IN THE SUPREME COURT OF THE STATE OF NEVADA

ERWIN U. HUERTA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39658

FILED

JAN 23 2004

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Appellant Erwin U. Huerta was sentenced to life without the possibility of parole in addition to a consecutive term of life without the possibility of parole as an enhancement for the use of a deadly weapon.

Witnesses Jennifer Herrera and Sandra Morfin were engaged in a longstanding feud. Morfin was the neighbor and girlfriend of the decedent, Antonio Ramos. Jennifer was Ramos's cousin. Following several verbal and physical altercations between Jennifer, Morfin, and their respective friends, Jennifer decided to get even with Morfin by beating her up. Jennifer gathered six people together, including appellant Huerta, together to accompany her to Morfin's home for that purpose.

Jennifer, Huerta, and five other persons drove past the Morfin/Ramos home, waited until Ramos' father left for work, and drove past Ramos as he approached his car. The five females in the car testified that Huerta fired a small caliber weapon at Ramos, resulting in his death. Morfin testified she did not see the shooting but identified the car leaving the scene as one she connected to Jennifer. Jennifer and the other females testified that they intended only to go to Morfin's house for the purpose of beating her up and, perhaps, vandalizing her home or Ramos's car. They

indicated they had no idea Huerta intended to shoot anyone. Further, all testified they did not know Huerta brought a gun with him until he pulled it out at the scene of the shooting, although three of the females saw him brandishing a weapon at his home prior to the shooting and talking about using the gun to damage Ramos' vehicle. Aside from the testimony of the women in the car, no evidence was presented to connect Huerta to the murder of Ramos.

Huerta argues his conviction must be reversed because it was based solely on the testimony of uncharged accomplices. Relying on NRS 175.291, Huerta contends his conviction was based on the uncorroborated testimony of: (1) Jennifer, (2) Christina Rand, (3) Laura Alvarez, (4) Natalie Rojas, and (5) Erika Herrera, all of whom were present in the car on the day of the shooting. Huerta argues that all five women were accomplices as a matter of law and that the district court erred in refusing to instruct the jury that the five were accomplices and issuing an advisory verdict of acquittal instruction.

Huerta argues the district court abused its discretion by refusing to give an advisory verdict of acquittal to the jury. This court will not overturn a district court's decision to grant or deny an advisory verdict absent an abuse of discretion.[1] A district court should only instruct the jury that a witness is an accomplice as a matter of law when the witness's testimony leaves no doubt that the witness was an accomplice.[2]

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[1]See NRS 175.381; Milton v. State, 111 Nev. 1487, 1493, 908 P.2d 684, 688 (1995) (citations omitted).

[2]Rowland v. State, 118 Nev. 31, 41, 39 P.3d 114, 120 (2002).

NRS 175.291 states that a defendant shall not be convicted solely on the uncorroborated testimony of an accomplice. Corroborative evidence does not, standing alone, need to be sufficient to establish guilt; "'it will satisfy the statute if it merely tends to connect the accused to the offense.'"[3] Additionally, "corroborative evidence may be either direct or circumstantial and can be taken from the evidence as a whole."[4] However, the corroborative evidence "must independently connect the defendant with the offense; evidence does not suffice as corroborative if it merely supports the accomplice's testimony."[5] An accomplice is "one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."[6]

Huerta was indicted for murder with the use of a deadly weapon. Therefore, in order to be accomplices under the statute, the five women would have to be liable for the same offense, either as aider and abettors or conspirators. The determination of whether someone is an accomplice is left to the jury to decide, unless the witnesses' own statements leaves no doubt that they are subject to prosecution for the charged crime.[7]

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[3]Heglemeier v. State, 111 Nev. 1244, 1250, 903 P.2d 799, 803 (1995) (quoting Cheatham v. State, 104 Nev. 500, 504-05, 761 P.2d 419, 422 (1988)).

[4]Id. (internal citations omitted).

[5]Id.

[6]NRS 175.291(2).

[7]Rowland, 118 Nev. at 41-42, 39 P.3d at 120-21.

