

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL EDWARD CLARK,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39913

FILED

NOV 20 2002

ORDER OF AFFIRMANCE

JUDITH A. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of offering or attempting to sell a controlled substance (Count I) and possession of a controlled substance with intent to sell (Count II). The district court sentenced appellant Michael Edward Clark to serve a term of 12 to 36 months for Count I and a concurrent term of 12 to 32 months for Count II in the Nevada State Prison. This appeal followed.

Clark contends first that there was insufficient evidence adduced at trial to support his convictions. In particular, Clark argues the State did not show beyond a reasonable doubt that the substance found by the police was cocaine, or that Clark was the individual who sold the substance. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹

In particular, we note that a police officer who saw the alleged sale testified that the substance preliminarily tested positive as rock cocaine. The officer then arrested Clark and another man, and sent the substance to a police laboratory. Criminalist David Witkowski from the

¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

laboratory testified at trial that the substance found was cocaine. His laboratory report of his findings was also entered into evidence at trial. We conclude that the jury could reasonably infer from this evidence that the substance was cocaine.

Further, there was sufficient evidence identifying Clark as the seller. We note that the two police officers testified that they were watching Clark and another man named Campbell from the video surveillance room of the El Cortez Hotel on Fremont Street in Las Vegas. The officers saw the two men converse briefly, pass an object hand-to-hand, and exchange money. The officers stopped Clark at a nearby bus stop and observed him throw an object down, which was found to be rock cocaine. Campbell ran away and also threw something down when the police approached him. That object tested positive as cocaine as well. Campbell testified at the preliminary hearing that he bought the cocaine from a black man, although he said he did not recognize Clark as the seller. We conclude the jury could reasonably infer from the evidence presented that Clark was the person who offered or attempted to sell a controlled substance and possessed a controlled substance with the intent to sell it to Campbell. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.²

Next, Clark contends that two of the jury instructions given in his case were unconstitutional, namely, the instruction regarding reasonable doubt and the instruction regarding "equal and exact justice"

²See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

between the defendant and the State. In particular, Clark claims that the reasonable doubt instruction improperly minimized the State's burden of proof and the "equal and exact justice" instruction created a danger that the jury would not consider Clark innocent until proven guilty. We note that Clark did not object to these instructions at trial. "Failure to object below generally precludes review by this court; however, we may address plain error and constitutional error *sua sponte*."³ We have reviewed Clark's contentions, and we conclude that they lack merit.

The jury instruction regarding reasonable doubt states, in relevant part, that reasonable doubt

is not mere possible doubt, but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt.

Clark claims that the instruction misstates the reasonable doubt standard as discussed by the United States Supreme Court in Cage v. Louisiana.⁴ This court has repeatedly upheld the constitutionality of the instruction, based on NRS 175.211, as clearly distinguishable from Cage.⁵ We decline the opportunity to revisit the issue and conclude it lacks merit.

The jury instruction regarding equal and exact justice states, in relevant part, that the jury has a

³Sterling v. State, 108 Nev. 391, 394, 834 P.2d 400, 402 (1992).

⁴498 U.S. 39 (1990).

⁵See, e.g., Elvik v. State, 114 Nev. 883, 965 P.2d 281 (1998); Lord v. State, 107 Nev. 28, 806 P.2d 548 (1991).

duty to be governed in your deliberation by the evidence as you understand it and remember it to be and by the law as given to you in these instructions, with the sole, fixed and steadfast purpose of doing equal and exact justice between the Defendant and the State of Nevada.

Clark argues that the instruction's language improperly implies that the defendant and State are on equal footing, thereby negating the presumption that the defendant is innocent until proven guilty. This court has upheld the constitutionality of this language as well. In Leonard v. State, this court held that this instruction does not implicate the presumption of innocence or burden of proof because these principles are explained clearly in separate instructions.⁶ Therefore, we conclude that Clark's argument lacks merit.

Next, Clark contends that the district court erred by failing to dismiss his case because the police did not retrieve the surveillance videotape of the alleged sale from the El Cortez. We note preliminarily that Clark did not move to dismiss the charges.⁷ As mentioned above, appellate review is generally precluded when no objection was made below, although this court may address plain or constitutional errors.⁸

To establish a due process violation based upon the State's failure to gather evidence,

⁶114 Nev. 1196, 1209, 969 P.2d 288, 296 (1998).

⁷Clark requested a jury instruction regarding the State's "failure to preserve" the videotape. The district court denied the request, noting that it "would not have granted a motion to dismiss" on this basis, either.

⁸Sterling, 108 Nev. at 394, 834 P.2d at 402.

a defendant must show: (1) that the State failed to gather evidence that is constitutionally material, i.e., that raises a reasonable probability of a different result if it had been available to the defense; and (2) that the failure to gather the evidence was the result of gross negligence or a bad faith attempt to prejudice the defendant's case.⁹

We conclude that Clark has failed to demonstrate either of these two requirements. First he has failed to demonstrate that the videotape was constitutionally material to his defense. Although Clark claims that the tape would have shown that he was waiting for a bus across the street from the place the alleged transaction occurred, the record does not support this contention. Police eyewitnesses testified at trial that the men engaged in what appeared to be a drug transaction, ran away and threw objects down when confronted by the police, and that rock cocaine was retrieved from the places where the objects were thrown down. Accordingly, we conclude that the videotape of the observed encounter between the two men was cumulative, and Clark has failed to demonstrate a reasonable probability of a different result even if the tape had been gathered by the police and given to the defense.¹⁰ Second, Clark has not established that the State's failure to obtain the tape from the El Cortez was the result of negligence, gross negligence, or bad faith. The

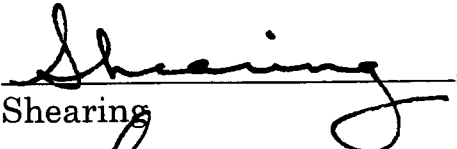
⁹Johnson v. State, 117 Nev. 153, 167, 17 P.3d 1008, 1017-18 (2001) (citing cases establishing legal analysis applicable to failure to gather evidence, rather than failure to preserve evidence).

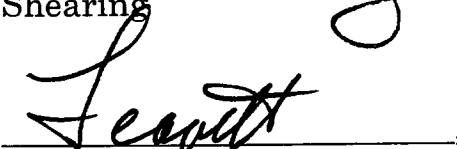
¹⁰See Daniels v. State, 114 Nev. 261, 268, 956 P.2d 111, 115 (1998) (holding that police officers generally have no duty to collect all potential evidence from a crime scene) (citing State v. Ware, 881 P.2d 679 (N.M. 1994)).

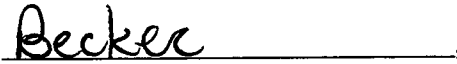
record shows that the State had the evidence they needed to convict once they apprehended the two participants in the transaction and examined the discarded objects. Clark cross-examined the officers at trial about what they observed but did not ask them why they did not collect the tape. Therefore, we conclude that no due process violation occurred.

Having considered Clark's claims and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Shearing


_____, J.
Leavitt


_____, J.
Becker

cc: Hon. Sally L. Loehrer, District Judge
Ross C. Goodman
Robert L. Langford & Associates
Attorney General/Carson City
Clark County District Attorney
Clark County Clerk