IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBIN R. MCGINNESS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39278

FILED

JUN 03 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a district court judgment of conviction pursuant to a jury trial. Robin R. McGinness was found guilty of first degree murder with use of a deadly weapon, first degree kidnapping with substantial bodily harm with use of a deadly weapon, and robbery.

On appeal, McGinness makes three challenges regarding the grand jury hearings. First, he claims the prosecutor violated his statutory duty to present exculpatory evidence by not providing testimony of two witnesses who claimed to have seen McGinness on the day the victim disappeared. Second, he claims there was insufficient evidence presented to the grand jury to support a charge of kidnapping. Third, he claims that he did not receive adequate notice of the grand jury hearing because he received notice just two days before the first of two days of grand jury testimony. McGinness also claims that the district court erred by refusing to admit out-of-court statements of an absent witness and erred by admitting evidence of duct tape, flex ties, and rubber gloves found in a search of his apartment.

A grand jury indictment will not be reversed without a showing of substantial prejudice to the defendant.[1] NRS 172.155(1) provides, "The grand jury ought to find an indictment when all the evidence before them, taken together, establishes probable cause to believe that an offense has been committed and that the defendant has committed it." In contrast, for conviction of a crime, guilt must be proved "beyond a reasonable doubt."[2] In this case, subsequent to the grand jury's indictment, a jury found McGinness guilty on all charges.

The United States Supreme Court has held that a jury verdict "render[s] harmless any conceivable error in the charging decision" by a grand jury.[3] The Court stated that:

> societal costs of reversal and retrial are an acceptable and often necessary consequence when an error in the first proceeding has deprived a defendant of a fair determination of the issue of guilt or innocence. But the balance of interest tips decidedly the other way when an error has had no effect on the outcome of the trial.[4]

Further, in Echavarria v. State, we stated, "Any irregularities which may have occurred in the second grand jury proceeding were cured when [the defendant] was tried and his guilt determined under the higher criminal burden of proof."[5]

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[1]See Sheriff v. Keeney, 106 Nev. 213, 216, 791 P.2d 55, 57 (1990).

[2]See NRS 175.201.

[3]U.S. v. Mechanik, 475 U.S. 66, 73 (1986).

[4]Id. at 72.

[5]108 Nev. 734, 745, 839 P.2d 589, 597 (1992).

Therefore, even if McGinness' claims of error in the grand jury hearings were true, these errors are harmless because the jury found him guilty based on the higher criminal burden of proof.

McGinness argues that the State was aware of two individuals who claimed to have seen McGinness on the date that the victim, Henry "Hank" Doepke, disappeared. McGinness further claims that had this evidence been presented to the grand jury, the grand jury could have deduced that there was not ample time available to him that day to make the trip to Mesquite and to commit the murder. Thus, McGinness claims, the prosecutor violated his statutory duty to present exculpatory evidence to the grand jury.

NRS 172.145(2) provides, "If the district attorney is aware of any evidence which will explain away the charge, he shall submit it to the grand jury." "This court has held that a district attorney violates NRS 172.145(2) if he fails to present to the grand jury evidence which has a tendency to explain away the charge."[6] "The determination of whether particular evidence is exculpatory is generally left to the discretion of the district court."[7]

In this case, the district court concluded that the evidence in question was not exculpatory. The court stated that "[the murder] could have been committed early that morning, it could have been committed later that evening, and Mesquite is only an hour away, so there was time

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[6]Ostman v. District Court, 107 Nev. 563, 564, 816 P.2d 458, 459 (1991) (citing Sheriff v. Frank, 103 Nev. 160, 165, 734 P.2d 1241, 1244 (1987)).

[7]Id.

at other points during the day when the defendant could have been present at the crime scene and committed the murder." Therefore, testimony that McGinness was seen at around 11:00 a.m. on April 21, 1999, had no tendency to explain away the charges against McGinness and the prosecutor was under no duty to present such evidence to the grand jury.

Next, McGinness claims there was insufficient evidence presented to the grand jury to support an indictment for kidnapping. Probable cause is required to support an indictment.[8] "A finding of probable cause may be based on slight evidence."[9] In Sheriff v. Badillo, we found sufficient probable cause for robbery where one witness identified the defendant, despite conflicting witness testimony.[10]

NRS 200.310(1) provides, in relevant part, "A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever . . . for the purpose of killing the person . . . is guilty of kidnapping in the first degree which is a category A felony."

Here, there was more than slight evidence to support a kidnapping charge. Detective Thowsen gave his opinion, based on his training and experience as a police officer and homicide detective, that Doepke was transported to the remote location in the desert and killed there. There were bullets, expended shell casings, and live ammunition

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[8]See NRS 172.155(1).

[9]Sheriff v. Badillo, 95 Nev. 593, 594, 600 P.2d 221, 222 (1979) (citing Franklin v. State, 92 Nev. 543, 554 P.2d 732 (1976)).

[10]Id.

found at the desert location, which would indicate the killing took place at that spot. In addition, there was evidence of a missing flex tie and used duct tape that could have been used to restrain a person. Finally, the torn-up notes found at McGinness' apartment also contribute to a conclusion that Doepke was restrained and transported.

We conclude there was sufficient evidence to establish probable cause. Furthermore, as previously stated, the jury found McGinness guilty of kidnapping beyond a reasonable doubt, a higher standard. Thus, the trial court did not abuse its discretion in denying McGinness' petition for a writ of habeas corpus.

Next, McGinness claims he was given insufficient notice of the intent to seek an indictment.

NRS 172.241(2) provides:

> 2. A district attorney or a peace officer shall serve reasonable notice upon a person whose indictment is being considered by a grand jury unless the court determines that adequate cause exists to withhold notice. The notice is adequate if it:
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> (a) Is given to the person, his attorney of record or an attorney who claims to represent the person and gives the person not less than 5 judicial days to submit his request to testify to the district attorney; and
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> (b) Advises the person that he may testify before the grand jury only if he submits a written request to the district attorney and includes an address where the district attorney may send a notice of the date, time and place of the scheduled proceeding of the grand jury.

We have previously stated that the reason a defendant must be given notice of a grand jury investigation is to give the defendant "an opportunity to exercise his right to testify at the grand jury hearing. Without proper notice, the right to testify would be meaningless."[11]

In this case, McGinness claims that he was given insufficient notice of the grand jury hearing because he did not receive the notice until May 19, 2000, (Friday) and the grand jury began hearing testimony on May 23, 2000, (Tuesday). Thus, he claims he was not given the five judicial days, as required by NRS 172.241(2), but was only given a day and a half to respond. The grand jury, however, only heard the testimony of two witnesses for this case on May 23, 2000. This occurred because these two witnesses were unavailable to testify on the May 30, 2000, scheduled hearing. Thus, the majority of the evidence was presented to the grand jury on May 30, 2000. Therefore, McGinness was given more than the statutorily required five judicial days to submit his request to testify. We agree with the district court's conclusion that McGinness was given adequate notice.

McGinness next claims the district court erred by refusing to admit the statements made to an investigating detective by an unavailable witness.

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[11]Solis-Ramirez v. District Court, 112 Nev. 344, 347, 913 P.2d 1293, 1295 (1996) (citing Sheriff v. Marcum, 105 Nev. 824, 826-27, 783 P.2d 1389, 1390-91 (1989)).

NRS 51.075 allows for an exception to the hearsay rule where the statements' "nature and the special circumstances under which it was made offer assurances of accuracy."[12] NRS 51.315 allows admission of a statement made by a declarant who is unavailable to testify at trial if "[i]ts nature and the special circumstances under which it was made offer strong assurances of accuracy."[13]

In Johnstone v. State, this court allowed the statements of two unavailable witnesses to be admitted because the witnesses (1) "had no evident involvement with the police, the accused, or the victims;" (2) had no "motivation whatever to lie, or to assist [defendant] in any way;" (3) "had no capacity even to know what might, or might not, ultimately assist [the defendant];" and (4) there were "not one, but two, declarants, and evidently material aspects of their recollections agreed."[14]

In this case, McGinness sought to introduce a statement made by Mary Spratt, McGinness' former girlfriend. Here, there are no similar strong assurances of accuracy of Spratt's statement as in Johnstone. Spratt gave a statement to LVMPD officers that McGinness paged her at approximately 10:00 a.m. on the day Doepke disappeared. She also stated that she went to his apartment at approximately 11:00 a.m. that same day. Unlike in Johnstone, (1) Spratt had involvement with the defendant; (2) she had a possible motive to lie and assist McGinness; (3) she had opportunity to discuss the events in question with McGinness and admitted that she visited McGinness in jail, therefore, she had the

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[12]NRS 51.075(1).

[13]NRS 51.315(1)(a).

[14]92 Nev. 241, 244, 548 P.2d 1362, 1364 (1976).

capacity to know what might assist him; and (4) there was no way to confirm her statement.

We conclude that the district court correctly excluded the statements made by Spratt because they "were not of an inherently trustworthy nature and were not made under special circumstances which might have given rise to strong assurances of accuracy."[15]

McGinness next claims that the latex gloves, cable ties, and partially used duct tape rolls, found hidden in a shopping bag beneath the bottom dresser drawer in his apartment, should have been excluded as irrelevant and more prejudicial than probative because there was no evidence showing that these items were used in the crimes.

NRS 48.015 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." Relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury."[16] However, "the prosecution is entitled to present 'a full and accurate account' of the circumstances surrounding a crime."[17]

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[15]Miranda v. State, 101 Nev. 562, 565-66, 707 P.2d 1121, 1123 (1985).

[16]NRS 48.035(1).

[17]Shults v. State, 96 Nev. 742, 748-49, 616 P.2d 388, 392 (1980) (quoting Dutton v. State, 94 Nev. 461, 464, 581 P.2d 856, 858 (1978)).

We have stated that district courts have "considerable discretion in determining the relevance and admissibility of evidence."[18] We do not disturb the district court's ruling unless there is a clear abuse of discretion.[19]

Here, the district court ruled that the evidence was relevant and admissible. Combined with evidence of shell casings and bullets found at the site where the body was found, testimony from a detective stating his conclusion that Doepke was transported to the site and then killed, and the reassembled note, this evidence had a tendency to make the fact of kidnapping more likely. This evidence was a part of the whole picture of the circumstances surrounding the crimes.

Although McGinness claims that this evidence was more prejudicial than probative, he claimed to the trial court that these were ordinary items used in his line of work. Further, the trial court limited the prejudicial affect of these items by requiring the state to instruct their witnesses not to testify to their use in a kidnapping kit.

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[18]Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 1119, 1123 (1996) (citing Sterling v. State, 108 Nev. 391, 395, 834 P.2d 400, 403 (1992)).

[19]Id. (citing Lucas v. State, 96 Nev. 428, 431-32, 610 P.2d 727, 730 (1980)).

Because the evidence of the flex ties, rubber gloves, and partially used rolls of duct tape, hidden in McGinness' apartment, were relevant to make the fact of kidnapping more likely, the district court did not err by admitting evidence of these items. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Shearing, J.

Leavitt, J.

Becker, J.

cc: Hon. Kathy A. Hardcastle, District Judge
Special Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk