IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID LEON SMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 53181

FILED

SEP 09 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of pandering. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Sufficiency of the evidence

Appellant David Smith contends that insufficient evidence supports his conviction. We disagree because, when viewed in the light most favorable to the State, the evidence adduced at trial was sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). During recorded phone calls between Smith and Andrea Vernon, Vernon indicated that she was "working" and walking down the street, that people pulled over to talk to her, and commented that she did not want "them" to notice her and take her to jail. Smith made comments directing Vernon where to place herself, advising her when police were likely to come out, encouraging her to make as much money as she could that day, and indicating that Vernon should not take clients who did not want to use condoms, among other

things. From this evidence, a rational juror could have concluded that Smith was guilty of pandering. See NRS 201.300(1)(a); see also Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Jail calls

Smith contends that the district court erred by denying his motion to suppress the jail calls between himself and Vernon. We review the district court's decision to admit or suppress evidence for an abuse of discretion. Zabeti v. State, 120 Nev. 530, 535, 96 P.3d 773, 776 (2004).

First, Smith asserts that his and Vernon's statements on the calls were inadmissible hearsay. See NRS 51.035. We disagree. Smith's own statements are not hearsay pursuant to NRS 51.035(3)(a), and Vernon's statements were not introduced to prove the truth of the matter asserted, but to provide context for Smith's statements, see NRS 51.035; Wade v. State, 114 Nev. 914, 918, 966 P.2d 160, 162-63 (1998) (recorded statements of an unavailable confidential informant offered for the limited purpose of providing a context for the defendant's statements on the same recording are not hearsay), modified on denial of rehearing by 115 Nev. 290, 986 P.2d 438 (1999); U.S. v. Hicks, 575 F.3d 130, 143 (1st Cir. 2009) cert. denied, 558 U.S. ___, 130 S. Ct. 647 (2009); United States v. Price, 792 F.2d 994, 996 (11th Cir. 1986).

Second, Smith contends that the district court erred in admitting the calls because they were more prejudicial than probative. See NRS 48.035(1). The calls were highly relevant to establish the charge, and we note that the parts of the calls which implicated Smith in other crimes were redacted. Accordingly, we conclude that the district court did not abuse its discretion in this regard.

Third, Smith contends that the district court erred by admitting the calls because the use of Vernon's statements violated his right to confrontation. See Crawford v. Washington, 541 U.S. 36 (2004). Whether a defendant's Confrontation Clause rights were violated is a question of law subject to de novo review. Chavez v. State, 125 Nev. ___, ___, 213 P.3d 476, 484 (2009). Considering the totality of the circumstances surrounding the statements, we conclude that Vernon's statements were not testimonial in nature. See Harkins v. State, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006); Davis v. Washington, 547 U.S. 813, 826-28 (2006). Accordingly, we conclude that the Confrontation Clause does not apply to Vernon's statements and the district court did not err. See Pantano v. State, 122 Nev. 782, 789, 138 P.3d 477, 481 (2006) (the Confrontation Clause requires cross-examination if the hearsay statements of an unavailable declarant are testimonial in nature).

Pretrial petition for writ of habeas corpus

Smith asserts that the district court erred by denying his pretrial petition for a writ of habeas corpus because insufficient evidence was presented to establish probable cause. We disagree because the testimony given at the preliminary hearing was sufficient to establish slight or marginal evidence that Smith committed pandering. See Sheriff v. Hodes, 96 Nev. 184, 186, 606 P.2d 178, 180 (1980). Detective Christopher Baughman testified regarding the content of the jail calls; that on the calls, Vernon stated she was "out here working," and that a man was asking about "doing it" without a condom. Smith advised her to stay away from certain areas where she had been stopped by police before,

referred to "our business," and told her to make all the money she could that day.

Smith further contends that the evidence adduced was not sufficient to establish probable cause because Vernon's statements were inadmissible hearsay. As discussed above, Vernon's statements are not hearsay. Further, although Smith complains that he was not permitted to cross-examine Vernon at the preliminary hearing, there is no Sixth Amendment right to confrontation at a preliminary examination. Sheriff v. Witzenburg, 122 Nev. 1056, 1061, 145 P.3d 1002, 1005 (2006). Finally, we note that any irregularities occurring during the preliminary hearing were cured when Smith was convicted by a jury under a higher standard of proof. Cf. Dettloff v. State, 120 Nev. 588, 596, 97 P.3d 586, 591 (2004) (holding that conviction by a jury "under a higher standard of proof cured any irregularities that may have occurred during the grand jury proceedings"). Accordingly, we conclude that Smith has failed to demonstrate that relief is warranted.

Testimony of Thomas Kimmel

Smith contends that Kimmel's testimony should have been excluded because it could have led the jury to believe that Smith had previously engaged in criminal activity.[1] We agree that Kimmel's testimony could have led a reasonable juror to believe that Smith engaged

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[1]Smith also asserts that Kimmel's testimony was not relevant to the crime charged. However, Smith does not cite to any authority and offers no argument in support of this assertion. Accordingly, we decline to address it. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

in prior criminal conduct. See Thomas v. State, 114 Nev. 1127, 1142, 967 P.2d 1111, 1121 (1998). However, the district court held a Petrocelli hearing regarding the admission of the testimony and determined that the evidence was admissible. See Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 1334, 930 P.2d 707, 711-12 (1996), on reh'r, 114 Nev. 321, 955 P.2d 673 (1998); Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997). Smith does not challenge that determination on appeal. Under these circumstances, we conclude that Smith has not demonstrated that he is entitled to relief.

Expert testimony

Smith asserts that the district court erred by admitting the expert testimony of Detective Fieselman because he was not qualified to testify as an expert. The record reflects that Fieselman had extensive training and experience regarding pimps and prostitutes. Accordingly, we conclude that the district court did not abuse its discretion by allowing Fieselman to testify as an expert on this subject. See NRS 50.275; Rudin v. State, 120 Nev. 121, 135, 86 P.3d 572, 581 (2004) (it is within the district court's discretion to qualify a witness as an expert).

Smith also asserts that the district court erred in admitting Fieselman's testimony because the "'prostitution subculture' is within the understanding of the average juror." We discern no abuse of discretion in this regard. See Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987) (expert testimony is appropriate if it provides the jury with information "outside the ken of ordinary laity").

Cumulative error

Smith contends that the cumulative effect of errors denied him his right to a fair trial. As Smith has failed to demonstrate any error, we conclude that this claim lacks merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Eighth Judicial District Court Dept. 7, District Judge
Bush & Levy, LLC
David Leon Smith
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk