

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DONALD KIE, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 71905

FILED

DEC 15 2017

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

Donald Kie, Jr. appeals from a judgment of conviction entered pursuant to a jury verdict finding him guilty of conspiracy to commit robbery, robbery, battery resulting in substantial bodily harm, and battery with intent to commit a crime. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Bryan Eagles and another man accosted, robbed, and severely battered the victim outside a bar, breaking the victim's neck and leaving him temporarily paralyzed. They, along with a third man, also stole the victim's personal property and his truck. The incident was captured by surveillance cameras. Donald Kie, Jr., who was present before, during, and after the crime, approached Eagles shortly after Eagles finished beating the victim. Kie moved his hand to his mouth and then touched Eagles' right hand. Seconds after, Eagles transferred something from his right hand to his left. The State's theory of the case was that Kie was angry with the victim for threatening to tell Kie's wife of Kie's extramarital affairs, and Kie retaliated by conspiring with Eagles to beat the victim. The State

argued Kie paid Eagles in drugs, and presented evidence that drugs are often transferred from mouth to hand.¹

On appeal, Kie argues that the evidence was insufficient to show the conspiracy and support the convictions and that the district court abused its discretion by admitting evidence of the alleged drug transaction. We disagree.

Evidence is sufficient to support a verdict if “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007)). A conspiracy is “an agreement between two or more persons for an unlawful purpose,” and a co-conspirator “who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator.” *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 91 P.3d 16 (2004). The Nevada Supreme Court has explained, “if a coordinated series of acts furthering the underlying offense is sufficient to infer the existence of an agreement, then sufficient evidence exists to support a conspiracy conviction.” *Thomas v. State*, 114 Nev. 1127, 1143, 967 P.2d 1111, 1122 (1998) (internal quotation marks omitted). “[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness.” *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

Our review of the record reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.

¹We do not recount the facts except as necessary to our disposition.

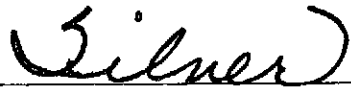
See *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979); *Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). The State presented evidence supporting the charges, including the surveillance video and testimony by the victim, the bartender and the manager, a trauma nurse who treated the victim, and the detective assigned to the case. We conclude the jury could reasonably infer the essential elements of the conspiracy and other crimes charged from this evidence.


We next turn to Kie's second assertion of error. We review the district court's decision to admit evidence for an abuse of discretion. *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008). NRS 48.035(3) permits the district court to admit evidence of another act or crime that "is so closely related to . . . [the] crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime." This exception is narrowly construed and limited to the express provisions of NRS 48.035(3). *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005); *Tabish v. State*, 119 Nev. 293, 307, 72 P.3d 584, 593 (2003). Because the statute refers to a witness's ability to describe, rather than explain, the charged crime, evidence of other acts may not be admitted under NRS 48.035(3) "to make sense of or provide a context for a charged crime." *Weber v. State*, 121 Nev. 554, 574, 119 P.3d 107, 121 (2005).

Here, the State charged Kie with conspiracy. "Conspiracy is seldom susceptible of direct proof and is usually established by inference from the conduct of the parties." *Thomas*, 114 Nev. at 1143, 967 P.2d at 1122 (internal quotation marks omitted). In this case, the State could not elicit testimony of the crime of conspiracy without referencing the facts of the alleged drug transaction, as that transaction was central to establish

the inferences supporting the conspiracy. The evidence was therefore admissible res gestae evidence, and the district court did not abuse its discretion by admitting this evidence.² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

cc: Hon. Douglas Smith, District Judge
Benjamin Durham Law Firm
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

²Though not raised by the parties, we note Kie failed to file below an opposition to the State's motion to admit the evidence, thereby consenting to the admission of the evidence. See EDCR 2.20(e) (stating that failure to file a written opposition will be construed as an admission that the motion has merit and should be granted).