In Mitchell v. State,[8] this court adopted and approved the natural and probable consequence doctrine to determine whether someone aided and abetted in the crime.[9] An aider and abettor was responsible for the "natural, probable, and foreseeable result of their actions."[10] The aider and abettor does not have to "'have the specific intent to [commit the crime] provided the [crime] was the natural and probable consequence of the aider and abettor's target crime.'"[11] In this case, jury instruction 21 properly instructed the jury on the natural and probable consequence doctrine under Mitchell.

Huerta argues all five women were accomplices to the murder. We conclude that as a matter of law, three of the women, Herrera, Rand and Alvarez, were accomplices. On the day of the murder, the three women drove to Huerta's residence, where they met Huerta and

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[8]114 Nev. 1417, 971 P.2d 813 (1998) (Mitchell overruled Sharma v. State, 118 Nev. ___, ___, 56 P.3d 868 (2002) (holding that "in order for a person to be held accountable for the specific intent crime of another under an aiding and abetting theory of principal liability, the aider or abettor must have knowingly aided the other person with the intent that the other person commit the charged crime."). In this case, the murder occurred in 2000 and Huerta was tried in April 2002. Therefore, since Sharma was not decided until October 2002, the natural and probable consequence doctrine for accomplice liability was applicable in this case.

[9]Mitchell, 114 Nev. at 1427, 971 P.2d at 820.

[10]Id.

[11]Sharma, 118 Nev. at ___, 56 P.3d at 871 (quoting Mitchell, 114 Nev. at 1426-27, 971 P.2d at 819-20).

"Downer."[12] The five teenagers discussed the property damage they intended to inflict, as well as the anticipated fight between Jennifer and Morfin.

While at the Huerta residence, Jennifer, Rand, and Alvarez saw Huerta brandish a revolver and talk about taking it with him to inflict property damage. Although Jennifer claimed she told Huerta not to bring the gun, none of the women called off the raid or ascertained that Huerta did not bring the gun with him into the car. Due to Jennifer, Rand, and Alvarez's knowledge of the gun and Huerta's intent to use the gun, as a matter of law, they could have been charged with murder, and thus, they were accomplices.

On the other hand, we cannot conclude that the other two women, Erika and Rojas, were accomplices as a matter of law to murder. They only learned of the existence of the gun two to three minutes before the shooting. While neither woman took action upon seeing the gun to prevent its use, they also did nothing to encourage Huerta to use the gun. Given the short time in which they had to object and their young age at the time of the incident,[13] we cannot say that Erika and Rojas were accomplices as a matter of law. Therefore, we conclude that the issue of whether Rojas and Erika were accomplices was properly submitted to the jury.

Here, because Huerta requested that the district court instruct the jury that all five women were accomplices, the district court

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[12]"Downer" was the seventh person involved in the incident and was never identified.

[13]Erika Herrera was thirteen and Rojas was fourteen.

did not err in refusing the instruction. We conclude the district court should have instructed the jury that: (1) Jennifer, Rand and Alvarez were accomplices as a matter of law; and (2) if the jury determined that Erika and Rojas were accomplices, then it should acquit Huerta.

However, Huerta did not request that the district court offer such an instruction. Huerta's requested instruction explicitly stated all five women were accomplices. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal."[14] Since Huerta did not propose the proper instruction, this court will review the district court's failure to offer the instruction for plain error.[15]

We conclude that the district court's failure to offer the proper instruction does not constitute plain error. The district court offered several general instructions that explained the law regarding accomplice liability. Additionally, the district court offered an instruction regarding the uncorroborated testimony of an accomplice. In light of the fact that the jury was properly instructed regarding the law on accomplice liability, a reasonable trier of fact could have determined that Erika and Rojas were not accomplices and based Huerta's conviction on Erika and Rojas' testimony. Therefore, we conclude the district court did not commit plain error.

Finally, Huerta contends that insufficient evidence supports his conviction. It is well established that, in reviewing a claim of

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[14]Old Aztec Mine, Inc. v. Brown, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

[15]See NRS 178.602.

insufficiency of evidence, the relevant inquiry is "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."[16] This court will not disturb a verdict supported by substantial evidence.[17] "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses."[18]

In this case, the jury was provided with the appropriate instructions on accomplice, co-conspirator, and aiding and abetting theories of liability, as well as strenuous closing argument by Huerta on these theories. Nonetheless, the jury found Huerta guilty of first-degree murder. Looking at the facts in the light most favorable to the State, we conclude that a rational trier of fact could have found the essential elements of the crimes charged beyond a reasonable doubt. Accordingly, we conclude that sufficient evidence supports Huerta's conviction.

Given that the jury could reasonably conclude that either Rojas or Erika were not accomplices, there is sufficient corroborating evidence to support Huerta's conviction. Accordingly, we

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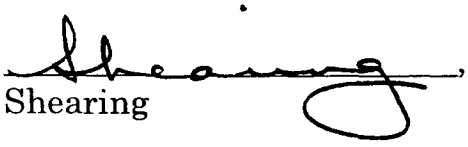
[16]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[17]Id.

[18]Id.

ORDER the judgment of the district court AFFIRMED.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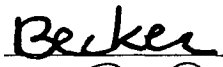
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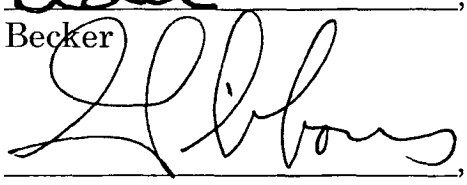
, J.
Gibbons

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

ROSE, J., with whom, MAUPIN, J., and AGOSTI, J., agree, concurring:

I agree with the conclusion reached by the majority, but differ on the analysis in reaching an affirmance. Jennifer, Laura, and Christina met at Huerta's house and agreed to accompany Jennifer to beat up Sandra Morfin and smash the windows of her house. Huerta said he was taking a gun along to shoot out the windows and Christina spoke of shooting at Ramos as a warning if he was present. However, the three girls testified that they did not know that Huerta actually took a pistol with him until shortly before the shooting.

The district court instructed the jury that an aider and abettor is responsible for the "natural and probable consequences" of the principal's acts, which was in conformity with our decisions at the time. Neither party objected to the instructions defining an aider and abettor, a conspirator, or an accomplice. Under the definitions used, Jennifer, Laura, and Christina could have been charged with aiding and abetting murder, and they were clearly accomplices with Huerta.

The law requires that the incriminating testimony of an accomplice be corroborated with independent evidence.[1] Since the only testimony implicating Huerta in the murder was the testimony of the five girls, the jury had to find that one or more of the girls were not an accomplice. And, because Jennifer, Laura, and Christina were all accomplices as a matter of law, the corroborating testimony had to be that of Erica and Natalie, who were picked up on the way to Morfin's house.

Consequently, the instructions should have reflected that the testimony of Jennifer, Laura, and Christina could not be used as the

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[1]NRS 175.291(1) (providing that a defendant cannot be convicted based on the testimony of an accomplice unless the accomplice's testimony is corroborated by other evidence).

necessary corroborating evidence, and that only the testimony of Erica and Natalie could be so used provided the jury found that these girls were not accomplices. Unfortunately, the instructions given stated only the need for corroboration of an accomplice's testimony and made no differentiation between the testimony of Jennifer, Laura, and Christina on the one hand, and that of Erica and Natalie on the other. The appropriate instruction should have stated that Jennifer, Laura, and Christina were accomplices as a matter of law, and thus, their testimony could not be used as the necessary corroboration; rather, the corroboration would have to come from the testimony of Erica and Natalie if they were found not to be accomplices. Such an instruction tailored to the facts of this case was not given.

While the appropriately tailored instruction concerning which witnesses could provide corroboration was not given, no objection was made to the general instruction on the need for an accomplice's testimony to be corroborated and Huerta offered no other proposed instructions on this subject. Therefore, I conclude that this issue was not preserved for appeal and concur in the dismissal of this appeal.

_____, J.
Rose

We concur:

_____, J.
Maupin

_____, J.
Agosti