IN THE SUPREME COURT OF THE STATE OF NEVADA

SAMMY CHARLES MCCOWAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 38085

FILED

APR 21 2003

CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Sammy Charles McCowan appeals from a judgment of conviction entered after a jury found him guilty of two counts of burglary while in possession of a firearm, two counts of first-degree murder with the use of a deadly weapon, second-degree kidnapping with the use of a deadly weapon, and conspiracy to commit murder.[1] McCowan challenges his convictions on various grounds. We conclude that all of his arguments lack merit, and we affirm his conviction.

McCowan first contends that the district court erred in admitting the hearsay testimony of Ryan McRorie as a present sense impression. We conclude that the district court's determination was not

[1]McCowan received the following sentences: 156 months with a minimum parole eligibility of 35 months for second-degree kidnapping with an equal and consecutive sentence for the deadly weapon enhancement; two equal sentences of 156 months with a minimum parole eligibility of 35 months for the two counts of burglary while in possession of a firearm; two equal sentences of life with possibility of parole after 20 years for the two counts of first-degree murder with an equal and consecutive sentence for the deadly weapon enhancement; and 96 months with a minimum parole eligibility of 24 months for conspiracy to commit murder. The district court ruled that all the counts would run concurrent.

manifestly wrong.[2] Indeed, the record supports the district court's finding that McRorie's testimony regarding his phone conversation with the victim, Lori Ann Montori, was a present sense impression: McRorie testified that Montori called immediately after the man left; Montori's statements were made immediately after she perceived the man attempting to enter her apartment, which left little time for Montori to reflect on the event; and there was corroboration of Montori's statements to McRorie.

McCowan next contends that the district court erred in denying his motion to sever the case, as he and co-defendant Jason Taylor were tried jointly. Under NRS 174.165, a defendant is entitled to a severed trial if he presents a sufficient showing of facts demonstrating that substantial prejudice would result in a joint trial. McCowan argues that the joinder prejudiced him because Taylor's statement to the police was used to impeach Taylor's testimony that John Christopher Person was the aggressor, in essence, arguing that Taylor's police statement impermissibly "spilled over" or "rubbed off" to McCowan's case. We conclude that McCowan has failed to meet his heavy burden of showing that the district court abused its discretion in refusing to sever the trial.[3]

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[2]See Petty v. State, 116 Nev. 321, 325, 997 P.2d 800, 802 (2000) (noting that the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed on appeal unless manifestly wrong).

[3]See Lisle v. State, 113 Nev. 679, 688, 941 P.2d 459, 466 (1997) (noting that this court will not reverse the district court's decision to join defendants absent an abuse of discretion) limited on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n. 9, 968 P.2d 296, 315 n.9 (1998); see also Amen v. State, 106 Nev. 749, 756, 801 P.2d 1354, 1359 (1990)

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The State argued that McCowan was guilty of murder under the theory of felony murder, and therefore, whether Person was the aggressor was irrelevant.[4] Also, Taylor's police statement was merely used to impeach his testimony.

McCowan next contends that the district court violated his due process rights because the court did not hold a competency hearing. "The test to be applied in determining competency 'must be whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'"[5] Under NRS 178.405, a district court is constitutionally and statutorily required to hold a hearing to determine a defendant's competency if the district court finds that reasonable doubt exists on the issue. We conclude that the district court did not err when it failed to order a formal competency hearing because substantial evidence supports the district court's conclusion that no doubt existed as to McCowan's competency.[6] On the day of trial, McCowan's attorney raised concerns

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(stating that the appellant has the "heavy burden" of showing that the district court abused its discretion in refusing to sever the trial).

[4]See Payne v. State, 81 Nev. 503, 506, 406 P.2d 922, 924 (1965) (noting that the purpose of the felony-murder rule is "to deter felons from killing negligently or accidentally by holding them strictly responsible for the killings that are the result of a felony or an attempted one").

[5]Melchor-Gloria v. State, 99 Nev. 174, 179-80, 660 P.2d 109, 113 (1983) (quoting Dusky v. United States, 362 U.S. 402 (1960)).

[6]See Williams v. State, 85 Nev. 169, 174, 451 P.2d 848, 852 (1969) (upholding the district court's decision regarding whether to hold a formal

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that if McCowan took the stand he would be unable to answer questions directly because he would ramble. However, this does not raise the necessary reasonable doubt required to order a formal hearing, as McCowan's attorney failed to show that McCowan was unable to understand the proceedings or assist in his defense.

Finally, McCowan argues that there was insufficient evidence to support his conviction of first-degree murder—the Person murder—with the use of a deadly weapon. His specific concern is that there was insufficient evidence of a burglary, the underlying felony; therefore, his conviction for the murder of Person, which was based on felony murder, cannot be sustained. He asserts that there was only evidence of his intent to enter the apartment to lawfully retrieve his tire rims. However, there was no evidence that the rims were McCowan's. Even assuming that McCowan was lawfully retrieving the rims, Melvin Perkins testified that McCowan hit him in the face several times, asking about some stolen rims. Based on this, the jury could draw the inference that McCowan entered the apartment with the intent to physically attack Person, which he did, according to Perkins' testimony.[7] In addition, the State presented evidence that McCowan kidnapped Perkins, which continued while

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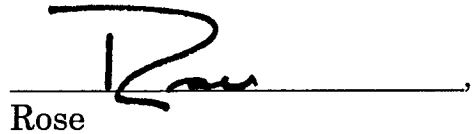
competency hearing if substantial evidence supports the court's conclusion that there was no doubt regarding the defendant's competency).

[7]See Flynn v. State, 93 Nev. 247, 250, 562 P.2d 1135, 1136 (1997) (noting that the intention with which appellant entered the apartment is a question of fact that the jury can infer from appellant's conduct and other circumstances disclosed by the evidence); see also Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981) (stating that "the jury must be given the right to make logical inferences which flow from the evidence").

McCowan entered into the apartment where Person was killed. Thus, we conclude that after viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence to sustain McCowan's conviction of the murder of Person.[8]

Having concluded that McCowan's contentions lack merit, we ORDER the judgment of the district court AFFIRMED.



_____, J.
Rose

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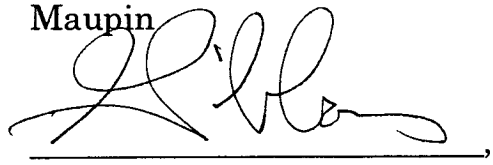

_____, J.
Gibbons

cc: Hon. Lee A. Gates, District Judge
David M. Schieck
Attorney General
Clark County District Attorney
Clark County Clerk

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[8]See Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (noting that if the sufficiency of evidence is challenged, this court must view the evidence in the light most favorable to the prosecution, and determine whether "'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt'" (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original))).