

IN THE SUPREME COURT OF THE STATE OF NEVADA

TYON HOPKINS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50873

FILED

JAN 08 2009

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 second-degree murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant Tyon Hopkins to serve a term of life in prison with the possibility of parole after ten years, plus an equal and consecutive term for the deadly weapon enhancement.

Hopkins' conviction stems from a shooting outside of a market in Las Vegas. His sole issue on appeal relates to the admission of the preliminary hearing testimony of Tabale Ia, a cashier at the market where the shooting occurred. Hopkins challenges the admission of her testimony on two grounds. First, he contends that because the State's motion to admit Ia's preliminary hearing testimony was untimely, the district court should not have admitted it. NRS 174.125(3)(a) required the State to file its motion to admit Ia's preliminary hearing testimony at least 15 days before trial. See Hernandez v. State, 124 Nev. ___, ___, 188 P.3d 1126, 1132 (2008); Grant v. State, 117 Nev. 427, 432, 24 P.3d 761, 764 (2001). Here, the State submitted its motion on the second day of trial. Because the State's motion was untimely, it was required to show good cause for

the delay. NRS 174.125(4); Hernandez, 124 Nev. at ___, 188 P.3d at 1132. “[T]o establish good cause for making an untimely motion to admit preliminary hearing testimony, the [proponent of the testimony] must provide an affidavit or sworn testimony regarding its efforts to procure the witness prior to the pretrial motion deadline.” Hernandez, 124 Nev. at ___, 188 P.3d at 1133. This court reviews a district court’s finding that the prosecution exercised constitutionally reasonable diligence to procure a witness’s attendance as a mixed question of law and fact, giving deference to the district court’s findings of fact. Id. at ___, 188 P.3d at 1131-32. However, we “will independently review whether those facts satisfy the legal standard of reasonable diligence.” Id. at ___, 188 P.3d at 1132.

Here, the State included an affidavit with its motion to admit the challenged testimony in which a State investigator outlined his efforts to secure Ia’s presence at trial. The investigator averred that he served Ia two subpoenas, one for each time trial was set to commence, and arranged transportation to the proceeding. With each subpoena, Ia agreed to appear at trial. Throughout the week before trial and until the second day of trial, the investigator made numerous attempts to communicate with Ia by telephone, visits to her home, and contact with several of Ia’s relatives. Despite these efforts, Ia did not appear at trial. We conclude that the record demonstrates that the State exercised reasonable diligence in attempting to secure Ia’s presence at trial and therefore established good cause for the late filing of its motion to admit her prior testimony. Accordingly, we conclude that the district court did not err by admitting Ia’s preliminary hearing testimony on this basis.

Second, Hopkins argues that the district court erred by admitting Ia’s preliminary hearing testimony because the conditions of

NRS 171.198(6) were not met. That statute allows the State to use a witness's prior testimony if the defendant was represented by counsel at the prior proceeding and the witness is unavailable. We have held that "the admission of prior testimony comports with the requirements of the Sixth Amendment of the United States Constitution provided that defense counsel had the opportunity to, and in fact did, thoroughly cross-examine the witness, and the witness was actually unavailable for trial." Grant v. State, 117 Nev. 427, 432, 24 P.3d 761, 764 (2001) (internal footnote omitted); see Funches v. State, 113 Nev. 916, 920, 944 P.2d 775, 777-78 (1997).

Hopkins concedes that he was represented by counsel at his preliminary hearing but argues that the other two requirements for the admission of the challenged testimony were not satisfied. In particular, Hopkins contends that he was not afforded an adequate opportunity to cross-examine Ia at the preliminary hearing because he had not been provided certain discovery at that time which revealed inconsistencies in Ia's testimony. However, our review of Ia's testimony shows that trial counsel thoroughly cross-examined her at the preliminary hearing, including the inconsistencies Hopkins now identifies. Moreover, trial counsel challenged Ia's credibility at trial by highlighting these inconsistencies during closing argument. We conclude that the record demonstrates that Hopkins was afforded an adequate opportunity to cross-examine Ia during the preliminary hearing.

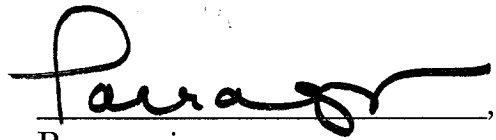
Hopkins next argues that the State failed to show that Ia was actually unavailable for trial. However, as explained above, the State acted with reasonable diligence in attempting to secure Ia's presence at

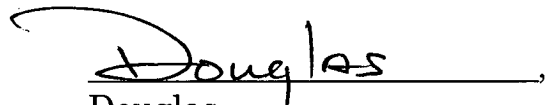
trial. We conclude that the record demonstrates that Ia was unavailable for trial and therefore this requirement was satisfied.

Because the record demonstrates that the constitutional and statutory requirements for the admission of prior testimony were met, we conclude that the district court properly admitted Ia's preliminary hearing testimony.¹

Having considered Hopkins' arguments and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Pickering

¹We reject Hopkins' argument that Ia's preliminary hearing testimony was unreliable and therefore inadmissible. The alleged unreliability of a witness's testimony is not a basis for exclusion but rather speaks to the credibility and weight of the evidence, which are determinations reserved for the trier of fact. See Passarelli v. State, 93 Nev. 292, 294, 564 P.2d 608, 610 (1977).

cc: Hon. Stewart L. Bell, District Judge
Thomas A. Ericsson, Chtd.
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk