

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENNIS SHAWN HARDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40231

FILED

FEB 18 2004

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. R. [Signature]*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, of Dennis Shawn Hardy, pursuant to a jury verdict, of one count of aiding and abetting in the manufacture of methamphetamine; one count of possession of methamphetamine; and one count each of unlawful use of methamphetamine and marijuana.

The district court sentenced Hardy to serve consecutive prison terms of forty-eight to one-hundred-eighty months for the aiding and abetting charge; twelve to forty-eight months for the unlawful possession of methamphetamine charge; twelve to forty-eight months for the unlawful use of marijuana charge; and twelve to forty-eight months for the unlawful use of methamphetamine charge. Hardy appeals only the convictions for aiding and abetting another to commit the crime of manufacturing methamphetamine and the willful, unlawful possession of methamphetamine. We affirm the convictions for unlawful possession of methamphetamine and for aiding and abetting another to commit the crime of manufacturing methamphetamine.

Hardy challenges the sufficiency of evidence supporting his conviction for aiding and abetting another to commit the crime of manufacturing methamphetamine. When sufficiency of the evidence is challenged on appeal, this court inquires as to "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.”¹ Circumstantial evidence alone is sufficient to support a conviction.²

The two statutes under which Hardy was convicted for aiding and abetting are NRS 453.322(1) and NRS 195.020. NRS 453.322(1) provides, in pertinent part: “[I]t is unlawful for a person to: (a) Manufacture or compound a controlled substance other than marijuana; (b) Possess a majority of the ingredients required to manufacture or compound a controlled substance other than marijuana.” NRS 195.020 provides, in pertinent part: “Every person concerned in the commission of a felony . . . whether he directly commits the act constituting the offense, or aids or abets in its commission . . . shall be proceeded against and punished as such.” After the time of Hardy’s trial in this case, this court determined that NRS 453.322(1)(b) is unconstitutional on its face.³ However, although Hardy was charged with violation of that portion of the statute, the evidence presented at trial clearly was directed toward NRS 453.322(1)(a) rather than (b). Therefore, we will analyze the sufficiency of the evidence claim under NRS 453.322(1)(a).

Hardy shared a residence with his girlfriend, Ana Mariezcurrena, who was on probation. On October 31, 2001, law enforcement officers searched this shared residence after Mariezcurrena’s

¹Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

²Collman v. State, 116 Nev. 687, 711, 7 P.3d 426, 441 (2000).

³Sheriff v. Burdgo, 118 Nev. ___, ___, 59 P.3d 484, 487 (2002).

urine sample tested positive for amphetamine, a methamphetamine derivative. At the residence, law enforcement officers found overwhelming evidence that the residence had been used for methamphetamine manufacture. The officers found not only items commonly used in the manufacture of methamphetamine, but also items that would only have been present if methamphetamine had been manufactured there, such as used filters with residue appropriate for each stage of the manufacturing process, striker plates from matchbooks soaking in a solution to extract phosphorus, and methamphetamine in both powder form and liquid form.

Hardy is not disputing that methamphetamine was being manufactured at the residence. He argues that he had been absent from the home for five days and knew nothing about any manufacturing. Although the home was leased to Hardy, and shared by Mariezcurrena and their baby, Hardy testified that he had just returned home on the morning the officers arrived. He testified that he had not resided there for the previous five days and had been staying with friends. He also testified that he did not place any of the ingredients used in the manufacture of methamphetamine in the residence, and that he did not assist in the manufacture of the methamphetamine.

The State offered no direct evidence to show that Hardy himself assisted in the manufacture of methamphetamine on the premises. However, there is ample circumstantial evidence so that, viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the elements of this crime beyond a reasonable doubt. Although Hardy testified that he had not been in the residence for five days and knew nothing about manufacturing

methamphetamine, the jury was free not to believe his testimony.⁴ There was no corroborating evidence of his absence, even though he testified he had been staying with friends. Hardy admitted that he had put up a curtain in the pump house where most of the manufacturing equipment and residue was found. When the officers initially arrived, Hardy was in the bathroom which contained methamphetamine and drug paraphernalia and ingredients used to make methamphetamine.

Mariezcurrana's probation officer testified that he overheard conversations between Hardy and Mariezcurrana while the officers were searching the house. He testified that Mariezcurrana said, "Why, daddy? Why, daddy?" and Hardy kept saying, "I'm sorry, I'm sorry." The probation officer who administered the urine test testified that Mariezcurrana admitted using methamphetamine the night before with "her spouse." After the paraphernalia was found, both Hardy and Mariezcurrana were arrested and while they were sitting together two probation officers overheard part of the conversation between the two. One probation officer testified that she overheard Hardy say, "Anything in the house, she had nothing to do with it. It was all mine." The officer testified that Mariezcurrana just said she could not believe he had done this, shaking her head. Another probation officer testified that he heard Hardy make the same statements.

⁴Hutchins v. State, 110 Nev. 103, 109, 867 P.2d 1136, 1140 (1994) (holding that it is for the jury to determine the weight and credibility to give allegedly conflicting testimony, and the verdict will not be disturbed on appeal where substantial evidence supports the verdict).

We conclude that there was sufficient evidence to support the jury verdict that Hardy was guilty of aiding and abetting in the manufacture of methamphetamine.

Hardy next contends that he was denied due process of law when the district court canvassed the witness, Mariezcurrena, after she had already started to testify. After the canvas, Mariezcurrena invoked her Fifth Amendment rights and refused to testify further. Hardy failed to object contemporaneously to the district court's canvas of Mariezcurrena. This court has held that the "failure to object below bars appellate review."⁵ In any case, the district court's canvas was not error as it merely explained the possible consequences of her testimony.

After Mariezcurrena refused to testify further, the district court struck her entire testimony. Hardy contends that this was error. Hardy maintains that exclusion of this testimony prejudicially impacted his convictions for possession of methamphetamine and marijuana and for aiding and abetting in the manufacture of methamphetamine. This court has held that:

A witness may not take the stand to testify and then refuse to answer questions on cross-examination relating to his testimony given on direct examination. If a witness refuses to answer such questions, it is within the district court's discretion to apply any of several sanctions against the witness, including the sanction of striking all of the witness' testimony.⁶

⁵Emmons v. State, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991).

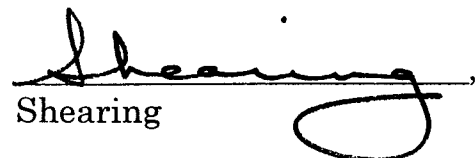
⁶Layton v. State, 99 Nev. 253, 255, 661 P.2d 877, 878 (1983) (citations omitted).

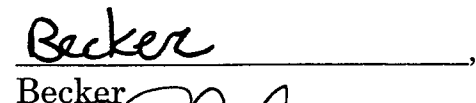
Here, the district court exercised its discretion in striking Mariezcurrena's testimony. We conclude that the district court did not err in striking this testimony.

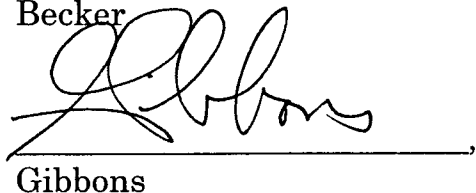
Hardy contends that the trial court erred in refusing Hardy's proposed jury instruction, based on NRS 195.020, accessory to a crime, claiming it is a lesser-included offense. We disagree that the proposed instruction described a lesser-included offense or is appropriate considering the evidence in this case.

Having considered Hardy's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.

 _____, C.J.
Shearing

 _____, J.
Becker

 _____, J.
Gibbons

Hon. Archie E. Blake, District Judge
Steve E. Evenson
Attorney General Brian Sandoval/Carson City
Churchill County District Attorney
Churchill County Clerk