IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN LAMONT MONROE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42050

FILED

FEB 2 8 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 conspiracy to commit robbery (count I) and two counts of robbery with the use of a deadly weapon (counts II & III). Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Steven Lamont Monroe to serve a prison term of 12-36 months for count I, two concurrent prison terms of 24-84 months for count II, and two consecutive prison terms of 24-84 months for count III. Monroe was also ordered to pay $130.00 in restitution.

First, Monroe contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of conspiracy to commit robbery (count I) and robbery with the use of a deadly weapon (counts II & III). Monroe argues that the pretrial statements made by the two victims were not consistent with their trial testimony.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational

trier of fact.[1] In particular, we note that both victims, Daniel Reuben and Gabor Orosz, testified at trial that while sitting in a car parked outside of a convenience store, they noticed three individuals sitting in a car parked two spaces away. The individuals turned out to be Monroe, Kanika Hawkins (Monroe's girlfriend), and an individual identified only as either "David" or "Brian." The victims were eventually approached by Monroe, who demanded money and threatened them, stating, "Don't make me pull my 9 out on you," indicating that he had a gun. Orosz, based on his knowledge of guns, testified that Monroe possessed a black, semi-automatic handgun. Reuben gave Monroe $130.00, and Orosz handed over approximately $50-$60.00. Both victims testified that David approached their vehicle and threatened them, and then punched Reuben twice in the face as Reuben sat on the driver's side of the vehicle with the window down.

Monroe argues that the victims' trial testimony differed significantly from statements they made prior to trial. For example, in a written statement given to the investigating officers the night of the robbery, Reuben stated that it was David who first demanded money and threatened them with a gun. Also, in his statement, Reuben claimed that Monroe "petted" his head after David punched him, whereas at trial, he stated that Monroe pulled his hair.

In a recorded statement produced approximately one month after the incident, Orosz stated that Monroe approached them and asked for change in order to make a telephone call, whereas in a statement made

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[1]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

the night of the robbery, Orosz claimed that Monroe asked for a dollar for gas; at trial, Orosz testified that after offering Monroe some change, Monroe "told us to 'F' that and give him a twenty." Further, in his 9-1-1 call, Orosz told the operator that he saw a knife, yet he never mentioned the knife in his statement that night, in his recorded statement a month later, at the preliminary hearing, or at trial. On cross-examination at trial, Orosz admitted that he made the statement about the knife but that he was never really sure that he saw one, so he did not mention it again. Finally, in his statement that night, Orosz claimed that it was Monroe who stated, after Reuben had been punched, "Come on, I don't want to catch a case," whereas at trial he stated that David made the comment. Orosz explained the discrepancy, stating that at the time of his statement to police that night, he was still panicking from the incident.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Monroe committed the crimes of conspiracy to commit robbery and robbery with the use of a deadly weapon.[2] 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, sufficient evidence supports the verdict.[3] Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Monroe contends that the district court erred in not allowing the defense to present exculpatory statements made by a

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[2]See NRS 193.165(1); NRS 199.480(1); NRS 200.380(1).

[3]See 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).

witness/accomplice. Monroe argues that statements David made to a defense investigator "clearly fall within the statement against interest exception to the rule against hearsay under NRS 51.345." According to Monroe, David, among other things, told the investigator that neither he nor Monroe had a gun or a knife, that Monroe did not know that David was going to punch one of the victims, and that they never planned on robbing the two victims. David was allegedly subpoenaed, but failed to appear and testify at Monroe's trial.[4] Monroe speculates that even if David did appear in court, he would have invoked his Fifth Amendment right not to testify and therefore would be unavailable. We conclude that Monroe's contention is without merit.

This court has stated that "[t]he decision to admit or exclude evidence rests within the trial court's discretion, and this court will not overturn that decision absent manifest error."[5] NRS 51.345(1)(b) provides, in part, that a statement which, when made –

> tended to subject the declarant to civil or criminal liability . . . is not inadmissible under the hearsay rule if the declarant is unavailable as a witness. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused in a criminal case is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The district court must consider the totality of the circumstances in determining whether the statement is trustworthy and if sufficient

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[4]Monroe did not provide the district court or this court on appeal any proof of service of process indicating that the witness was in fact subpoenaed.

[5]Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000).

corroboration exists to defeat the notion that the statement was fabricated to exculpate the accused.[6] Further, "it is well-settled that a statement against interest made to a close friend or relative is considered to be more reliable than a statement made to a stranger."[7]

In the instant case, the district court ordered the parties to brief the issue of the witness' availability and the admissibility of his statements to the defense investigator. Outside the presence of the jury, the district court heard the arguments of counsel and found the witness' statements to be inadmissible. The district court made several findings: (1) the witness' interview with the defense investigator was not audio- or videotaped; (2) the exact name and location of the witness was allegedly not known, despite the representation of defense counsel that the witness was in fact served with a subpoena; (3) the identification of the witness could not verified and his background could not be checked; and (4) it is not known why the witness failed to appear. The district court stated:

> The Court finds that the defense has not met its burden on this request: that the Court has serious questions on the trustworthiness and reliability of the statement, and the speaker or declarant is not legally unavailable under our statute.[8] That has not been established . . . .

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[6]Walker v. State, 116 Nev. 670, 676, 6 P.3d 477, 480 (2000).

[7]Id. at 676, 6 P.3d at 481 (quoting Woods v. State, 101 Nev. 128, 134-35, 696 P.2d 464, 469 (1985)).

[8]Pursuant to NRS 51.055, a declarant is "unavailable as a witness" if he is:

> (a) Exempted by ruling of the judge on the ground of privilege from testifying concerning the subject matter of his statement;

continued on next page . . .

The district court further noted that the statements of the witness were not corroborated. Based on all of the above, we conclude that the district court did not commit manifest error in excluding the evidence in question.

Third, citing to Moore v. State for support,[9] Monroe contends that the district court erred in refusing to instruct the jury on the lesser-related offense of accessory. In Moore, we held "that the jury should receive instruction on a lesser-related offense when three conditions are satisfied: (1) the lesser offense is closely related to the offense charged; (2) defendant's theory of defense is consistent with a conviction for the related offense; and (3) evidence of the lesser offense exists."[10] Monroe's reliance on Moore is misplaced. In Peck v. State, this court "expressly overrule[d] Moore as it pertains to the necessity of giving a jury instruction on a

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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.

[9]105 Nev. 378, 383, 776 P.2d 1235, 1238 (1989) ("fairness to the defendant requires instructions on related but not necessarily included offenses"), overruled by Peck v. State, 116 Nev. 840, 7 P.3d 470 (2000).

[10]105 Nev. at 383, 776 P.2d at 1239.

lesser-related offense."[11] Therefore, we conclude that the district court did not err.

Fourth, Monroe contends that the jury misunderstood the deadly weapon instruction. During deliberations, the jury sent the following note and question to the court: "Does the act of simulating a weapon constitute use of a deadly weapon as per Instruction 28 or 33?" Outside the presence of the jury, the district court informed counsel:

> The Court has fashioned a response to advise them as follows: Review your instructions, including the ones you noted and Nos. 30 and 5. I believe that this is appropriate in response to their query. The Court notes additionally they do have a separate instruction that tells them what a robbery is, and they have the instruction on the burden of proof. So when you take the instructions together and assess them in the light of the others, they already have the answer to their question, but I think it would be inappropriate to tailor an instruction to try to suppose what it is they're thinking and address that which may be in error.

Trial counsel filed an affidavit wherein he stated that "at least one juror informed me [after the trial] that the jury understood the instructions to provide that the State did not need to prove beyond a reasonable doubt that an actual firearm was used . . . in order to find the Defendant guilty." Further, "at least one juror" informed counsel that had there not been any confusion with regard to the instruction, "she would not have voted for conviction." Notably, Monroe does not argue that the jury instruction was

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[11]116 Nev. at 845, 7 P.3d at 473.

improper or that any misconduct occurred, and he has not provided this court with an affidavit from a member of the jury.

NRS 50.065(2) expressly precludes any inquiry into internal jury deliberations. It prohibits a juror from testifying "concerning the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith."[12] Furthermore, "[t]he affidavit or evidence of any statement by a juror indicating an effect of this kind is inadmissible for any purpose."[13] The statute allows "juror testimony regarding objective facts, or overt conduct, which constitutes juror misconduct,"[14] but it forbids evidence, like the affidavit in question, regarding the jurors' mental processes during their deliberations.[15] Accordingly, we conclude that Monroe's contention is without merit.[16]

Finally, Monroe contends that he should have received credit for time served while he was on house arrest after being released on bail. Citing to Kuykendall v. State for support,[17] argues that "the restraints on

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[12]NRS 50.065(2)(a).

[13]NRS 50.065(2)(b).

[14]Barker v. State, 95 Nev. 309, 312, 594 P.2d 719, 720 (1979).

[15]See Meyer v. State, 119 Nev. 554, 80 P.3d 447 (2003).

[16]See McDonald v. Pless, 238 U.S. 264, 269 (1915) ("[T]here is nothing in the nature of the present case warranting a departure from what is unquestionably the general rule, that the losing party cannot, in order to secure a new trial, use the testimony of jurors to impeach their verdict.").

[17]112 Nev. 1285, 926 P.2d 781 (1996).

liberty in connection with the house arrest program constitute confinement within the meaning of NRS 176.055(1)." The district court ordered briefing and conducted a hearing on Monroe's request, and ultimately denied Monroe's motion.

NRS 176.055(1) provides that a defendant is entitled to credit "for the amount of time which the defendant has actually spent in confinement before conviction."[18] This court has recognized, however, that a defendant is not entitled to credit for time served in residential confinement because it is time spent "outside of incarceration."[19] Likewise, in construing NRS 176.055, this court has held that a defendant is only entitled to credit for time served for confinement that so restrains a defendant's liberty that it "is tantamount to incarceration in a county jail."[20] In this case, Monroe's house arrest was more tantamount to a form of conditional liberty than to actual confinement in jail.[21] We conclude that the time Monroe spent on house arrest was time spent outside of incarceration, and not "confinement" within the purview of NRS 176.055, and therefore, the district court did not err in denying Monroe's motion for credit for time served on house arrest.

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[18]See also id. (holding that purpose of NRS 176.055(1) is to ensure that a criminal defendant receives credit for all time served).

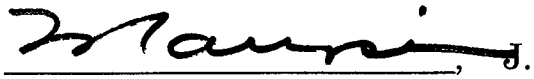
[19]See Webster v. State, 109 Nev. 1084, 1085, 864 P.2d 294, 295 (1993) (discussing residential confinement as a condition of probation).

[20]Grant v. State, 99 Nev. 149, 151 & n.2, 659 P.2d 878, 879 & n.2 (1983).

[21]See Webster, 109 Nev. at 1085, 864 P.2d at 295 ("The imposition of residential confinement as a condition of appellant's probation is insufficient to change the character of his probation from a conditional liberty to actual confinement.").

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

ORDER the judgment of conviction AFFIRMED.[22]



_____, J.
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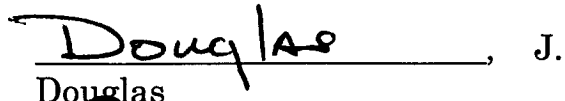

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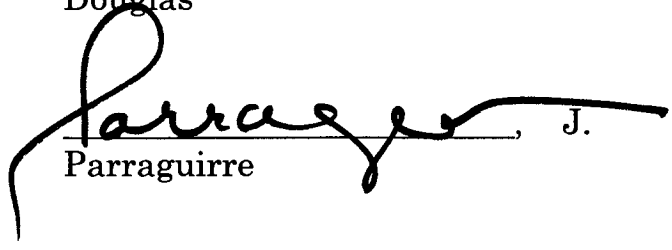

_____, J.
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cc: Hon. Valorie Vega, District Judge
Flangas Law Office
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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[22]Because Monroe is represented by counsel in this matter, we decline to grant him permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to Monroe unfiled all proper person documents he has submitted to this court in this matter.