

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
ROBERT JACKSON,
Respondent.

ROBERT STEPHEN JACKSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66573 ✓

FILED

MAR 16 2016

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

No. 67707

*ORDER AFFIRMING IN PART, REVERSING IN PART AND
REMANDING*

The appeal in Docket No. 66573 is an appeal from a district court order granting a motion for a new trial. The appeal in Docket No. 67707 is an appeal from a judgment of conviction pursuant to a jury verdict of five counts of attempt murder with use of a deadly weapon with the intent to promote, further or assist a criminal gang; battery with use of a deadly weapon resulting in substantial bodily harm with the intent to promote, further or assist a criminal gang; three counts of battery with use of a deadly weapon with the intent to promote, further or assist a criminal gang; and possession of firearm by ex-felon. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge. We consolidate these appeals for dispositional purposes only. NRAP 3(b)(2).

Appellant Robert Jackson was found guilty by a jury of multiple charges stemming from a shooting on the Las Vegas Strip.¹ Both Jackson and the State appeal, alleging various errors. In this order, we primarily consider whether the district court erred by allowing the State to add charges to Jackson's indictment or by granting Jackson's motion for a new trial as to two counts based on insufficient evidence.² We conclude the district court erred in both instances.

We review a district court's decision to amend an indictment for abuse of discretion. *Green v. State*, 94 Nev. 176, 177, 576 P.2d 1123, 1123 (1978) (noting amendment of an information is usually within the district court's discretion). "[T]hat discretion is abused if an additional or different offense is charged." *Id.* (quotations omitted); *see also* NRS 173.095(1). The district court "may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." NRS 173.095(1). If a superseding indictment is filed while the original indictment is validly pending, changes included in the new indictment are not barred by the statute of limitations if they do not broaden or substantially amend the original charges. *Benitez v. State*, 111 Nev. 1363, 1364-65, 904 P.2d 1036, 1037 (1995).

Here, the district court denied Jackson's motion to dismiss the original indictment. The original indictment was filed by the State almost four years after the State filed the criminal complaint in justice court. The

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

²We have carefully considered the additional arguments and conclude they are without merit.

original indictment included an additional charge of attempt murder (count 1) and changed an assault charge to a battery charge (count 9).³ The statute of limitations for attempt murder and battery is three years.⁴ But, NRS 173.095(1) allows the district court to grant an amendment of an indictment before the verdict if no additional or different offense is charged and the defendant's substantial rights are not prejudiced. Here, however, the State filed additional charges that did not relate back to the original complaint, as these charges were additional and different charges. Further, count one involved an entirely new victim who was not identified in the original criminal complaint. Consequently, the statute of limitations was not tolled and the newly added charges, originating from the grand jury, as opposed to justice court, were procedurally barred. We therefore conclude that these additional charges are barred by the statute of limitations. Accordingly, we vacate count one.⁵

We next review the district court's order granting Jackson a new trial on counts eight and nine on the basis of insufficient evidence. The Double Jeopardy Clause of the Constitution bars a district court's grant of a defendant's motion for a new trial based on insufficient evidence. *Hudson v. Louisiana*, 450 U.S. 40, 42-43 (1981); see also *State v.*

³The State also added an assault charge, but dropped that charge before trial.

⁴We note NRS 171.085 was amended in October 2015 to add subsection 3. Prior to that time, the language relevant to this case was contained in subsection 2. 2013 Nev. Stat., ch. 426, § 5, at 2418.

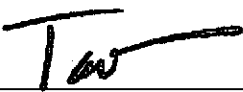
⁵Here, vacating count nine is unnecessary, as the judgment of conviction does not currently reflect that Jackson was convicted of that count.

Purcell, 110 Nev. 1389, 1396, 887 P.2d 276, 279 (1994). Although a court may grant a motion for a new trial based on conflicting evidence, “[i]f there is truly insufficient evidence, a defendant must be acquitted.” *Purcell*, 110 Nev. at 1393, 1395, 887 P.2d at 279.

Here, the district court granted Jackson a new trial on counts eight and nine based on insufficient evidence. Such action is not permitted by law, as the district court has the authority to acquit a defendant after the trial if the evidence at trial is insufficient, but may not grant a new trial. See NRS 175.381; see also *Hudson*, 450 U.S. at 42-43 and *Purcell*, 110 Nev. at 1395, 887 P.2d at 279. Therefore, we reverse the district court’s granting Jackson’s motion for a new trial on count eight. Although the district court erred in granting a new trial on count nine as well, reversal of the court’s order with respect to count nine is unnecessary in light of our conclusion that count nine is barred by the statute of limitations. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.⁶


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

⁶As noted above, this matter is being remanded for the limited purpose of amending the judgment of conviction to remove count one, and to reinstate and sentence Jackson on count eight.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Attorney General/Carson City
Clark County District Attorney
Robert Stephen Jackson
Eighth District Court Clerk