brown's suspicion that Bennett was selling drugs was rationally based on her perception of what was occurring in the apartment. Her opinion was also helpful to the determination of whether Bennett was trafficking in a controlled substance in violation of NRS 453.3385. For these reasons, we conclude that Brown was a competent witness. The district court did not abuse its discretion by permitting Brown to testify at trial.

Sufficiency of the evidence

Bennett contends that the State presented insufficient evidence to support the jury's verdict of guilty on both counts.

In reviewing whether there is sufficient evidence to support a jury's verdict, this court reviews "'"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."'" Mejia v. State, 122 Nev. 487, 492, 134 P.3d 722, 725 (2006) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979))). Where substantial evidence supports the jury's verdict, it will not be overturned on appeal. Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981). Substantial evidence is "'evidence that "a reasonable mind might accept as adequate to support a conclusion."'" Brust v. State, 108 Nev. 872, 874-75, 839 P.2d 1300, 1301 (1992) (quoting First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990) (quoting State, Emp. Security v.

Hilton Hotels, 102 Nev. 606, 608, 729 P.2d 497, 498 (1986))). It is within the jury's providence to determine what weight and credibility it gives to conflicting testimony and "[c]ircumstantial evidence alone may support a judgment of conviction." Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

NRS 453.3385

A person is guilty of trafficking in controlled substances in violation of NRS 453.3385 if he "knowingly or intentionally sells, manufactures, delivers or brings into this State" or if he is "knowingly or intentionally in actual or constructive possession" of controlled substances, including cocaine. "Possession [can] be actual or constructive." Glispey v. Sheriff, 89 Nev. 221, 223, 510 P.2d 623, 624 (1973). Constructive possession exists only if the person "maintains control or a right to control the contraband." Id. Possession may be imputed either when the "contraband is found in a location which is immediately and exclusively accessible to the accused and subject to [his] dominion and control" or, "if the accused does not have exclusive control of the hiding place[, then] possession may be imputed if [the accused] has not abandoned the narcotic and no other person has obtained possession." Id. at 223-24, 510 P.2d at 624.

A rational jury could find Bennett guilty of trafficking in cocaine if it found that he knowingly and intentionally sold or manufactured cocaine, delivered or brought cocaine into Nevada, or possessed cocaine. While none of the witnesses testified that they saw Bennett in possession of or selling cocaine, the jury is allowed to base its verdict on circumstantial evidence. See Collman, 116 Nev. at 711, 7 P.3d at 441. The evidence supports a finding that Bennett sold cocaine: Officer

Travis Snyder's and Officer Paul Maalouf's testimony that rock cocaine was found scattered on the floor of the northwest bedroom, along with a razor blade with white residue on it; Forensic Scientist David Welch's testimony that a total of 11.73 grams of cocaine was found at the apartment; Officer Travis Snyder's testimony that he found baggies and scales (one of which had white residue on it), typically associated with the sale of drugs, in the kitchen; Officer Snyder's testimony that there was no evidence of drug use, leading him to believe Bennett and Gupton sold drugs; Brown and Officer Jeff Pollard's testimony that there was heavy foot traffic at the apartment, which was consistent with foot traffic at residences where illegal activities occurred; and Brown's testimony that she suspected Bennett and Gupton of selling drugs.

Alternatively, there was substantial evidence to support the verdict on the basis of Bennett possessing cocaine. The police found cocaine in the northwest bedroom, which was the room from which Bennett exited. Because the bedroom also contained many of Bennett's possessions, a rational trier of fact could conclude that Bennett had either actual possession of the cocaine or constructive possession because Bennett did not abandon the cocaine, he merely exited the bedroom when the police arrived. See Glispey, 89 Nev. at 223, 510 P.2d at 624. Therefore, viewing the evidence in the light most favorable to the State, we conclude that there was substantial evidence presented by which the jury could find trafficking in controlled substances beyond a reasonable doubt.

NRS 453.3325

While an accused can violate NRS 453.3325 with several different courses of conduct, the verdict form clearly asked the jury to find

that Bennett had violated NRS 453.3325 by selling a controlled substance. Bennett would have this court believe that because the amended information charged him with violating NRS 453.3325 "on or about" December 29, 2007, the State had to present evidence proving that he sold a controlled substance on December 29, 2007, while allowing children to be present. This contention is without merit. The amended information clearly states that the violation occurred "on or about" December 29, 2007. (Emphasis added). We conclude that the State presented substantial evidence in support of the jury's determination that Bennett violated NRS 453.3325. During the months of surveillance, Officer Pollard saw Bennett at the complex and observed heavy foot traffic at the residence, with people going to the apartment, knocking, and staying inside for less than 20 seconds. Based on this surveillance the police obtained a warrant to search the apartment for drugs and narcotics paraphernalia. When the police entered the apartment, Bennett and Gupton were in the northwest bedroom and the two minor children exited the southwest bedroom. Their presence in the apartment, along with the evidence presented concerning Bennett possessing and selling cocaine, is sufficient to support the jury's finding that Bennett intentionally allowed the children to be present in the apartment when controlled substances were being sold.

Jury instructions

Bennett argues that the district court abused its discretion when it refused to adjust jury instruction number 13. Bennett argues that jury instruction number 13 should have included that, in order to find Bennett guilty of NRS 453.3325, the jury had to find that he had "legal authority" over the minor children, D.B. and R.R. Bennett further

argues that the district court abused its discretion when it refused to include a proposed theory of the defense jury instruction.

"'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.'" Nolan v. State, 122 Nev. 363, 376, 132 P.3d 564, 572 (2006) (quoting Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005)). The district court abuses its discretion if its "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." Id. (internal quotations omitted). While "a criminal defendant is entitled to have the jury instructed on [his] theory of the case, no matter how weak or incredible the evidence supporting the theory may be . . . the [jury] instruction must correctly state the law." Barron v. State, 105 Nev. 767, 773, 783 P.2d 444, 448 (1989) (citations omitted). Further, a proffered jury instruction need not be given if it "misstates the law or is adequately covered by other instructions." Id.

Jury instruction number 13

Jury instruction number 13 informed the jury that "[a]ny person who intentionally allows a child to be present upon any premises wherein a controlled substance other than marijuana is being sold . . . is guilty of Allowing Child to Be Present Where Controlled Substance is Sold."

Unless ambiguous, a statute's words should be given their plain meaning. Harris Assocs. v. Clark County Sch. Dist., 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003). Further, a jury instruction must be an accurate statement of the law. See Cortinas v. State, 124 Nev. ___, ___, 195 P.3d 315, 319 (2008).

The plain meaning of NRS 453.3325 is that any person—not only those with legally recognized authority over the minor—that allows a child to be present upon any premises wherein a controlled substance other than marijuana is being sold is in violation of NRS 435.3325. In other words, having "legal authority" over the child is not an element of NRS 435.3325. Further, were the district court to have instructed the jury as Bennett proposed, jury instruction 13 would not have been an accurate statement of law. Therefore, the district court did not abuse its discretion.

Proposed theory of defense jury instruction

Bennett also argues that the district court abused its discretion and violated the Sixth and Fourteenth Amendment when it refused to give his proposed theory of defense jury instruction. Bennett's proposed theory of defense jury instruction read: "[w]hen an accused does not have exclusive access to illegal drugs, there is not sufficient evidence to establish possession, even if he frequented the apartment and stored some of his personal belongings there, without further evidence of possession."

In Marshall v. State, this court noted that evidence showing that the defendant frequented the apartment and stored some of his belongings there, was insufficient to prove that he had possession of the contraband found at the apartment. 110 Nev. 1328, 1333, 885 P.2d 603, 606 (1994). In so deciding, this court noted that numerous other persons had access to the apartment, and that the defendant did not have exclusive access to the contraband. Id. Accordingly, Bennett is correct that frequenting and storing personal belongings at Gupton's apartment

was insufficient, without more, to establish possession of contraband found at the residence.

However, the fact that Bennett's proposed theory of defense instruction noted a correct standard of law does not mean the district court abused its discretion when it refused to give the instruction. As noted by the district court when refusing the instruction, the proposed jury instruction improperly discussed what constituted evidence. Specifically, the proposed jury instruction states that Bennett only "frequented" the apartment and "stored" his personal belongings there.

Jury instruction number 12 instructed the jury that Bennett's mere frequenting and storing of belongings alone was insufficient to establish possession of items found at the residence. See Barron, 105 Nev. at 773, 783 P.2d at 448. Therefore, we conclude that the district court did not abuse its discretion or violate Bennett's rights because the district court had a proper basis for excluding Bennett's proposed theory of defense jury instruction. Moreover, this theory was adequately covered by jury instruction number 12.

Double Jeopardy

Bennett contends that his double jeopardy rights were violated when he was convicted of and sentenced pursuant to NRS 453.3385, trafficking in a controlled substance, and NRS 453.3325, allowing a child to be present during certain violations of NRS Chapter 453. Bennett argues that NRS 453.3385 is a lesser-included offense of NRS 453.3325. We agree.

This court reviews de novo a claim that a conviction violates double jeopardy. See Davidson v. State, 124 Nev. ___, ___, 192 P.3d 1185, 1189 (2008). The Double Jeopardy Clause provides that a person

must not be put in jeopardy twice for the same offense. U.S. Const. amend. V; Nev. Const. art. 1, § 8(1). To determine if two convictions violate double jeopardy, Nevada applies the Blockburger v. United States test. 284 U.S. 299 (1932); see Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006). Blockburger provides: "two offenses are separate if each offense requires proof of a fact that the other does not." Estes, 122 Nev. at 1143, 146 P.3d at 1127. "[I]t is impermissible for a defendant to suffer conviction for both greater- and lesser-included offenses." Id. "To determine the existence of a lesser-included offense, this court looks to 'whether the offense in question "cannot be committed without committing the lesser offense."'" Id. (quoting McIntosh v. State, 113 Nev. 224, 226, 932 P.2d 1072, 1073 (1997) (quoting Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966))).

To establish that Bennett violated NRS 453.3385, the State had to show that Bennett knowingly or intentionally sold, manufactured, delivered, or brought into Nevada; or had been in actual or constructive possession of cocaine in an amount of more than four grams. To establish that Bennett violated NRS 453.3325, the State had to show that Bennett intentionally allowed a child to be present when he used, sold, or manufactured an illicit drug, "in violation of the provisions of NRS 453.011 to 453.552." NRS 453.3385 fits squarely within the parameters of NRS 453.3325. The elements that the State had to prove to demonstrate that Bennett had violated NRS 453.3385 and NRS 453.3325 varied only in one respect: the presence of a child. Thus, Bennett could not violate NRS 453.3325 without first violating NRS 453.3385.

NRS 453.3385 is a lesser-included offense of NRS 453.3325. Bennett's double jeopardy rights were violated when he was convicted for

violating both statutes. We remand this matter with instructions to vacate Bennett's NRS 453.3385 conviction and to re-sentence him accordingly.

Therefore, for the reasons stated above, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Valerie Adair, 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