

IN THE SUPREME COURT OF THE STATE OF NEVADA

FORREST LEDBETTER,
Appellant
vs.
THE STATE OF NEVADA,
Respondent.

No. 52208

FILED

NOV 04 2009

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of domestic violence, third offense. Seventh Judicial District Court, White Pine County; Steve L. Dobrescu, Judge. The district court sentenced appellant Forrest Ledbetter to a prison term of 12 to 40 months.

Ledbetter raises two claims on appeal: (1) his conviction must be vacated because the district court did not have jurisdiction and (2) the district court admitted improper hearsay evidence at trial. We conclude that neither claim has merit and affirm the judgment of conviction.

Ledbetter's jurisdictional claim arises from the district court's grant of a pretrial petition for a writ of habeas corpus. After a preliminary hearing, Ledbetter was bound over to the district court on one count of domestic violence, third offense. Ledbetter filed a pretrial petition for a writ of habeas corpus, alleging that at the preliminary hearing the State had failed to present any evidence that he had two prior convictions for domestic violence. The district court granted the petition and remanded to the justice court. Pursuant to the district court's order, the State filed two motions in justice court: (1) a motion to discharge Ledbetter from custody

and (2) a motion to dismiss the case without prejudice. The justice court granted both motions with brief orders stating that the motions were supported by good cause. Subsequently the State filed a new complaint, Ledbetter unconditionally waived his preliminary hearing, and the case proceeded to trial.

Ledbetter claims that the district court lacked jurisdiction because these circumstances barred a second prosecution. His claim is based on the assertion that the justice court's order dismissing the case lacked written findings, and thus did not comply with the requirements of NRS 174.085(7).¹ Ledbetter asserts that the justice court's failure to comply with NRS 174.085 leads to the conclusion that the dismissal was made pursuant to NRS 178.554, and therefore a second prosecution was barred by statute. See NRS 178.562(1) (stating that "except as otherwise provided in NRS 174.085, an order for the dismissal of the action, as provided in NRS 178.554 and 178.556, is a bar to another prosecution for the same offense").

Ledbetter's claim lacks merit for three reasons. First, the plain language of the statute requires a showing of good cause and "written findings and a court order to that effect." NRS 174.085(7) (emphasis added). Thus, it does not appear that anything beyond a written finding of good cause is required by the statute. Second, the State's motion clearly indicated that it was based on NRS 174.085. And finally, because the motion to dismiss was based on the district court's

¹NRS 174.085(7) states in part that "the prosecuting attorney may voluntarily dismiss an indictment or information without prejudice to the right to bring another indictment or information only upon good cause shown to the court and upon written findings and a court order to that effect."

decision to grant Ledbetter's petition for a writ of habeas corpus, there was no reason for the justice court to make any additional written findings. Therefore, we conclude that the justice court's order to dismiss did not bar Ledbetter's subsequent prosecution.

Ledbetter's second claim is that the district court erred by permitting inadmissible hearsay to be presented at trial. Specifically, he refers to the testimony of Deputy Sheriff Darren Wallace, who responded to the crime scene and testified regarding the victim's statements to him about what had happened. Ledbetter did not object to this testimony at trial. Therefore, his claim is reviewed for plain error affecting his substantial rights. See Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006).

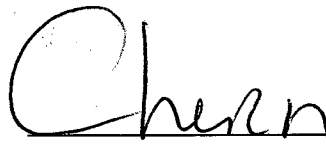
Deputy Wallace testified that when he arrived at the scene, the victim "was very upset, she was shaking, crying," and that for about 20 to 30 seconds she kept repeating that "he was going to kill me." He explained that he spent several minutes trying to calm her down, but that during their conversation he kept having to "calm her down again." His entire conversation with her lasted "maybe five minutes."


Ledbetter concedes that the victim's initial statement that "he was going to kill me" was "probably excited utterance," see NRS 51.095, but contends that Deputy Wallace's repetition of her subsequent description of what happened was improper hearsay. "The proper focus of the excited utterance inquiry" is not "[t]he elapsed time between the event and the statement," but "whether the declarant made the statement while under the stress of the startling event." Medina v. State, 122 Nev. 346, 352, 143 P.3d 471, 475 (2006). Here, where Deputy Wallace testified that he had to try to calm the victim down during the entirety of their brief conversation, we conclude that all of his testimony regarding her

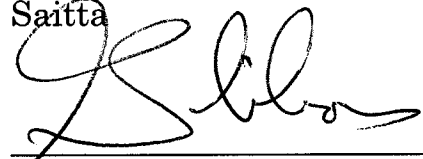
statements fell under the rubric of an excited utterance. Therefore, we further conclude that the record does not reveal plain error.

Having considered Ledbetter's claims, we conclude that no relief is warranted. However, our review of the judgment of conviction reveals a clerical error. The judgment of conviction incorrectly states that appellant pleaded guilty, when in fact he was convicted by a jury. We therefore conclude that this matter should be remanded to the district court for correction of the judgment of conviction. See NRS 176.565. Accordingly, we

ORDER the judgment of conviction AFFIRMED and REMAND this matter to the district court for the limited purpose of correcting it.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Steve L. Dobrescu, District Judge
State Public Defender/Carson City
State Public Defender/Ely
Attorney General Catherine Cortez Masto/Carson City
White Pine County District Attorney
White Pine County Clerk