

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

JASON JEROME BOLEN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

Docket No. 79715

Appeal from a Judgment of Conviction
Following a Jury Trial and Verdict
Eighth Judicial District Court, Clark County
The Honorable Richard F. Scotti, District Judge
Case No. C-18-334635-1

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed pursuant to that rule. These representations are made so that the justices of this Court may evaluate any potential conflicts warranting disqualification or recusal.

1. Attorney of Record for Appellant:
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2. Publicly-held Companies Associated:
 - a. N/A
3. Law Firm(s) Appearing in the Court(s) Below:
 - a. Clark County District Attorney
 - b. Law Office of Benjamin Nadig, Chtd.

DATED this 10 of August, 2020.

/s/ Ben Nadig

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JURISDICTIONAL STATEMENT

This is an appeal from a jury trial and verdict before the Honorable Richard Scotti in the Eighth Judicial District Court and the subsequent Judgment of Conviction. (3 Appellant's Appendix [AA] 135–37.) This Court has jurisdiction to hear this appeal pursuant to NRS 177.015(3), which provides for the right to appeal a final judgment in a criminal case.

ROUTING STATEMENT

This appeal is presumptively retained by the Supreme Court because it relates to convictions for, *inter alia*, category B felonies. NRAP 17(b)(2)(A).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The district court erred when it permitted the State to file an Information by affidavit because the justice court was within its power to dismiss this case.

There was insufficient evidence to support the jury's verdict of guilt on these charges given the inherent unreliability of the only witness to identify Mr. Bolen.

STATEMENT OF FACTS

The facts that follow are those presented by the State at trial. At around 8:00 AM on July 1, 2018, Las Vegas Metropolitan Police Officer Kevin Shackaford was on duty and responded to a report of a shooting at 2883 Wheelwright in Las Vegas, Clark County, Nevada. (1 AA 200:9–201:9.) On arrival, the suspect was already gone. (*Id.* at 201:10–11.) Detective Ken Krm-potich testified that at the scene officers recovered eight spent shell casings. (2 AA 120:9–122:2, 126:7–9.)

Bryson Martinez testified at the preliminary hearing, but not at trial; his preliminary hearing testimony was read into the record. (1 AA 208:19–210:9.) On July 1, 2018, he testified he was at his ex-girlfriend Brandi Coleman’s house along with his brother Brenton Martinez and Brandi’s young daughter Sanyleh. (*Id.* at 210:18–211:13.) That day Brenton and Bryson had been smoking marijuana and drinking alcohol. (*Id.* at 211:21–24, 218:7–11.) Bryson was inside and Brenton was outside when Brenton was shot. (*Id.* at 211:25–212:7.) Bryson heard multiple gunshots but wasn’t sure if they were coming into the house. (*Id.* at 212:23–11.) Bryson gave a statement to police that he fabricated. (*Id.* at 214:25–215:14.)

Joshua Knowlton testified that on July 1, 2018, he was in his apartment at 4581 Carriage Park Drive, near Wheelwright, around 8 or 9 o’clock in the

morning when he heard a couple of gunshots and then saw a black male running across the apartment complex. (2 AA 56:16–57:5.)

Brenton Martinez testified that on July 1, 2018, he was at 2883 Wheelwright Drive with his brother Bryson Martinez, Bryson’s girlfriend Brandi, Brandi’s cousin, and Brandi’s daughter. (*Id.* at 99:14–101:7.) Brenton testified that he was outside with his brother when he got shot. (*Id.* at 101:19–102:11.) Brenton heard about three shots. (*Id.* at 106:25–107:4.) Brenton identified Mr. Bolen as the shooter. (*Id.* at 110:12–111:1.) Brenton did not identify Mr. Bolen as the shooter at the preliminary hearing. (*Id.* at 111:3–20.)

STATEMENT OF THE CASE

On August 22, 2018, the Las Vegas Township Justice Court dismissed a criminal complaint in case number 18F12217X against Appellant Jason Bolen (incorrectly styled Jason Bolden) after finding that there was insufficient evidence to support an identification of Mr. Bolen as the shooter. (1 AA 1, 18–20.) The State subsequently filed a Motion for Leave to Amend Information by Affidavit in District Court case number C-18-334635-1 on September 5, 2018. (*Id.* at 33.) The State then filed its Information on December 6, 2018, charging Mr. Bolen with four counts of attempt murder with use of a

deadly weapon; one count of ownership or possession of firearm by prohibited person; seven counts of discharging firearm at or into occupied structure, vehicle, aircraft, or watercraft; and one count of battery with use of a deadly weapon. (*Id.* at 68–71.) The State filed an Amended Information on the eve of trial for the purposes of bifurcating the count of ownership or possession of firearm by prohibited person. (*Id.* at 73–76.)

Trial commenced on May 28, 2019. (*Id.* at 78.) On May 30, 2018, the jury returned verdicts of guilty on all charges. (3 AA 66:18–68:7, 87–91.) On July 23, 2019, the district court sentenced Mr. Bolen as to the attempt murder charges to four consecutive terms of twenty years with parole eligibility after four years, each with consecutive time for the deadly weapon enhancement of twenty years with parole eligibility after three years. (*Id.* at 132:16–133:23, 136–37.) The other charges were ordered to run concurrent, for an aggregate total of 336 to 1920 months. (*Id.*) Mr. Bolen filed his notice of appeal on September 24, 2019. (*Id.* at 138.) This appeal follows.

SUMMARY OF THE ARGUMENT

The district court erred when it found that the justice court egregiously erred in dismissing the case against Mr. Bolen, as the justice court acted within its power to weigh the credibility of the witnesses presented.

There was insufficient evidence to support the jury's verdict because the only witness to identify Mr. Bolen was intoxicated at the time of the event and admitted to lying on the stand.

ARGUMENT ON THE ISSUES

I. The District Court Erred When it Granted the State Leave to File an Information by Affidavit.

The Las Vegas Township Justice Court dismissed the criminal complaint against Mr. Bolen after finding that there was insufficient evidence to support an identification of Mr. Bolen as the shooter. (1 AA 1, 18–20.) The State subsequently filed a Motion for Leave to Amend Information by Affidavit in the district court. (*Id.* at 33.) The State's motion did not comport with the plain reading of the statute governing filing an information by affidavit, and the district court erred in granting the motion given that the justice court did not commit egregious error by dismissing the charges.

Article I, section 8 of the Nevada Constitution provides that “no person shall be tried for a capital or other infamous crime . . . except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney” The purpose of a preliminary hearing is to determine whether there is slight or marginal evidence that a crime was committed and that the defendant committed that crime. *Sheriff v. Hodes*, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980).

Nevada Revised Statute 173.035(2) allows for filing of an information by the State’s motion “upon affidavit of any person who has knowledge of the commission of an offense, and who is a competent witness to testify in the case” An information by affidavit may be filed to correct a magistrate’s egregious error in discharging a defendant, but not to correct deficiencies in evidence at a preliminary hearing. *State v. Sixth Judicial Dist. Ct.*, 114 Nev. 739, 741–42, 964 P.2d 48, 49 (1998). Despite the State’s argument to the contrary in its motion, Nevada case law does not clearly hold that “the ultimate question of credibility of witnesses must be left to the trier of fact and not the magistrate.” (See 1 AA 40:25–27 (citing *Wrenn v. Sheriff*, 87 Nev. 85, 482 P.2d 289 (1971))). Quite to the contrary, this Court has held that “it is the function of the magistrate to determine the weight to be accorded to the testimony of the witnesses.” *Wrenn*, 87 Nev. at 87, 482 P.2d at 290.

Appellate courts review a district court’s determination of egregious error in determining probable cause de novo. *Moultrie v. State*, 131 Nev. 924, 929, 364 P.3d 606, 610 (2015). This Court has held that plain or constitutional errors are subject to review even absent a contemporaneous objection. See, e.g. *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986); *McCullough v. State*, 99 Nev. 72, 74, 657 P.2d 1157, 1158 (1983).

When the State filed its motion for leave to file by affidavit, it did so based purely on the preliminary hearing transcript. This does not comport with the plain reading of the statute requiring an affidavit. Furthermore, the State did not establish that the justice court egregiously erred by finding the witnesses to be incredible, as weighing the credibility of witnesses is one of the core functions of a magistrate at preliminary hearing. *See Wrenn*, 87 Nev. at 87, 482 P.2d at 290. For these reasons, Mr. Bolen would ask this Court to reverse the decision of the district court and remand with instructions to vacate the conviction and sentence and to dismiss this case.

II. The Jury Verdict Was Not Supported by Sufficient Evidence.

Brenton Martinez testified that he was outside of 2883 Wheelwright Drive with his brother when he got shot. (3 AA 99:14–102:11.) Brenton identified Mr. Bolen as the shooter at trial, but did not identify Mr. Bolen as the shooter at the preliminary hearing. (*Id.* at 110:12–111:20; 1 AA 2.) Brenton was also under the influence at the time of the shooting. (1 AA 3, 211:21–24, 218:7–11.) Brenton’s lying under oath renders his testimony incredible, and no reasonable juror would have found Mr. Bolen guilty based on that identification.

A defendant in a criminal action is entitled to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States

Constitution. The Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970); *Edwards v. State*, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974). In reviewing an insufficiency of the evidence claim, a court must determine whether, viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). A verdict will be upheld only if supported by “substantial evidence.” *Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 937 (1978).

There was no “substantial evidence” presented to indicate that Mr. Bolen was the shooter. Instead, the State presented the in-court identification of a demonstrable liar, knowing full well that Brenton either had perjured himself previously or was going to do so. In either case, Brenton’s identification by itself is not substantial evidence, as no reasonable juror could have believed Brenton. It is telling that a reasonable jurist had already found Brenton’s testimony to be unreliable. *See supra* section I. For these reasons, Mr. Bolen would ask this Court to vacate the judgment of the district court.

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CONCLUSION

For these reasons, Mr. Bolen would ask this Court to reverse the decision of the district court and remand this case with instructions to vacate the conviction and sentence and to dismiss this case.

DATED this 10 of August, 2020.

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ATTORNEY’S CERTIFICATE OF COMPLIANCE

I certify that I have read this brief and, to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I certify that this brief is typed in 14-point Georgia font using Microsoft Word 2016, is 16 pages and 2550 words long, and complies with the typeface and -style requirements of NRAP 32(a)(4)–(6), as well as the page length requirements of NRAP 32(a)(7)(A). I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure and/or subsequent orders of this Court and with NRAP 28(e), which requires every assertion in the brief regarding matters in the record be supported by a reference to a page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10 of August, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 10 of August, 2020, I served this document on the following:

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AFFIRMATION

Pursuant to NRS 239B.030, this document contains no social security numbers.

/s/ Ben Nadig

Ben Nadig

8-10-20

Date