

IN THE SUPREME COURT OF THE STATE OF NEVADA

IROC AVELLI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40597

FILED

SEP 22 2003

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

ORDER OF AFFIRMANCE AND LIMITED REMAND TO CORRECT
THE JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a deadly weapon (Count I), battery with intent to commit a crime (Count II), and possession of a firearm by an ex-felon (Count III). The district court sentenced appellant Iroc Avelli to serve two consecutive prison terms of 36 to 90 months for Count I, a concurrent prison term of 24 to 90 months for Count II, and a concurrent prison term of 13 to 60 months for Count III.

First, Avelli contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. 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 the victim testified that, on June 24, 2001, Avelli called him and told him to meet him at the Thomas and

¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Mack Center so that he could purchase the victim's Rolex watch.² The victim and his girlfriend went to the Thomas and Mack, where the victim met up with Aveli, while his girlfriend waited in the car.³ The victim testified that while he and Aveli were in a stairwell, Aveli struck the victim in the chest, grabbed him by the neck, demanded the Rolex, and then attempted to tie up the victim's hands with a belt. The victim also testified that Aveli pulled out a semi-automatic handgun and struck the victim in the face.⁴

UNLV Police Sergeant Richard Helm responded to the scene. Sergeant Helm testified that, in the stairwell, he found an empty Rolex box, a magazine from a Smith and Wesson butt plate and some .40 caliber bullet cartridges, but did not find a gun. Over the objection of defense counsel, two Kansas State Troopers testified that, on July 30, 2001, they pulled Aveli over for speeding, searched his car, and seized a Smith and

²The victim testified that he met Aveli when he responded to a newspaper advertisement the victim had placed to sell a Rolex. Aveli told the victim his name was "Mike" and gave the victim his cellular phone number. The victim and Aveli spoke by phone on numerous occasions and, prior to the robbery, met each other at a local casino jewelry store to have the Rolex appraised.

³The victim's girlfriend also testified at trial that, shortly after she observed Aveli walking quickly away from the Thomas and Mack Center, she saw the victim emerge from the Center in a state of shock, holding his belt, and covered in blood.

⁴The victim was hospitalized for treatment of his injuries, which included a broken arm and cuts and bruises to his head, neck and face.

Wesson .40 caliber handgun and ammunition. The handgun and ammunition were admitted into evidence as part of the State's case-in-chief. A Las Vegas Metropolitan Police Department firearms expert testified that the ammunition recovered from the Thomas and Mack stairwell was made by the same manufacturer from the same lot and same machine as the ammunition seized from Avelli in Kansas.

At trial, Avelli alleged that the victim was lying and presented two defense witnesses who testified that they saw Avelli wearing a gold watch the night before Avelli purportedly took the Rolex from the victim. Although Avelli claimed that he did not take the Rolex, the jury could reasonably infer from the evidence presented that Avelli beat the victim with the intent to rob him, and then took the Rolex by force using a deadly weapon.⁵ 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.⁶

Second, Avelli contends the district court erred in admitting the testimony of the two Kansas State Troopers that they pulled Avelli over for speeding and found a gun in a search of his vehicle.⁷ Specifically, Avelli argues that the Kansas State Troopers' testimony constitutes

⁵See NRS 200.380; NRS 193.165; NRS 200.400; NRS 202.360.

⁶See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁷Notably, the State did not attempt to admit the prior bad act evidence that cocaine was also found in Avelli's car.

evidence of a prior bad act and, therefore, the district court should have conducted a Petrocelli⁸ hearing and given the jury a limiting instruction pursuant to Tavares v. State.⁹ We conclude that Avelli's contention lacks merit.

Preliminarily, we note that the district court did conduct an on-the-record hearing outside the presence of the jury that complied with the mandates set forth in Petrocelli. In particular, the State discussed the nature of the Troopers' testimony, both the State and defense counsel presented their arguments on the admissibility of that testimony, and the district court weighed the probative value of the proffered testimony against its prejudicial effect. The district court then admitted the Trooper's testimony, stating: "This is the complete story. This is the same weapon used in this alleged crime. . . . It's not unduly prejudicial."

We conclude the district court did not commit manifest error in admitting the Kansas State Troopers' testimony.¹⁰ To the extent that Avelli alleges the Troopers' testimony about the gun and ammunition was inadmissible prior bad act evidence, we disagree and note that the district court correctly ruled that the gun and ammunition were alleged to have been used in the robbery at issue and, therefore, was direct evidence of the

⁸Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985).

⁹117 Nev. 725, 30 P.3d 1128 (2001).

¹⁰See Qualls v. State, 114 Nev. 900, 961 P.2d 765 (1998).

charged crimes.¹¹ To the extent that Avelli alleges the Troopers' testimony about Avelli being stopped for speeding and searched was inadmissible prior bad act evidence, we conclude that the district court properly admitted that evidence.¹² The testimony of the Troopers was necessary to lay a proper evidentiary foundation for the admission of the gun and ammunition seized from Avelli in Kansas.¹³ Moreover, the district court properly admitted that testimony under the complete story doctrine.¹⁴

Having considered Avelli's contentions and concluded that they lack merit, we affirm the judgment of conviction. However, our review of the judgment of conviction reveals a clerical error. The judgment of conviction states that Avelli was convicted pursuant to a guilty plea when, in fact, he was convicted pursuant to a jury verdict. We

¹¹See Tavares, 117 Nev. at 731, 30 P.3d at 1131 (noting that Petrocelli hearing required where the State seeks to introduce uncharged bad act evidence).


¹²Even assuming the district court erred in admitting the Troopers' testimony that Avelli was speeding and searched and erred in failing to give a limiting instruction, the error was harmless in light of the overwhelming evidence of Avelli's guilt because it did not have a "substantial and injurious effect or influence in determining the jury's verdict." See Tavares 117 Nev. at 732, 30 P.3d at 1132 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

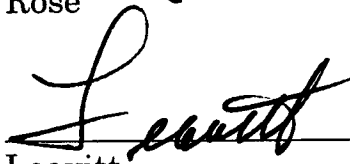
¹³See NRS 52.015.

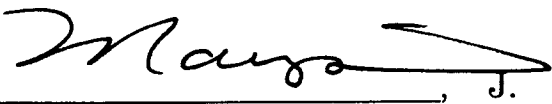
¹⁴See NRS 48.035(3); Walker v. State, 113 Nev. 853, 944 P.2d 762 (1997) (evidence of prior vehicle theft admissible, in part, because evidence found inside vehicle linked defendant to the murder scene).

therefore conclude that this matter should be remanded to the district court for the correction of the judgment of conviction. Accordingly, we

ORDER the judgment of conviction AFFIRMED, and REMAND this matter to the district court for the limited purpose of correcting the judgment of conviction.¹⁵


_____, J.
Rose


_____, J.
Leavitt


_____, J.
Maupin

cc: Hon. Joseph T. Bonaventure, District Judge
Kirk T. Kennedy
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹⁵We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.