IN THE SUPREME COURT OF THE STATE OF NEVADA

LAMAAR BRAZIER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41173

FILED

APR 2 0 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction pursuant to a jury verdict of one count of robbery of a victim 65 or older. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Lamaar Tyron Brazier (Brazier) appeals from a judgment of conviction, pursuant to a jury verdict, of one count of robbery of a victim age 65 or older. On September 11, 2000, Vaughn Cannon (Cannon) parked his car near the intersection of Third Street and Imperial Avenue in Las Vegas, Nevada. As Cannon exited the car, Brazier approached him and asked for the time. Cannon told him the time and attempted to reenter the car, but Brazier prevented him from getting back into the car. As Brazier held Cannon, he removed Cannon's wallet from his rear left pocket. The wallet contained $38 in cash, two credit cards, a driver's license, and a blank unsigned check. Brazier was tried and convicted of one count of robbery of a victim 65 or older. He was sentenced to serve two equal and consecutive terms of a maximum of one hundred and twenty months with a minimum parole eligibility of forty months in the Nevada Department of Corrections.

Brazier appeals this conviction and raises three issues on appeal. Brazier contends that the district court erred: (1) in ruling that evidence, which was ultimately never admitted, of appellant's prior

convictions was admissible, (2) in denying his request for a continuance to allow him to prepare and respond to newly admitted evidence, and (3) in denying his motion to admit evidence of the victim's testimony at the preliminary hearing when Brazier had the opportunity to impeach the victim's testimony on cross-examination. We conclude these claims are without merit.

1. Appellant's prior bad acts

Brazier contends that the district court improperly ruled that his prior felony convictions were admissible. NRS 50.095(1) permits impeachment by proof of prior felony convictions which are not too remote in time. Moreover, this court has held that NRS 50.095 does not limit the admission of felony convictions to those that are directly related to truth or veracity.[1] The admission of such evidence is within the district court's discretion and will not be overturned absent an abuse of discretion.[2] In addressing the admissibility of this evidence, the trial court must decide whether the probative value of the evidence is substantially outweighed by the potential for unfair prejudice.[3] However, when substantial evidence supports the conviction, any error in admitting evidence under NRS 50.095(1) will be deemed harmless.[4]

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[1]Pineda v. State, 120 Nev. ___, ___, 88 P.3d 827, 832 (2004).

[2]Id. (quoting Givens v. State, 99 Nev. 50, 53, 657 P.2d 97, 99 (1993) overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986)).

[3]Id.

[4]Boley v. State, 85 Nev. 466, 470, 456 P.2d 447, 449 (1969).

When presenting evidence of a prior felony conviction to impeach, the State may not question the defendant regarding such a prior conviction unless it is prepared "to prove such prior conviction in the event of the accused's denial."[5] Here, Brazier contends that his prior convictions are inadmissible because the State failed to establish, by appropriate means, that the convictions occurred. We disagree.

Importantly, Brazier never testified in the instant matter and the evidence of his prior convictions was never presented to the jury. The United States Supreme Court has held "that to raise and preserve the claim for improper impeachment with a prior conviction a defendant must testify."[6] In reaching this decision, the Court pointed out that because a reviewing court has no way to determine if the government would have sought to use such evidence, or to determine how the admission of such evidence impacts a defendant's decision not to testify, any resulting harm is purely speculative.[7] However, some states have held that a defendant need not testify to challenge the prior convictions that were to be used to impeach him.[8] We need not decide this issue because even if Brazier had preserved the issue of the validity of his prior convictions for appellate review, it is clear that the convictions are legally sufficient. Here, the evidence offered by the State to prove the truth of such convictions, which consisted of the abstracts of judgment and the documents containing the

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[5]Revuelta v. State, 86 Nev. 224, 226, 467 P.2d 105, 106 (1970) (citing Fairman v. State, 83 Nev. 287, 429 P.2d 63 (1967)).

[6]Luce v. United States, 469 U.S. 38, 43 (1984).

[7]Id. at 41.

[8]Pineda, 120 Nev. at ___, 88 P.3d at 836 n. 9.

guilty plea, waiver of trial, and sentencing, contain the information that is required under Nevada law.[9] Accordingly, we reject Brazier's claim regarding admission of the prior convictions.

2. Appellant's request for a continuance

Brazier contends that the district court abused its discretion when it refused to grant him a continuance to allow time to investigate newly presented evidence. While the grant of a motion to continue is within the sound discretion of the trial court,[10] the denial of a continuance may not be decided arbitrarily, and this court must examine the "circumstances present in every case, particularly those presented to the trial judge at the time the request is denied" to determine whether the trial court abused its discretion.[11] This court does not favor last minute proceedings that delay commencement of trial.[12]

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[9]While it is true, as appellant notes, that the only irrefutable documentation is an exemplified copy, this is not the only means of demonstrating such a conviction. Boley, 85 Nev. at 470, 456 P.2d at 449. The documents presented by the State contain information regarding the plea, the verdict or finding, the sentence, the amount of credit due for time served, and all are signed by the clerk of the court as required under California law in CAL. PENAL CODE § 1213. Physical descriptions of the defendant are not necessary and name alone "is sufficient to establish identity in the absence of contradictory evidence." Bayless v. United States, 381 F.2d 67, 74 (9th Cir. 1967) (internal citations omitted).

[10]Batson v. State, 113 Nev. 669, 674, 941 P.2d 478, 482 (1997).

[11]Johnson v. State, 90 Nev. 352, 353, 526 P.2d 696, 697 (1974) (citing Ungar v. Sarafite, 376 U.S. 575, 589 (1964)).

[12]Id. at 354, 526 P.2d at 697 (citing Howard v. Sheriff, 83 Nev. 150, 153, 425 P.2d 596, 598 (1967)).

On the first morning of trial, Brazier learned that the State was going to seek to admit a check that had been tendered, two days after the robbery, to an individual named Lamaar Brazier. This check was in the victim's wallet when it was stolen. Subsequently, Brazier made a motion for a continuance arguing that he needed time to have an expert investigate the signature on the check. The district court denied the motion, pointing out that the trial had already been continued five times. The following day, Brazier asked the district court to reconsider his motion for a continuance, informing the court that he had lost his identification just prior to the offense, and asked for time to establish the loss, to contact the person who accepted the check, and to retain a handwriting expert to determine if Brazier had, in fact, tendered the check. Once again, the district court denied the motion. The district court indicated that the handwriting evidence went to the weight of the evidence, not admissibility, and a continuance was inappropriate considering that two of the five continuances previously granted were the result of Brazier's failure to make an appearance.

Brazier points to this court's decision in O'Brien v. State[13] as support for his proposition that a continuance was necessary. In that case, the State received information, in a report prepared by the FBI, which contained opinion evidence favorable to the defense and adverse to the State's theory of the case.[14] The defense moved for a continuance to secure the proper person from the FBI to testify about the report, which

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[13]88 Nev. 488, 500 P.2d 693 (1972).

[14]Id. at 490-91, 500 P.2d at 694-95.

was denied.[15] This court determined that such a denial constituted an abuse of discretion because "[t]he conclusion of the expert would tend to exculpate the defendant since it had a direct bearing upon the issue of criminal intent."[16]

This case is clearly distinguishable from O'Brien. Here, the information did not tend to exculpate Brazier. Instead, regardless of the handwriting on the check, the fact that the check contained Brazier's name tended to further connect him with the commission of the robbery. Furthermore, expert testimony was not necessary because Brazier had the option of submitting a handwriting sample to the jury to allow them to compare the handwriting on the check with that sample.[17] Therefore, the circumstances of this case demonstrate that the trial court acted within its discretion in denying Brazier's motion for a continuance.

3. Appellant's request to present evidence of the victim's testimony at the preliminary hearing

Brazier contends that the district court abused its discretion when it refused to allow a preliminary hearing transcript to be admitted into evidence. At trial, defense counsel questioned the victim, Vaughn Cannon, about his testimony at the preliminary hearing. Cannon testified that he had pointed out the wrong person as the perpetrator at the preliminary hearing, but that someone had corrected him, and he immediately corrected his mistake by pointing out Brazier. This

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[15]Id.

[16]Id. at 491, 500 P.2d at 694-95.

[17]See NRS 52.045, which provides: "Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated is sufficient for authentication."

interaction was not recorded on the preliminary hearing transcript. Defense counsel failed to impeach Cannon by having him read the transcript and point out the lack of evidence showing he corrected his mistaken identification. Instead, on the following day the defense moved to have the preliminary hearing transcript admitted into evidence. Defense counsel argued that he failed to impeach Cannon on the previous day because he had not wanted to make a frail, elderly gentleman read thirty pages of evidence. The district court denied Brazier's request. We agree with this determination.

First, we note that trial courts have considerable discretion in determining the relevance and admissibility of evidence.[18] An appellate court should not disturb the trial court's ruling absent a clear abuse of that discretion.[19] Nevada law limits "admissibility of prior officially recorded testimony to a narrow set of circumstances."[20] Under NRS 171.198(6), before such evidence is admitted "there must be a showing that (1) the defendant was represented by counsel; (2) defendant's counsel had an opportunity to cross-examine the witness; and (3) the witness is shown to be unavailable."[21]

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[18]Atkins v. State, 112 Nev. 1122, 1127, 923 P.2d 119, 1123 (1996).

[19]Id.

[20]Anderson v. State, 109 Nev. 1150, 1152, 865 P.2d 331, 333 (1993).

[21]Id. at 1152, 865 P.2d at 333. NRS 51.055 defines unavailability as:

> 1. A declarant is "unavailable as a witness" if he is:
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> (a) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement;

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Here, Brazier has failed to demonstrate the third statutory requirement for the admission of such evidence, namely, that the witness was unavailable. Cannon was present on December 30, 2002, when Brazier's counsel had every opportunity to cross-examine him as a witness. Furthermore, Cannon was still under subpoena on the day that the district court denied Brazier's motion to admit the preliminary transcript. Despite this fact, Brazier made no attempt to show that he tried to gain Cannon's presence before the cessation of trial on the following day. In Grant v. State, this court determined that the State failed to meet its burden to show the unavailability of a witness because the State failed to make proper and diligent service of a witness and made no attempt to show that it had attempted to contact the witness either at home or via family and friends.[22] This case is analogous. Because Brazier failed to show that he attempted to contact Cannon, and that Cannon was

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. . . continued

> (b) Persistent in refusing to testify despite an order of the judge to do so;
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> (c) Unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
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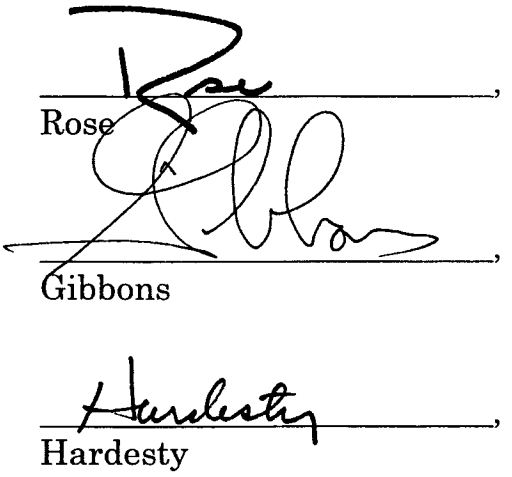
> (d) Absent from the hearing and beyond the jurisdiction of the court to compel appearance and the proponent of his statement has exercised reasonable diligence but has been unable to procure his attendance or to take his deposition.

2. A declarant is not "unavailable as a witness" if his exemption, refusal, inability or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

[22]117 Nev. 427, 24 P.3d 761.

unavailable to testify prior to the end of trial, he failed to meet his burden to demonstrate unavailability. As such, we find that the district court appropriately denied his motion to admit the preliminary transcript into evidence.

Accordingly, we ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Sally L. Loehrer, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk