IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMUEL EARL CULVERSON,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37074

FILED

MAR 27 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of robbery with the use of a deadly weapon, possession of a controlled substance, and possession of a firearm by an ex-felon. The district court sentenced appellant to serve two consecutive terms of 60 to 156 months in prison for robbery with the use of a deadly weapon, a consecutive term of 12 to 36 months in prison for possession of a controlled substance, and a consecutive term of 24 to 60 months in prison for possession of a firearm by an ex-felon.

Appellant raises three issues: (1) the State presented insufficient evidence to support the jury's verdict on the charges of robbery with the use of a deadly weapon and possession of a firearm by an ex-felon; (2) the district court abused its discretion by admitting testimony regarding the co-defendant's admissions; and (3) trial counsel provided ineffective assistance by failing to locate and call two witnesses. Based on our review of the record, we conclude that appellant's contentions lack merit.

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First, appellant contends that the State presented insufficient evidence to support the jury's finding of guilt on the charges of robbery with the use of a deadly weapon and possession of a firearm by an ex-felon. We disagree.[1]

When reviewing a claim of insufficient evidence, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[2] Furthermore, "it is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."[3]

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. The victim, Francisco Osorio, testified that he was at a friend's apartment when he heard a knock on the door. There were two men at the door, one of whom Osorio identified as appellant. Appellant wanted to see Osorio's friend, who had gone to the store. When Osorio let appellant and his companion into the apartment, appellant pulled out a small caliber handgun and said that it was a robbery. Appellant's companion searched

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[1]We note that, consistent with this court's decision in Brown v. State, 114 Nev. 1118, 967 P.2d 1126 (1998), the district court bifurcated the trial on the charges of robbery with the use of a deadly weapon and possession of a controlled substance from that on the charge of possession of a firearm by an ex-felon.

[2]Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted).

[3]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Osorio and took over $400.00 in cash from Osorio. Appellant and his companion fled.

Osorio made contact with a police officer and provided a description of the robbers. Two other police officers responded and located two men running away from the area; the men were later identified as appellant and Charles Whaley. Appellant and Whaley slowed as they saw one of the officers, but then started running when the officer activated his overhead lights. Both men were eventually detained and Osorio identified them as the robbers. Police found $435.00 in cash on Whaley and a rock of cocaine on appellant. Police also found a small caliber handgun on the roof of a home in front of the alley where appellant and Whaley were seen running.

Appellant hid his identity at first, but eventually admitted his true identity. He then admitted to being in the apartment and getting into a fight with Osorio, but denied robbing Osorio. Appellant claimed that the fight was over Osorio selling him fake cocaine; Osorio testified that he had a prior conviction in 1991 for possession of a controlled substance with intent to sell, but that he no longer sold drugs.

During the guilt phase on the ex-felon charge, the State presented evidence that appellant has three prior felony convictions: two for robbery with the use of a deadly weapon and one for second degree murder.

The jury could reasonably infer from the evidence presented that appellant used a deadly weapon to take property from the victim and that appellant was an ex-felon and had

possession of a firearm. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[4]

Next, appellant contends that the district court abused its discretion by allowing Officer Lawson to testify as to the statements made by Whaley. Appellant contends that Whaley's statements are inadmissible hearsay. We disagree.

Officer Lawson testified that Whaley "stated that he was present at the robbery and that he had snatched the money when it was presented." Officer Lawson further testified that when asked whether he could identify appellant, who had been apprehended by Officer Gray, Whaley provided a first name, which Officer Lawson communicated to Officer Gray to assist in identifying appellant. Appellant's counsel objected to the officer's testimony about Whaley's statement; the district court determined that the statement was a statement against penal interest and overruled the objection.

NRS 51.345 sets forth an exception to the hearsay rule for statements against penal interest. A statement against penal interest is admissible if: (1) at the time of its making, the statement tends to subject the declarant to civil or criminal liability; (2) a reasonable person in that position would not have made the statement unless he believed it to be true; and (3) the declarant is unavailable as a witness at the time of trial.[5] The exception "does not make

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[4]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[5]NRS 51.345(1).

admissible a statement or confession offered against the accused made by a codefendant or other person implicating both himself and the accused."[6]

The record reveals that Officer Lawson's testimony complied with NRS 51.345. Whaley, the declarant, was a co-defendant set to be tried separately after appellant's trial and thus was unavailable within the meaning of the statute. By admitting that he participated in the robbery, Whaley exposed himself to criminal liability. Moreover, Whaley's statement did not implicate appellant. Even assuming that Whaley's statement inferentially implicated appellant because Whaley was asked whether he knew appellant's name, any error in admitting the testimony was harmless.[7]

Finally, appellant contends that trial counsel provided ineffective assistance by failing to locate and call two witnesses who Osorio testified were in the apartment at the time of the robbery. We decline to address this issue because claims of ineffective assistance are not appropriate for review on direct appeal where, as here, there has been no evidentiary hearing on the issue.[8]

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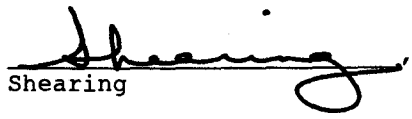
[6]NRS 51.345(2); see also Bruton v. United States, 391 U.S. 123 (1968) (holding that a nontestifying defendant's admission which expressly incriminates another defendant cannot be used at a joint trial).

[7]See Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993) (recognizing that hearsay errors are subject to harmless error analysis).

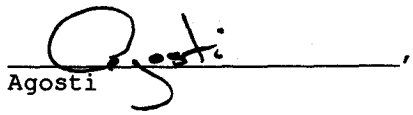
[8]Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

Having considered appellant's contentions and concluded that they lack merit or are not appropriate for review on direct appeal, we

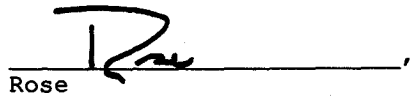
ORDER the judgment of conviction AFFIRMED.[9]



Shearing, J.



Agosti, J.



Rose, J.

cc: Hon. Jack Lehman, District Judge
Attorney General
Clark County District Attorney
G. Brent Heggie
Clark County Clerk

[9]We note that the fast track statement is hardly a model of appellate briefing. For example, the statement of facts does not summarize all facts material to a consideration of the issues on appeal; it does not even set forth the facts underlying the charged offenses. See NRAP 3C(e)(1)(iii). Similarly, the legal argument includes little in the way of authority or cogent argument. See NRAP 3C(e)(1)(vi); Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (stating that appellant has responsibility to present cogent argument and relevant authority). Moreover, counsel for appellant failed to file an appendix as required by NRAP 3C(e), 30 and 32. Although the fast track statement is deficient, it is adequate, in this case, to allow us to conduct a meaningful review. Nonetheless, we caution counsel for appellant that failure to comply with the Nevada Rules of Appellate Procedure in the future may result in the imposition of sanctions. See NRAP 3C(n).