IN THE SUPREME COURT OF THE STATE OF NEVADA

JESUS R. MERAZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52005

FILED

FEB 03 2011

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

ORDER OF REVERSAL AND REMAND

This is an appeal from a judgment of conviction, pursuant to a jury trial, of second-degree murder with the use of a deadly weapon and assault with a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Meraz claims that the evidence submitted at trial was insufficient to support the jury's verdict on either count. We disagree. In addition to gunshot residue that was discovered on the shirt Meraz wore the night of the incident, at least two witnesses testified that Meraz shot the murder victim. Though there was conflicting evidence, it was sufficient for a rational jury to find Meraz guilty of second-degree murder with the use of a deadly weapon. See Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); Jackson v. Virginia, 443 U.S. 307, 319 (1979); NRS 200.010; NRS 200.030; NRS 193.165. As to the assault count, Meraz requested an instruction on the lesser-included offense of assault with a deadly weapon. It therefore follows that Meraz cannot complain on appeal about the sufficiency of the evidence supporting the alternative count that he requested. See Rosas v. State, 122 Nev. 1258, 1269, 147 P.3d 1101, 1109 (2006). Nevertheless, based upon the evidence adduced at trial, a rational jury could find the evidence was indeed

sufficient to convict Meraz of assault. See Origel-Candido, 114 Nev. at 381, 956 P.2d at 1380; Jackson, 443 U.S. at 319; NRS 200.471.

Meraz next claims that the district court should have granted his motion for a new trial based, in part, on the district court's ruling allowing prior sworn testimony of a State's witness to be read into the record at trial. We agree and conclude that the lower court's ruling on this issue was error warranting reversal.[1]

Meraz was charged after a shooting outside of a convenience store. The surviving victim, Karla Barboza, testified both at a preliminary hearing and at Meraz's first trial, which resulted in a mistrial. At a hearing on the day the second trial was to begin, the State moved to admit Barboza's prior trial testimony over Meraz's objection because she was, the State believed, in Mexico. There was some dispute as to whether the State submitted a supporting written motion to the district court alleging additional efforts it undertook to procure Barboza's live testimony.[2] The district court nevertheless allowed the testimony. In so doing, the court made no record as to the reasonableness of the State's efforts in attempting to procure Barboza's live testimony and did not make an unavailability finding on the record.

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[1]Meraz also makes several claims of prosecutorial misconduct. Because we are remanding for a new trial, we decline to address Meraz's other assignments of error.

[2]Meraz notes that the motion's filing date was three days after the hearing. The State argues that this is a clerical error. The motion was dated three days before the hearing. The record seems to indicate that the motion was submitted at the hearing. At any rate, the district court did not make of a record of its reliance upon the motion when it allowed the reported testimony to be used.

The reading of prior testimony at trial, even when subject to a full opportunity for cross-examination, is disfavored. U.S. v. Yida, 498 F.3d 945, 950 (9th Cir. 2007). For the reading of such testimony to pass constitutional muster, three preconditions must be met, Power v. State, 102 Nev. 381, 383, 724 P.2d 211, 212 (1986), only one of which is in controversy here: the witness must actually be unavailable. See id. The prosecution bears the burden of proving that the State made reasonable efforts to procure the witness's testimony. Id.

Reasonable efforts require more than minimal efforts. See, e.g., id. at 384, 724 P.2d at 213 (finding that prosecutor and detective going to witness's house and repeatedly trying to contact him by phone, but making little attempt to contact neighbors, friends or employees were not reasonable efforts); Hernandez v. State, 124 Nev. 639, 652, 188 P.3d 1126, 1135 (2008) (concluding that prosecutor buying plane tickets and securing hotel room for out-of-town witness, but failing to follow up when she did not appear on day of trial, were not reasonable efforts); Grant v. State, 117 Nev. 427, 432-33, 24 P.3d 761, 765 (2001) (sending subpoenas to witness's place of employment constituted only minimal efforts). But see Quillen v. State, 112 Nev. 1369, 1376, 929 P.2d 893, 897-98 (1996) (noting that futile acts are not required and State, in proving that witnesses had quit their jobs, moved with no forwarding address and may be in Mexico, met the test for reasonable efforts).

A mere belief that a witness may be in Mexico is not reasonable effort. Yet even if it were, and the district court did in fact rely upon the efforts to find Barboza detailed in the State's late motion, the district court failed to find the witness unavailable on the record. See Hernandez, 124 Nev. at 649 n.25, 188 P.3d at 1133 n.25 ("When a decision

is subject to review as a mixed question of law and fact, the district court must make specific factual findings to enable adequate appellate review."). Nor did the court require the State to support its untimely motion by affidavit or sworn testimony. See id. at 649, 188 P.3d at 1133 ("Therefore, to establish good cause for making an untimely motion to admit preliminary hearing testimony, the State must provide an affidavit or sworn testimony regarding its efforts to procure the witness prior to the pretrial motion deadline."). Rather, in admitting the testimony, the district court relied entirely on the fact that Meraz had a thorough opportunity to cross-examine the witness at his first trial. "The constitutional requirement that a witness be 'unavailable' before his prior testimony is admissible stands on separate footing that is independent of and in addition to the requirement of a prior opportunity for cross-examination." Yida, 498 F.3d at 950 (citing Barber v. Page, 390 U.S. 719, 724-25 (1968)). We conclude that the district court's failure to consider Barboza's unavailability in accord with Meraz's Confrontation Clause rights was error.

As the only surviving victim, Barboza was central to the investigation and her statement that Meraz was the shooter led directly to his arrest. Her testimony was also not cumulative. Each of the State's witnesses had a different perspective of the events surrounding the shooting: some saw just a gun, some saw Meraz with a gun and none seemed able to calculate distance with any reliability—a key issue at trial. And while the evidence the State adduced at trial—apart from the surviving witness's testimony—may have been sufficient to support his convictions, see Hutchins v. State, 110 Nev. 103, 107-08, 867 P.2d 1136, 1139 (1994), it was not overwhelming, see Hernandez, 124 Nev. at 653,

188 P.3d at 1136 (explaining that a district court's erroneous decision to admit prior testimony is only harmless if this court concludes beyond a reasonable doubt that prior testimony did not contribute to defendant's conviction).

We therefore cannot conclude, beyond a reasonable doubt, that Barboza's testimony did not contribute to Meraz's conviction. Accordingly, the admission of the prior testimony was not harmless error, and we reverse the judgment of conviction and remand this case for a new trial.

Having considered Meraz's contentions, and for the reasons discussed above, we

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

Douglas, C. J.

Pickering, J.

Hardesty, J.

cc: Hon. Valerie Adair, District Judge
Mueller Hinds & Associates
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk