

IN THE SUPREME COURT OF THE STATE OF NEVADA


GREGORY G. AMATO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39515

FILED

JUN 30 2009

ORDER OF AFFIRMANCE

TRACE K. LINSEMAN
CLERK OF SUPREME COURT
BY  DEPUTY CLERK

This is an appeal from a judgment of a conviction, pursuant to a jury verdict, of one count each of burglary, first-degree murder with the use of a deadly weapon, robbery, grand larceny auto, fraudulent use of a credit card, and possession of a stolen vehicle. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

Gregory Amato met the victim at a bar in Bullhead City, Arizona, and thereafter left with the victim in the victim's car. The victim's body was later found in the desert in Laughlin, Nevada, and the cause of death was determined to be from blunt force trauma to the head by a rock. Amato was subsequently found in possession of the victim's car and credit cards, both of which he admitted using after he was recorded on various security cameras. After a six-day trial, a jury convicted Amato of burglary, murder with the use of a deadly weapon, robbery, grand larceny auto, fraudulent use of a credit card and possession of a stolen vehicle. Amato now appeals his conviction and alleges numerous errors by the district court, including improper preservation of the trial transcript.¹ The

¹Amato also argues that the district court erred in failing to videotape the trial, improperly instructing the jury, and improperly admitting hearsay testimony. Moreover, Amato challenges the deadly
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parties are familiar with the facts, and we do not recount them here except as necessary to our disposition.

Standard of Review

“[M]eaningful, effective appellate review depends upon the availability of an accurate record covering lower court proceedings relevant to the issues on appeal. Failure to provide an adequate record on appeal handicaps appellate review and triggers possible due process clause violations.” Daniel v. State, 119 Nev. 498, 508, 78 P.3d 890, 897 (2003) (quoting Lopez v. State, 105 Nev. 68, 84-85, 769 P.2d 1276, 1287 (1989)). Thus, “[a] criminal defendant is normally entitled to a new trial if a trial transcript has been lost or destroyed and the transcript cannot be adequately reconstructed pursuant to NRAP 10(c).” Bellows v. State, 110 Nev. 289, 291, 871 P.2d 340, 342 (1994). Moreover:

The mere failure to make a record of a portion of the proceedings, however, standing alone, is not grounds for reversal. Rather, an appellant must demonstrate that the subject matter of the missing portions of the record was so significant that the appellate court cannot meaningfully review an appellant’s contentions of error and the prejudicial effect of any error.

Daniel, 119 Nev. at 508, 78 P.3d at 897.

... continued

weapons enhancement statute as unconstitutionally vague. We conclude that all of these arguments are without merit.

Preservation of the trial transcript

Amato argues that the trial transcript is not properly preserved for appeal and, because the transcript was lost at no fault to Amato and the reconstruction is ineffective because of the length of time between trial and the reconstruction effort, his conviction should be reversed. Amato also argues that there is no way to preserve his appellate rights because both sides agree that all record of jury selection is lost. We disagree and conclude that proper procedure under NRAP 10(c) was followed because the district court held a hearing on the reconstruction of the record and, with affidavits from both sides, found that the record was sufficient for appeal.

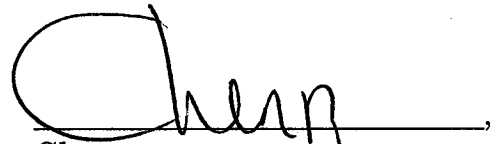
We have addressed very similar issues on appeal in the past. In Bellows, we adopted a three-part test for reviewing the issue of whether a new trial is warranted when portions of a trial record are lost. 110 Nev. at 293, 871 P.2d at 343. Under this three-part test, we analyze whether: 1) the appellant has complied with the procedures for perfecting an appeal, 2) the transcript can be reconstructed, and 3) the appellant's conduct has led to the inability to obtain the transcript. Id.

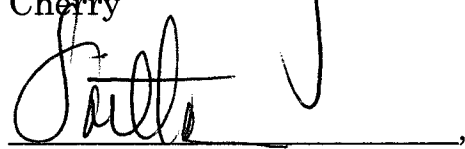
Here, we conclude that the district court followed proper procedure under NRAP 10(c) and that the record has been sufficiently reconstructed for appeal. While there are portions of the record missing, the record was reconstructed and that reconstruction was adopted by the district court. We cannot conclude that a new trial is warranted based on the loss of a portion of the trial transcripts because, unlike in Bellows, the majority of the trial transcript was recovered in the instant case, and the rest of the record was reconstructed. Further, the district court followed the proper procedure in reconstructing the record and from the trial testimony that has been produced there is overwhelming evidence of


Amato's guilt. We therefore conclude that the district court did not err in its adoption and approval of the reconstruction, thus further distinguishing the case at bar from Bellows.

Regarding Amato's assignment of error concerning the loss of the jury-selection transcripts, we also conclude this loss did not affect meaningful review of Amato's appeal because there were no objections at trial to the jury selection and Amato fails to specify any error in the jury selection. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 8, District Judge
Clark County Public Defender Philip J. Kohn
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk