

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN ELIAS MORENO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42126

FILED

JUN 25 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of battery with a deadly weapon and one count of discharging a firearm at or into an occupied structure. Second Judicial District Court, Washoe County; Janet J. Berry, Judge. The district court sentenced appellant to a prison term of 24 to 62 months for battery, and to a consecutive prison term of 12 to 36 months for discharging a firearm.

Appellant contends that the district court erred by allowing the preliminary hearing testimony of one of the witnesses to be read to the jury in lieu of live testimony.

In Funches v. State,¹ this court noted that three prerequisites must be met before a witness' preliminary hearing transcript may be admitted as evidence at trial: (1) the defendant must have been represented by counsel at the preliminary hearing; (2) counsel must have cross-examined the witness; and (3) the witness must be actually unavailable at trial.²

¹113 Nev. 916, 944 P.2d 775 (1997)

²Id. at 920, 944 P.2d at 777-78 (citing Drummond v. State, 86 Nev. 4, 7, 462 P.2d 1012, 1014 (1970); see also NRS 171.198(6)(b)).

In this case, appellant was represented by counsel at the preliminary hearing. As to the second requirement, appellant acknowledges that the witness was cross-examined at the preliminary hearing, but appellant argues that he was deprived of the opportunity to cross-examine the witness thoroughly because the defense was not provided with information regarding the interview of the witness by police officers. We note that the prosecutor did not have a tape or a transcript of the interview at the time of the preliminary hearing. Pursuant to the discovery statute, there was nothing relating to the interview that the State was obligated to provide to appellant prior to the preliminary hearing.³ Defense counsel did ask the witness at the preliminary hearing whether she had been interviewed by police and she responded affirmatively. Defense counsel asked no further questions regarding the interview. We conclude that appellant was given a meaningful opportunity to cross-examine the witness and did, in fact, cross-examine her.

Finally, despite appellant's arguments to the contrary, the record supports the district court's finding that the witness was unavailable for trial.⁴ Specifically, the State's investigator testified regarding the various and numerous efforts he made to locate the witness.⁵ Based on our consideration of the three prerequisites for

³See NRS 171.1965(1)(a).


⁴See NRS 171.198(6)(b); NRS 51.055.

⁵See Quillen v. State, 112 Nev. 1369, 1374-76, 929 P.2d 893, 896-98 (1996); Ohio v. Roberts, 448 U.S. 56, 75-77 (1980).

admission of the testimony, we conclude that the district court properly admitted the preliminary hearing testimony.

Having considered appellant's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Becker


_____, J.
Agosti


_____, J.
Gibbons

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk