IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD E. POWELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 37374

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts of first-degree murder with use of a deadly weapon.[1] The State sought the death penalty against appellant Richard E. Powell, but the jury returned verdicts of life without the possibility of parole. Powell was also ordered to pay administrative and extradition fees and $6,000 in restitution.

Powell was convicted of murdering Samantha Scotti and three other people at her apartment in 1992. Vernell Ray Evans was convicted in an earlier trial of the same murders.[2] Scotti, working as a police informant in December 1990, had arranged a drug transaction with Powell at which he was arrested. Police confiscated from Powell about a kilogram and a half of cocaine, $29,800 in cash, and his 1982 Cadillac. He was released on his own recognizance a few days later. Federal authorities eventually prosecuted the case, but Powell was not rearrested until

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

[2]See Evans v. State, 112 Nev. 1172, 926 P.2d 265 (1996).

February 1993. He was convicted and served over seven years in federal prison.

After his arrest in 1990, Powell realized that Scotti had set him up, and he made threats against her life to a number of people. She and three other adults at her apartment were shot to death early in the morning on May 1, 1992. Two young children were also in Scotti's apartment but were physically unharmed. One of them, four-year-old Adriana Ventura, gave various statements identifying Evans and Powell as the murderers. Later, during his federal incarceration, Powell made incriminating admissions regarding the murders to two fellow inmates.

Powell first claims that the district court erred in denying his pretrial habeas petition, which challenged the sufficiency of the indictment. We conclude that this issue is moot.

In July 1998, Powell filed a habeas petition challenging his original indictment. The district court dismissed the petition. Powell contends that this was error and renews his challenge to the indictment. He fails to note, however, that the State filed an amended indictment in May 2000 after his counsel expressly stated that the defense had no objection. He ignores also that the defense stipulated to the filing of a second amended indictment at the beginning of the trial. Thus, Powell is attempting to attack an indictment under which he was not even tried.

This court's appellate jurisdiction in criminal cases does not include the resolution of moot questions.[3] "'The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon

[3]State v. Viers, 86 Nev. 385, 386, 469 P.2d 53, 54 (1970).

moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'"[4] Even if we considered the sufficiency of the original indictment and judged it wanting, that judgment could not affect the matter at issue in this case: Powell would still warrant no relief because his trial and conviction were not based on the original indictment.

Powell next contends that the district court erred in admitting evidence of his drug trafficking offense, set up by Scotti's informant activities. He points out that the offense occurred a year and a half before the murders of Scotti and the other victims and claims that it was not related to the murders.

This issue is completely meritless. Powell complains first that the district court improperly admitted the evidence of the earlier offense under the "complete story" doctrine. The record is not clear, but the court may have relied in part on this doctrine to admit evidence. NRS 48.035(3) codifies this doctrine, providing that "[e]vidence of another act or crime which is so closely related to an act in controversy or a crime charged that an ordinary witness cannot describe the act in controversy or the crime charged without referring to the other act or crime shall not be excluded."[5] This provision does not apply here because the murders could be described without referring to the drug transaction.[6]

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[4]Id. at 386-87, 469 P.2d at 54 (quoting Mills v. Green, 159 U.S. 651 (1895)).

[5]State v. Shade, 111 Nev. 887, 894, 900 P.2d 327, 331 (1995).

[6]Cf., e.g., id. at 893-95, 900 P.2d at 330-31; Cirillo v. State, 96 Nev. 489, 493, 611 P.2d 1093, 1095-96 (1980).

Although it was not possible to explain Powell's motive for the murders without informing the jury that he had been arrested and convicted due to Scotti's cooperation with the police, another statute encompasses this concern. NRS 48.045(2) provides that evidence of other acts is not admissible to show that a person "acted in conformity therewith" but may be admissible "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In ruling that evidence of the prior offense was admissible, the district court properly invoked NRS 48.045(2) and found the evidence relevant to motive. It also found the evidence "more probative than prejudicial under the circumstances."

Powell suggests that because motive is not an element of the crime which must be proven, the evidence should not have been admitted. This proposition disregards the language of NRS 48.045(2), which expressly permits evidence of other acts if they are relevant to motive.

In addition to the relevance of the evidence, two other factors require consideration. Before admitting evidence of Powell's earlier drug trafficking offense, the district court had to determine, outside the presence of the jury, that (1) the offense was relevant to the charged murders; (2) it was proven by clear and convincing evidence; and (3) its probative value was not substantially outweighed by the danger of unfair prejudice.[7] The court explicitly found the first and third factors, but not the second. However, Powell has not argued that there was insufficient evidence of the earlier offense, and the evidence--a federal conviction--was

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[7]See Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

more than clear and convincing. Therefore, even though the district court failed to address this factor, the failure is of no consequence because the record is sufficient for this court to determine that the evidence was admissible.[8]

Powell does take issue on the third factor, asserting that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. However, the evidence had great probative value because there was no other way to establish Powell's motive to kill Scotti. And the risk of unfair prejudice was low because there appears to be no reason that jurors would have relied on Powell's nonviolent drug offense per se to find him guilty of murder.

We conclude that the district court did not err in admitting evidence of Powell's prior drug offense under NRS 48.045(2).

Next, Powell claims that the admission of evidence of four-year-old Adriana's statements made during two interviews with a psychologist violated his rights under the Confrontation Clause. The Confrontation Clause of the Sixth Amendment applies to the states through the Fourteenth Amendment and provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[9] The Clause nevertheless allows the admission of hearsay statements, even though the defendant cannot confront the declarant at trial, if two requirements are satisfied.[10] First, in most cases the prosecution must demonstrate that the declarant is

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[8]See Qualls v. State, 114 Nev. 900, 903-04, 961 P.2d 765, 767 (1998).

[9]U.S. Const. amend. VI; Idaho v. Wright, 497 U.S. 805, 813 (1990).

[10]Wright, 497 U.S. at 814.

unavailable.[11] Second, the hearsay statement must bear adequate indicia of reliability.[12] This second requirement is met if the statement qualifies as a firmly rooted hearsay exception; if not, it must display particularized guarantees of trustworthiness.[13]

The Supreme Court has held that particularized guarantees of trustworthiness must be shown from the "totality of the circumstances . . . that surround the making of the statement and that render the declarant particularly worthy of belief."[14] The relevant circumstances do not include other evidence at trial that corroborates the statement.[15] The statement must "be so trustworthy that adversarial testing would add little to its reliability."[16] Appellate courts "should independently review whether the government's proffered guarantees of trustworthiness satisfy the demands of the Clause."[17]

In discussing out-of-court statements made by children about sexual abuse, the Supreme Court stated that the procedural conditions of the statement, e.g., videotaping or the absence of leading questions, may enhance reliability but are not absolute requirements for determining that

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[11]Id.

[12]Id. at 814-15 (citing Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

[13]Id. at 815.

[14]Id. at 819.

[15]Id.

[16]Id. at 821.

[17]Lilly v. Virginia, 527 U.S. 116, 137 (1999) (plurality opinion).

the statement is sufficiently trustworthy.[18] A number of factors are relevant to this determination, including: spontaneity, consistent repetition, the mental state of the declarant, her use of unexpected terminology, and lack of motive to fabricate.[19]

Here, because the State was unable to procure Adriana as a witness for Powell's trial or to depose her, it moved in limine to admit a number of her out-of-court statements, including those made the night of the murders, those made at Powell's federal sentencing in 1994, her testimony at Evans's trial later in 1994, and her videotaped interviews with the psychologist soon after the murders. The district court excluded the testimony from Evans's trial but admitted evidence of the other statements, stating: "It is prejudicial but it is probative. And looking at totality, I think it has . . . indicia of reliability."

Powell challenges only the admission of the evidence of Adriana's statements to the psychologist, and he concedes that Adriana was not available to testify at his trial. And the State concedes that the statements do not fall within a firmly rooted hearsay exception.

Preliminarily, Powell contends that when the district court ruled Adriana's statements admissible, it erred in three ways: in considering the "totality," in finding the statements to be excited utterances, and in citing this court's opinion in Bockting v. State.[20] None of these criticisms has any merit. First, Powell argues that the court's reference to "totality" means that it improperly considered corroborating

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[18]Wright, 497 U.S. at 818-19.

[19]Id. at 821-22.

[20]109 Nev. 103, 847 P.2d 1364 (1993).

evidence, not just the circumstances of the statement itself. But the use of the term "totality" is consistent with Idaho v. Wright, where the Supreme Court set forth a "totality of the circumstances" standard but restricted the relevant circumstances to those that "surround the making of the statement."[21] Powell has not shown that the court looked beyond this totality to make its determination. Second, although the district court's language (or the transcript) is somewhat unclear, when the court found excited utterances it was undoubtedly referring to Adriana's statements immediately following the murders, not her videotaped interviews. The interviews were obviously not excited utterances, and trial counsel did not challenge the court's finding on this basis. Third, in Bockting this court decided the constitutionality of NRS 51.385 and the admissibility of a child sex-abuse victim's out-of-court statements.[22] Therefore, although neither NRS 51.385 nor Bockting controls this case, much of the opinion's discussion of the Confrontation Clause is apposite, and the district court acted reasonably in relying on it.

The primary question is: did Adriana's statements during her two interviews with the psychologist exhibit particularized guarantees of trustworthiness? Several factors support admitting the statements. First, they were videotaped, a procedural safeguard recognized by the Supreme Court. This allowed the jury to see and hear the statements directly, as it were, unlike most hearsay. Second, her mental state was good: on the tapes she appeared relaxed, alert, and fairly focused for a four-year-old.

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[21]Wright, 497 U.S. at 819.

[22]See 109 Nev. 103, 847 P.2d 1364.

Third, the record does not indicate any motive for Adriana to fabricate her account of the murders.

Other factors do not contribute to guaranteeing trustworthiness. First, Adriana's statements were not spontaneous, but elicited by the psychologist at the behest of the State. Second, although Adriana did not use unexpected terminology, at times she wanted to speak to her mother, and by the second interview she was able to identify the two male victims, after failing to do so the first time. This suggests that Adriana spoke with her mother about the crimes. However, Powell does not identify a motive on the mother's part to manipulate Adriana's story. Powell also stresses that at the first interview Adriana incorrectly identified Scotti's boyfriend, Anthony Collins, as a victim. However, a detective testified that Collins resembled one of the victims, Jermaine Woods.

Two more factors appear neutral on the whole. First, Adriana's statements were not always consistent, but this was apparently the result of a young child being in a confusing, stressful situation, not of attempts to lie or fabricate. Adriana was bright and responsive, but her ability to recount what occurred during the murders was not complete. However, she was consistent on certain important facts, for example, that there were two killers and Evans was one of them. Second, the psychologist asked somewhat leading questions at times, but for the most part she refrained from suggesting specific answers. Most important to this appeal, she did not prompt Adriana regarding Powell.

In sum, Adriana's ability to relate the facts of the murders was imperfect, but there is no basis to question her truthfulness. Because she

had no motive to lie or fabricate and the jury was able to see and hear her speak, we deem the statements admissible.

Even if we deemed them inadmissible, the error would be harmless. Appellate courts must determine whether Confrontation Clause errors are harmless beyond a reasonable doubt.[23] Factors relevant to this determination include the importance of the hearsay evidence to the prosecution's case, whether the evidence was cumulative, the presence or absence of other evidence corroborating or contradicting the hearsay evidence, and the overall strength of the prosecution's case.[24] We conclude that Adriana's statements to the psychologist were not that important to the prosecution because in them her identification of Powell as the second killer was not categorical. Whatever weight the jury gave that evidence was cumulative to Adriana's much more forceful identification of Powell at his federal sentencing. And contrary to Powell's assertions, Adriana's statements to the psychologist were corroborated by other evidence: not just her own statements at the federal sentencing and immediately after the murders, but also Powell's own incriminating admissions. We conclude that overall the prosecution's case was strong and that any error would be harmless.

Finally, Powell contends that the district court improperly denied his motion to call a former agent for the federal Drug Enforcement Agency as an expert witness on law enforcement procedures involving the recruitment, evaluation, and presentation of informant witnesses. Powell argued that such matters were not within the experience of the average

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[23]Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

[24]Cf. id.

juror. The district court denied the motion, concluding that the defense would have the opportunity to cover all of the relevant issues in either its direct or cross-examination of potential witnesses and that the jury would be capable of deciding the issues presented.

NRS 50.275 provides: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge." The threshold test for admitting testimony by a qualified expert is whether the testimony will "provide the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity."[25] The admission of expert testimony lies within the sound discretion of the district court.[26]

We conclude that the district court acted within its discretion in excluding the proffered testimony. Several of the State's witnesses either were or had been incarcerated, and the prosecution did not dispute that these witnesses came forward to testify "in the hopes that they will get some benefit." This information was presented to the jury, and the defense cross-examined the witnesses as to their motives, questioned law enforcement witnesses on the problems involved in relying on informants, and argued at length to the jury that the informant witnesses could not be trusted.

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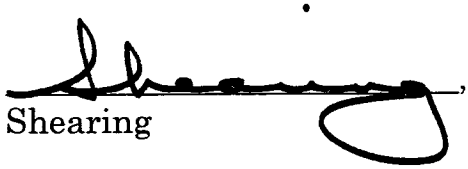
[25]Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987).

[26]Brown v. State, 110 Nev. 846, 852, 877 P.2d 1071, 1075 (1994).

We conclude that the district court correctly determined that the jury was capable of understanding without expert assistance the problems and dangers inherent to informant testimony. Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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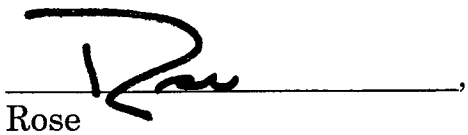
Shearing



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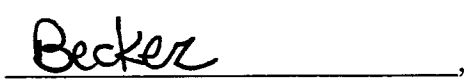

_____, J.
Becker

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Clark County District Attorney
Clark County Clerk