IN THE SUPREME COURT OF THE STATE OF NEVADA

IAN ANDRE HAGER,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

_____/

No. 72613

RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction following a jury trial in which Appellant Hager was found guilty of six felonies. Each involved possession of a firearm by a prohibited person. Counts I through III recited that Hager possessed an assault rifle (Count I) and handguns (Count II) and three other firearms (Count III). Those first three counts alleged that he was prohibited from possessing those guns by virtue of having been adjudicated mentally ill. The second set of crimes listed the same guns but listed the nature of the prohibition as Hager being a user of controlled substances, or being addicted to controlled substances. 1 Joint Appendix (JA) 1-4. The first set of crimes are category "D" felonies, in violation of

NRS 202.360(2)(a) while the similar offenses by an addict or unlawful drug user are category "B" crimes in violation of subsection (1) of that same statute.

All of the sentences were concurrent. 1 JA 185-86. That may be why appellant has raised only issues that would affect each of the convictions, as an argument pertaining to only some of the charges may not provide a meaningful remedy.

II. STATEMENT OF THE FACTS

Appellant Hager came to the attention of police via threats from Hager to police officers. 4 JA 875-876. Ultimately, the police found that Hager owned and possessed several different firearms. He had two different disabilities. First, he had been ordered into the Second Judicial District Court Mental Health Court by the district court of Humboldt County. That required an Order by the Judge of Humboldt County and a finding by the Judge of the Mental Health Court in Washoe County that he was mentally ill, with a qualifying diagnosis. 3 JA 488-491.

The second disability arose because Hager was a drug addict or an unlawful user of controlled substances. That was established first by an admission to the author of a presentence report a few years back, and then by Hager's own testimony in the trial. 3 JA 525-27; 4 JA 707. However,

Hager apparently claimed that his addiction, unlike other addictions, could be switched on and off from time to time, like a light bulb. So, there was additional evidence in the form of YouTube videos showing him ingesting a white crystalline substance contemporaneously with the possession of the guns, and his own subsequent admission that the substance was indeed methamphetamine. 2 JA 356-57.

III. ARGUMENT

1. The Judgment is Supported by Sufficient Evidence.

a. Being an addict or user

The issues on appeal are somewhat entangled, with issues of the instructions being intermingled with issues of the sufficiency of the evidence. The State will attempt to unwind the arguments.

Because the remedy attending a claim of insufficient evidence is different from the remedy attending a claim of error in the instructions, it seems that the claim of insufficiency should be based on the elements in the instructions. *United States v. Inman*, 588 F.3d 742 (8th Cir. 2009). Any argument concerning the instructions should be viewed separately from the argument concerning the sufficiency of the evidence. *Id.* If that is the case, then the evidence is sufficient.

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The standard of review is well known. The relevant inquiry for this court is " '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.' " *Koza v. State,* 100 Nev. 245, 250, 681 P.2d 44, 47 (1984). Here, the element of possession or ownership is not disputed. Appellant Hager contests only the issue of whether he was a prohibited person. One of the prohibitions was being addicted to a controlled substance. It is clear enough that in 2012 Hager was addicted, as that was established by his own testimony and prior statements to a probation officer. 4 AA 839. He seems to now claim that he had a spontaneous cure at some unknown time.[1] The evidence allowed the conclusion that the claim of a spontaneous cure was false and that, close to the time of his arrest, he was still deep within it. The jury saw a video of Hager ingesting methamphetamine, contemporaneously with his ownership and possession of firearms. Although Hager tried to persuade the jury that he was just simulating the act, and that the substance was actually salt, the jury could elect to believe his statement to the police that he had indeed ingested methamphetamine. In addition, there was a room

[1] Medical science seems to scoff at the idea of a "cure" for an addiction, and the notion of a spontaneous cure is laughable, but that need not drive the decision of this Court.

in his house that had a great deal of drug paraphernalia and empty baggies. His shoes were under the bed in the room with many baggies and a meth pipe. 4 JA 781. He initially claimed that he only used that room to shower, but then he also admitted that his clothes were in that room. He admitted that he sometimes would drink alcohol in that room and the evidence showed a substantial number of empty beer bottles in the room with the pipe and the baggies. Hager tried to claim that the baggies had never held drugs and they were there with the pipe simply because it was a "junk drawer," although he admitted that the meth pipe in the drawer with all the empty baggies was indeed his pipe. 4 JA 817. The jury was not required to believe that he just happened to store empty baggies in that drawer with his meth pipe. The jury might have concluded that the story was sufficiently unusual as to be disbelieved, simply because most people keep their baggies in a kitchen, not in a drawer in a nightstand in a bedroom with a meth pipe. Among the things the jury could consider is Hager's description of the room as a "man cave," coupled with the evidence that he lived alone. 4 JA 781. The jury was not required to believe his story, of course, and could instead conclude that Hager was an addict in 2012 and remained an addict until the time of his arrest.

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The jury was also instructed that being a "user" of drugs was also a disability. However, the court also instructed the jury that they need not agree on which theory was proven. Therefore, it is not necessary to examine the sufficiency of both theories. *See Griffin v. United States*, 502 U.S. 46, 56-57, 112 S.Ct. 466 (1991). Nevertheless, the State also contends that the same evidence mentioned above allowed the alternate or additional conclusion that Hager was indeed a "user" of illegal drugs until the time of his arrest. "User" would seem to be someone who regularly uses drugs, whether addicted or not. Certainly one who is addicted and is recorded on video ingesting what is admittedly methamphetamine can be considered a "user" of drugs.

b. Having been adjudicated mentally ill

A second set of crimes were based on the disability of having been adjudicated mentally ill. *See* NRS 202.360. The evidence was clear that Hager had been ordered into, and accepted into the Washoe County Mental Health Court. Hager contends that the evidence was insufficient because the findings that he was mentally ill were not in a final, appealable order. Again, there was no instruction with that definition and so the analysis of the sufficiency of the evidence should not turn on that definition of "adjudicated". *See* Instruction at 1 JA 163. One can argue that the

instructions were in error, but the question of the sufficiency of the evidence should turn on the evidence as applied to the instructions actually given by the court. *See United States v. Inman*, *supra*.

The instructions defined "adjudicated" simply as "to rule upon judicially." 1 AA 163. By that definition, it is clear that the evidence was sufficient. For Hager to be admitted to the mental health court, it was necessary for at least one judge and one mental health professional to find that he was mentally ill with a qualifying diagnosis. 3 JA 503. That is, the evidence demonstrated that by being admitted to the mental health court he had been adjudicated mentally ill.

2. The Court Did Not Err in Relation to the *Mens Rea*.

The Opening Brief includes a discussion of the general principles that arise when a felony statute makes no reference to the *mens rea*. However, the discussion is general, without an assertion of error. Once one gets past the caption, the argument becomes slightly clearer. Hager simply asserts that this Court should find certain facts to be true, and then to declare, based on those facts, that Hager is not guilty of the crime. That is not the traditional role of this Court. The argument is defined by the last paragraph, in which appellant suggests that this Court should determine as

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a matter of fact that Hager honestly believed he was allowed by law to own and possess his firearms. *See* Opening Brief at 34-35.

In general, this Court is ill-equipped to make factual findings and must instead rely on the trier of fact. *See Graves v. State,* 112 Nev. 118, 124, 912 P.2d 234, 238 (1996) ("The cold record is a poor substitute for demeanor observation."). The trier of fact in this case was instructed on the defense theory of estoppel/entrapment that law enforcement agencies returned Hager's guns to him some time earlier, but the jury rejected that defense. That may have been because the defendant did not testify that anyone told him that it was lawful for him to own or possess those guns. 4 JA 824. As the jury rejected the factual assertions in the Opening Brief, and there is no assignment of error associated with the argument, this Court should decline to substitute its judgment for that of the jury.

That being said, the State also contends that this crime ought not to be a specific intent crime. In general, possessory crimes require only knowledge, not some sort of specific intent. *See e.g.*, *State v. Dougherty*, 86 Nev. 507, 471 P.3d 212 (1970) (knowledge of narcotic nature of the substance possessed); *Gray v. State*, 100 Nev. 556, 688 P.2d 313 (1984) (possession of stolen property). Here, Hager clearly understood that the things he owned were firearms. In addition, of course, the actor must be

acting voluntarily. That need not detain the Court because the jury was indeed instructed that a conviction required that the defendant act willfully. *See* 1 JA 163, 166. If the claim is that the court should have instructed the jury on some additional element, of some sort of specific intent, the State wonders what intent that would be. To the extent that Hager argues that the conviction would require some familiarity with the Nevada Criminal Code,[2] that has never been the rule of law in this State or any other state and the Court should reject it.

The Court may also note that the defendant himself asked to be assigned to the mental health court and the defendant himself provided the evidence that he was a drug addict and a user of drugs. Thus his knowledge of his status seems to be established.

Because the argument concerning the *mens rea* does not address any error by the district court, this Court should simply affirm the judgment of conviction.

3. The District Court Did Not Err to the Prejudice of Appellant by Giving Instruction 16.

Hager next attacks a couple of jury instructions. Instruction 16 included definitions of an "addict" and a "user." 1 AA 161. In the district

[2] As suggested in the instruction proposed by the defense but rejected by the court.

court, Hager argued that the court should give no instruction at all and should leave it to the jury to decide who is an addict and who is a user. 5 AA 9-7. As the instruction that was given increased the prosecution's burden of proof beyond the silence proposed by Hager, it is difficult to see how he could be prejudiced by that increased burden.

Hager argues that the court erred in using the definitions taken from Nevada statutes relating to drug courts. *See* NRS 458.290. The argument asserts that by including the phrase "as used in" certain statutes, the Legislature clearly intended that the definition would not be applied to any other situation. In contrast, Hager asked the court to use the definition from Federal administrative law, in 27 CFR 478.11. The State notes that the regulation begins with the same limitation, "when used in this part. . . ." Why that would be more applicable than a Nevada statute is a bit unclear.

The State concedes that the terms "addict" and "user" could be defined in many ways, and that they could also be left undefined, to let the jury use the common meaning. Indeed, one court cited in the Opening Brief ruled just that way, holding that the term "addicted" was sufficiently clear to obviate the need for any additional definition. *United States v. Grover*, 364 F. Supp. 2d 1298, 1302 (D. Utah 2005). One could also use common medical terminology (although the Diagnostic and Statistical

Manual defines "dependence," not "addiction.") One could use the various definitions used in 12 step groups such as Narcotics Anonymous, although it seems unlikely that the Legislature intended such a definition. Using the definition in NRS 458.290 has the advantage of having been approved by the Nevada Legislature. In addition, using the definition of NRS 458.290 would seem to comport with the meaning of the term in common usage. So, the State contends that the portion of the instruction defining an addict was not error, and certainly not prejudicial error.

Hager also seems to suggest that a "user" must be using "regularly" for some unknown period. He relies, again, on federal law, as set out in *Grover, supra*. That additional verbiage does not seem to be any more useful or definite, and it is not supported by any Nevada laws.

4. The District Court Did Not Err to the Prejudice of Appellant by Giving Instruction 18.

Hager next turns to instruction 18. That instruction concerned one who has been adjudicated mentally ill. The argument in the district court was such that the instruction should be the same as is used in federal courts. The State merely notes that the federal statute on the subject is different from the Nevada statute. NRS 202.360 uses this language: "has been adjudicated as mentally ill *or* has been committed to any mental

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health facility by a court of this State, any other state or the United States" (emphasis added). In contrast, the relevant federal law refers to those who have been determined to be mentally "defective." 18 U.S.C.A. § 922(g)(4). That is reason enough to conclude that they are not the same.

