

IN THE SUPREME COURT OF THE STATE OF NEVADA

TY THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38289

FILED

JAN 03 2002

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

TY THOMAS,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38349

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of robbery and one count of attempted robbery.¹ The district court sentenced appellant to consecutive prison terms of 48 to 120 months for each robbery count,² and a consecutive prison term of 16 to 72 months for the attempted robbery count.

First, Thomas contends that he was denied his right to confront a witness at trial because the witness's translator allegedly did not translate the witness's testimony verbatim. The witness, Mr. Ihsan, was a convenience store clerk, the victim of one of the robberies. After

¹These cases were consolidated for trial, and a single judgment of conviction was filed, but they were appealed separately. They have been consolidated by this court for appeal, pursuant to a stipulation of the parties.

²One of the robbery convictions was enhanced, pursuant to NRS 193.167(1)(f), for commission of a crime against a person 65 years of age or older; therefore, appellant received an additional 48 to 120 month consecutive prison term for that robbery.

02-00161

Ihsan, a native of Pakistan, testified with the assistance of his translator, Thomas moved for a mistrial. The district court denied the motion.

Motions for mistrials are addressed to the sound discretion of the district court, and the district court's denial of such a motion will not be disturbed on appeal absent a clear showing of abuse of discretion.³ Here, no such showing of abuse of discretion was made. The record shows Ihsan stated that he and his translator spoke the same language, Punjabi, and that Ihsan's translated testimony, although somewhat labored, was consistent with his earlier statement to the police regarding the robbery. The district court heard argument from the State and the defense before denying the motion, and there was no evidence that inaccurate translation occurred or that translation difficulties caused Ihsan to misunderstand the proceedings.⁴ We conclude that the district court did not abuse its discretion in this regard.

Second, Thomas contends that the district court erred by allowing the State to amend the information after the State presented its case because the amendment changed the State's theory of the case as to two of the robbery counts in such a way as to prejudice Thomas. According to NRS 173.095(1), the court may permit an 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." Here, the district court permitted amendment of two of the robbery charges to allege that the robberies were committed by "force or violence or fear of immediate or future injury" rather than just by "fear of immediate or future injury."

We conclude this contention is without merit. The State's amendment of the charges did not prejudice Thomas because his defense was solely one of mistaken identity. Thomas did not in any way contest the manner in which the robberies were committed, nor does he allege on appeal that he would have done so because of the amended language. Therefore, the amended language was neither inconsistent with the defense nor the State's case, and no prejudice occurred.⁵

³Geiger v. State, 112 Nev. 938, 920 P.2d 993 (1996).

⁴See State v. Langarica, 107 Nev. 932, 822 P.2d 1110 (1991).

⁵DePasquale v. State, 106 Nev. 843, 848, 803 P.2d 218, 221 (1990).

Third, Thomas contends that the district court erred by allowing the use of one robbery victim's preliminary hearing testimony at trial because Thomas was unable to adequately cross-examine the victim at the preliminary hearing and because the State did not adequately demonstrate the victim was unavailable to testify at trial.

For the transcript of a witness's preliminary hearing testimony to be admitted into evidence at a criminal trial without violating the defendant's Sixth Amendment right to confront those testifying against him, three conditions must be met: (1) the defendant must have been represented by counsel at the preliminary hearing; (2) that counsel must have had an adequate opportunity to cross-examine the witness at the preliminary hearing; and (3) the witness must be actually unavailable at the time of trial.⁶

In this case, the district court held a pretrial hearing and found that the three factors had all been met. Specifically, the district court found, and our review of the record confirms, that Thomas was represented by counsel and that his counsel was able to cross-examine the witness extensively at the preliminary hearing. Moreover, the district court found that the State showed the witness was actually unavailable: the witness, a man in his late seventies, left Nevada shortly after the preliminary hearing, having been told by his doctor he had only a few months to live, to move to his son's home in Texas. We conclude that the district court's decision to admit the transcript was not manifestly wrong.⁷

Last, Thomas contends that the district court abused its discretion generally in refusing to amend the jury instructions at Thomas's request because they were "stock" instructions the court had given for eleven years and because one particular instruction improperly allowed the jury "to presume that the element of fear had been proven."

This court has held that the district court has broad discretion to settle jury instructions unless its decision is arbitrary or capricious or

⁶Power v. State, 102 Nev. 381, 383, 724 P.2d 211, 212 (1986).

⁷See Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) (holding that the determination of whether to admit evidence is within the sound discretion of the district court, and that determination will not be disturbed unless manifestly wrong); see also Passarelli v. State, 93 Nev. 292, 564 P.2d 608 (1977).


exceeds the bounds of law or reason.⁸ The record in this case shows that the district court considered the arguments of defense counsel, but it was not convinced to depart significantly from its standard instructions. We conclude that the district court did not abuse its discretion.

As for appellant's more specific argument that the last line of one of the robbery instructions⁹ improperly allowed the jury "to presume that the element of fear had been proven," we conclude that no error occurred. Although the instruction does state that fear may be implied from a robber's conduct, actual fear on the victim's part is not an element of the crime of robbery.¹⁰ Therefore, we conclude that the last line of the instruction is superfluous at worst and did not impact the State's burden to prove the elements of robbery.

Having considered appellant's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Young

 J.
Agosti

 J.
Leavitt

⁸See Jackson v. State, 117 Nev. ___, 17 P.3d. 998 (2001).

⁹The instruction at issue reads "It is unnecessary to prove both violence and intimidation. If the fact be attended with circumstances of threatening word or gesture as in common experience is likely to create an apprehension of danger and induce a person to part with his or her property for the safety of his or her person, it is robbery. It is not necessary to prove actual fear, as the law will presume it in such a case." (Emphasis added).

¹⁰Mangerich v. State, 93 Nev. 683, 685, 572 P.2d 542, 543 (1977) ("[t]he courageousness or timidity of the victim is irrelevant; it is the acts of the accused which constitute an intimidation" (quoting United States v. Alsop, 479 F.2d 65, 67 (9th Cir. 1973))).

cc: Hon. Steven R. Kosach, District Judge
Attorney General/Carson City
Washoe County District Attorney
Washoe County Public Defender
Washoe County Clerk