

IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,  
Appellant,  
vs.  
ROBERT STEVEN YOWELL,  
Respondent.

No. 51400

**FILED**

JUN 12 2008

TRACIE W. LINDEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

ORDER DISMISSING APPEAL

This is an appeal from a district court order setting aside the verdict. Fifth Judicial District Court, Nye County; John P. Davis, Judge.

Our initial review of this appeal revealed a potential jurisdictional defect. Specifically, the district court's order of March 27, 2008, set aside the jury's verdict based on a finding that respondent Robert Steven Yowell was not competent at his trial and ordered a new trial. Because the order setting aside the verdict was entered based on a competency finding, rather than a finding that insufficient evidence supported the jury's verdict, the order did not appear to be appealable under NRS 177.015(1)(b) as an order granting a motion for acquittal. Further, it appeared that the March 27, 2008, order was an intermediate order not subject to appeal, rather than a final appealable order, because the order was entered before Yowell was sentenced and a judgment of conviction entered. Accordingly, this court ordered appellant to show cause why this appeal should not be dismissed for lack of jurisdiction.

In response, appellant first argues that the order setting aside the verdict is appealable as an order granting a motion for acquittal under

NRS 177.015(1)(b) because the statute does not specify the grounds upon which a motion for acquittal must be based. We disagree.

Although NRS 177.015(1)(b) permits the State to appeal an order granting a motion for acquittal, it does not appear that the district court granted a motion for acquittal in this instance. A district court may only set aside the verdict and enter a judgment of acquittal after finding that insufficient evidence supported the conviction.<sup>1</sup> Because a judgment of acquittal necessarily involves a determination that insufficient evidence supported the conviction, the Double Jeopardy Clause prohibits a retrial on any charges for which the defendant was acquitted.<sup>2</sup> Here, the district court did not find that insufficient evidence supported the conviction. Rather, the district court set aside the verdict after finding that Yowell was incompetent at his trial and ordered a new trial. Accordingly, we conclude that the order setting aside the verdict is not appealable as an order granting a motion for acquittal.

Next, appellant argues that the order setting aside the verdict is appealable under NRS 177.015(1)(b) as an order granting a motion for a new trial. Appellant argues that it will suffer substantial prejudice if it has to proceed to a second trial and it should not have to go to extraordinary lengths to obtain relief.

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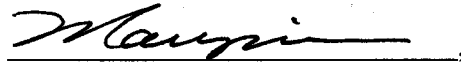
<sup>1</sup>NRS 175.381(2); see also State v. Jones, 96 Nev. 71, 76-77, 605 P.2d 202, 206 (1980) (holding that a district court order that set aside a verdict on the basis that the evidence presented was at variance with the allegations in the indictment was appealable as an order granting a motion for acquittal).

<sup>2</sup>U.S. Const. amend. V; see also Smith v. Massachusetts, 543 U.S. 462, 466-67 (2005).

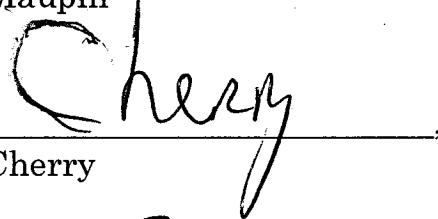
In State v. Lewis, this court recently held that pursuant to NRS 177.015(1)(b) “this court has authority to review determinations of the district court resolving post-conviction motions for a new trial.”<sup>3</sup> Here, the district court set aside the verdict before sentencing, and therefore, there was no final conviction entered. Accordingly, we conclude that the order setting aside the verdict and ordering a new trial is an intermediate order and not a final appealable determination.

Having reviewed the documents submitted in this appeal, we conclude that we lack jurisdiction to consider this appeal, and we

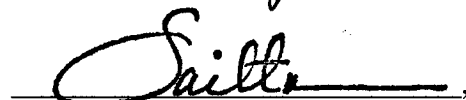
ORDER this appeal DISMISSED.

 \_\_\_\_\_, J.

Maupin

 \_\_\_\_\_, J.

Cherry

 \_\_\_\_\_, J.

Saitta

cc: Hon. John P. Davis, District Judge  
Attorney General Catherine Cortez Masto/Carson City  
Nye County District Attorney/Tonopah  
Nye County Public Defender  
Nye County Clerk  
Robert Steven Yowell

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<sup>3</sup>124 Nev. \_\_\_, \_\_\_, 178 P.3d 146, 148 (2008).