The instruction defining "mental illness" was taken verbatim from NRS 433.164. Although other definitions might be available, including the common understanding, it seems wise to use the more restrictive definition enacted by the Legislature in that statute.

The suggestion that the court should limit the term "adjudicated" to final-appealable judgments has no support in the language of any statute. If the Legislature wanted to enact such a law, they could have. But, they have not. Indeed, in a related but not quite applicable decision, *Vu v. Second Judicial District Court*, 132 Nev. Adv. Op. 21, 371 P.3d 1015 (2016), this Court held that a district court must transmit an order of commitment to the Central Repository for Nevada Records of Criminal History even before the order of commitment is final. The reasoning should apply here as well.

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5. The Court Did Not Abuse its Discretion in Admitting Video Recordings.

Prior to trial, there was some litigation concerning various video recordings of Hager. Those recordings of Hager were made by Hager. Those recordings do not seem to be included in the appendix. If they are not, then the Court may disregard the argument. *See Carson Ready Mix v. First National Bank of Nevada*, 97 Nev. 474, 635 P.2d 474 (1981) (appellant has the burden of providing this Court with an adequate record).

Prior to trial, the district court judge initially ruled that the videos would be excluded as being more prejudicial than probative. After the defendant testified, the court reconsidered that ruling and determined that Hager had "opened the door" and put the contents of the videos at issue. Now, on appeal, the focus of the argument is based on the notion that the analysis changed when counsel asked Hager if the failure of police officers to keep in touch with him was his own doing. The argument seems to be based on the unspoken premise that a pretrial ruling *in limine* is carved in stone and a court may not revisit the issue without good cause. There is no such rule of law. Instead, a district court judge may simply change his/her mind as the trial progresses. *See* discussion in *Richmond v. State*, 118 Nev. 924, 59 P.3d 1249 (2002).

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Evidentiary issues concerning the relative degree of prejudice and probative force are addressed to the sound discretion of the district court. *Colon v. State,* 113 Nev. 484, 491, 938 P.2d 714, 719(1997). The circumstances that led to the investigation might never have been known to the jury, as the district court originally ruled, but when counsel suggested that there was something to be interested in, the court did not err in allowing that subject to be explored with the videos.

During the examination of Hager, there was a concerted effort to portray him as a responsible gun owner who was just victimized by an uncaring police agency. *See e.g.*, 4 AA 724 (history of responsible gun use as a bounty hunter); 4 AA 726 (gun safety training); 4 AA 751 (opinion on negligent investigation by police); 4 AA 753 (testimony of sending links to videos to Detective Johnson); 4 AA 761 (Hager claims that simulating ingesting a large quantity of methamphetamine was just "theatrics."); 4 AA 776 (suggesting negligence by Detective in refusing to investigate). That latter comment, suggesting that there was something wrong with Detective Johnson not initiating more contact with Hager, that alone, would call for contrary evidence showing that the detective chose not to continue contact with Hager due to his threats. *See also,* 4 AA 771 (making the point of the defendant having a bible with him in a video). The defendant

acknowledged that the lack of additional contact with police was his own doing, but when that is coupled with the other testimony attempting to establish that he was just trying to expose the negligence of the police, the district court did not err in allowing the prosecutor to dispel the notion of retribution by an uncaring police department. That is, because of the way that Hager chose to testify, the probative value of his threats, leading to the investigation, greatly increased. When one tries to bring in nullification, tries to appeal to the jury's outrage about this poor man when he claims he was just trying to get an investigation going, one does so at the risk that the court will allow evidence to negate the attempt at nullification.

IV. CONCLUSION

Hager was fairly tried and convicted. The judgment of the Second Judicial District Court should be affirmed.

DATED: October 12, 2017.

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By: TERRENCE P. McCARTHY
Chief Appellate Deputy

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Georgia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: October 12, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on October 12, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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