

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT L. WHITESELL,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 39650

**FILED**

FEB 11 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary, robbery of a victim over the age of sixty-five years with the use of a deadly weapon, first-degree murder of a victim over the age of sixty-five years with the use of a deadly weapon, and possession of stolen property.

Appellant Robert Whitesell first claims that the district court erred in denying his motion to dismiss on the basis that his alleged admissions to a cellmate, Stephen Patzig, were obtained in violation of Whitesell's constitutional rights. We disagree.

In Massiah v. United States, the United States Supreme Court held that it was a violation of the defendant's Sixth Amendment rights to use the defendant's statements to his co-defendant after the defendant had been indicted but released on bail, where the defendant's retained counsel was not present and the co-defendant was working as a government agent.<sup>1</sup> Similarly, in Holyfield v. State, this court criticized the practice of government agents entering into an agreement with an inmate, where, in exchange for assistance with the inmate's charges, the inmate is placed in the cell of a defendant for the purpose of gathering

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<sup>1</sup>377 U.S. 201 (1964).

information from the unsuspecting defendant for use by the government against the defendant.<sup>2</sup> This court concluded that such situations are the “functional equivalent” of police questioning and, thus, the requirements of Miranda v. Arizona<sup>3</sup> must be met before the defendant’s statements may be used against him.<sup>4</sup> However, for there to have been a violation of Whitesell’s rights under Massiah and Holyfield, there must have been a deliberate elicitation of information by a government agent.<sup>5</sup> As we explained in Thompson v. State:

[W]hen a jailhouse informant elicits incriminating information from an accused while acting on his own initiative and not pursuant to any specific prior agreement with law enforcement, the incriminating statements may be received in evidence against the accused without violating his state or federal constitutional rights. An inmate should not be immune from the consequences of his voluntary loose talk to another inmate who does not represent a police presence.<sup>6</sup>

Here, a thorough review of the record shows no evidence that Patzig acted as a government agent. Patzig did not have any prior agreement with law enforcement when Whitesell made his incriminating statements. Also, Patzig acted on his own initiative when informing the

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<sup>2</sup>101 Nev. 793, 798-804, 711 P.2d 834, 837-41 (1985); see also Thompson v. State, 105 Nev. 151, 154, 771 P.2d 592, 594-95 (1989).

<sup>3</sup>384 U.S. 436, 444 (1966).

<sup>4</sup>Holyfield, 101 Nev. at 803-04, 711 P.2d at 838-41.

<sup>5</sup>Massiah, 377 U.S. at 206; Holyfield, 101 Nev. at 799-801, 711 P.2d at 838-39.

<sup>6</sup>105 Nev. at 156, 771 P.2d at 596.

authorities of Whitesell's admissions. The mere fact that Patzig had previously acted as an informant in an unrelated case years earlier does not make him an agent for law enforcement in the instant case. Therefore, there was no violation of Whitesell's rights under Massiah and Holyfield.

Whitesell next claims that the district court erred by admitting Patzig's preliminary hearing testimony into evidence at trial when the State could not locate him to testify at trial. Under Nevada law, a witness's preliminary hearing testimony "may be received in evidence at the trial if three preconditions exist: first, that the defendant was represented by counsel at the preliminary hearing; second, that counsel cross-examined the witness; third, that the witness is shown to be actually unavailable at the time of trial."<sup>7</sup> Whitesell argues that the second and third factors were not met in this case. We disagree.

Whitesell argues that the second factor was not satisfied because his counsel could not adequately cross-examine Patzig during the preliminary hearing. Whitesell makes a bald allegation that the district court limited the scope and conditions of Patzig's preliminary hearing cross-examination. However, the only limit he identifies was on the use of Patzig's name. But Whitesell fails to show how the inability to use Patzig's name during the preliminary hearing could limit an adequate cross-examination. Whitesell had the opportunity to cross-examine Patzig at the preliminary hearing and did cross-examine Patzig at the

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<sup>7</sup>Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012; 1014 (1970); see also NRS 171.198(6)(b).

preliminary hearing. We conclude that the second factor was met in this case.

Whitesell claims that the State failed to satisfy the third factor—that Patzig was unavailable. Specifically, Whitesell argues that the State failed to demonstrate that Patzig was “beyond the jurisdiction of the court to compel appearance” under NRS 51.055(1)(d). We conclude that this claim lacks merit. As we explained in Funches v. State, the district court may look to the provisions of NRS 171.198(6)(b), NRS 51.055, “and the more general provisions of the evidence code when determining a witness's unavailability.”<sup>8</sup> The State need only demonstrate that the witness is unavailable under one of those provisions, not all of them.<sup>9</sup> Here, the record reflects that the State tried, yet failed to locate Patzig’s whereabouts. Therefore, under NRS 171.198(6), Patzig was unavailable for trial because “his personal attendance [could not] be had in court.” Accordingly, we conclude that the district court correctly admitted Patzig’s prior testimony.

Whitesell finally claims that insufficient evidence supports his first-degree murder conviction.

When reviewing the sufficiency of the evidence, this court considers “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”<sup>10</sup> “Where there is

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<sup>8</sup>113 Nev. 916, 922-23, 944 P.2d 775, 779 (1997).

<sup>9</sup>See id. at 922-23, 944 P.2d at 779.

<sup>10</sup>Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

substantial evidence to support a verdict in a criminal case, as the record indicates exists in this case, the reviewing court will not disturb the verdict nor set aside the judgment.”<sup>11</sup>

Here, there is substantial evidence to support the jury’s guilty verdict. First, there is Patzig’s detailed testimony regarding how Whitesell admitted to killing the victim during a botched burglary. Then, there is Whitesell’s girlfriend’s testimony about events on the day of the murder. The morning of the murder, Whitesell and two accomplices were together talking at a homeless shelter when one accomplice asked the girlfriend if it was a good day to rob a bank. Soon, all three men changed into extra clothing and left together. The girlfriend next saw all three men together shortly after the murder. By this time, Whitesell and one accomplice had each shed their extra clothing. However, the second accomplice, still wearing his extra clothing, had noticeable bloodstains on his pants. The three men were drinking from a bottle of Jack Daniel’s whiskey that Whitesell had pulled from his pocket. Other testimony established that a bottle of Jack Daniel’s was taken from the victim’s home at the time of the murder. Additionally, there was evidence that Whitesell possessed two other items taken from the victim’s home at the time of the murder: a fake bomb and a handgun. The victim’s husband testified that one of the two accomplices had previously helped move furniture into the victim’s home. Next, the coroner testified that the missing murder weapon, used to slit the victim’s neck, was consistent with a box-cutter; Whitesell recently had begun carrying a box-cutter. Finally, the victim’s neighbor testified to observing three men walking away from


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<sup>11</sup>Sanders v. State, 90 Nev. 433, 434, 529 P.2d 206, 207 (1974).

the victim's home at the time of the murder. This neighbor identified Whitesell as one of those three men. Based on the evidence presented to the jury, we conclude that there is sufficient evidence to support the jury's determination that Whitesell committed first-degree murder.

Having considered Whitesell's arguments and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.<sup>12</sup>

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

cc: Hon. Sally L. Loehrer, District Judge  
David M. Schieck  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>12</sup>This matter was submitted for decision by a panel of this court comprised of Justices Rose, Leavitt, and Maupin. Justice Leavitt having died in office on January 9, 2004, this matter was decided by a two-justice panel.