IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HAROLD ROBERT WHITNEY, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70073

ORDER OF AFFIRMANCE

Harold Robert Whitney, Jr. appeals from a judgment of conviction, pursuant to a jury verdict, of attempted burglary. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

At trial, the State alleged that Whitney attempted to stealthily enter the victims' garage by covering certain outdoor motion sensor lights with clothing and prying open the garage door.[1] On appeal, Whitney argues that there was insufficient evidence showing that he was present during the attempted burglary.[2] Specifically, he contends that a rational trier of fact could not have found that he placed a beanie and a sweatshirt over the sensor lights. I disagree.[3]

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[1]I do not recount the facts except as necessary to this disposition.

[2]Whitney's argument addresses only the supposed lack of evidence showing that he was present during the attempted burglary. He does not otherwise argue that the State failed to prove the essential elements of that offense.

[3]Furthermore, any alleged error in denying Whitney's pretrial petition for writ of habeas corpus does not warrant reversal. *See Ex parte Deny*, 10 Nev. 212, 213 (1875) ("The petition [for writ of habeas corpus] should state facts sufficient to make out a *prima facie* case. . . . [I]f it appears from the petitioner's statement that there is no sufficient ground

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In reviewing a challenge to the sufficiency of the evidence supporting a criminal conviction, this court considers "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." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)) (internal quotation marks omitted).

Here, an expert witness testified that Whitney was the "single contributor" of the DNA detected in the beanie, and that Whitney's profile was the "dominant component" of the DNA obtained from the sweatshirt. Further, the expert concluded that based on the amount of DNA that she detected on these items, Whitney had worn them.[4] Moreover, a detective

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for his discharge the court should not issue the writ."); *cf. Dettloff v. State*, 120 Nev. 588, 595-96, 97 P.3d 586, 590-91 (2004) (footnote omitted) (concluding that "the jury['s] convict[ion] [of] [the defendant] under a higher burden of proof cured any irregularities that may have occurred during the grand jury proceedings").

[4]The expert further testified that although the sweatshirt also contained a small amount of DNA that may have belonged to another individual, the amount was insufficient to suggest that someone else had worn it. Moreover, she testified that the frequency of occurrence of the DNA profile from the beanie, the dominant component from the sweatshirt, and Whitney's sample "is approximately 1 in 1.344 quadrillion individuals."

Additionally, Whitney's challenge to the admissibility of this DNA evidence fails because he does not contest the district court's finding that the police inevitably would have obtained a sample of his DNA. *See Camacho v. State*, 119 Nev. 395, 402, 75 P.3d 370, 375 (2003) (footnote omitted) (quoting *Proferes v. State*, 116 Nev. 1136, 1141, 13 P.3d 955, 958 (2000)) (internal quotation marks omitted) ("The inevitable discovery rule

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testified that Whitney indicated that he was familiar with the victims' neighborhood, regularly visited a casino near the victims' residence, and used a travel route that passed by their home. Furthermore, although Whitney may have made pretrial statements that were inconsistent with the evidence presented at trial, I need not determine the legal significance of those statements. A rational trier of fact could find that Whitney was present and placed the two articles of clothing over the victims' sensor lights.[5] We

ORDER the judgment of the district court AFFIRMED.

_____, J.
Gibbons

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provides that evidence obtained in violation of the Constitution [can] still be admitted at trial[.]").

[5]Whitney also argues that the State failed to prove that he committed other offenses at the victims' residence on other dates, but any such failure would not undermine his attempted burglary conviction. Furthermore, Whitney's reliance on *Barber v. State*, 131 Nev. ___, 363 P.3d 459 (2015), is misplaced because that decision concerned whether a defendant's palm print on the exterior of a structure constituted sufficient evidence of entry, which Whitney concedes is not an essential element of attempted burglary. *See id.* at ___, 363 P.3d at 464-65. Lastly, I have carefully considered Whitney's other arguments and conclude that they are without merit.

SILVER, C.J., concurring:

I concur in the result only.

Silver, C.J.

TAO, J., concurring:

I concur in the judgment, albeit for perhaps slightly different reasons than articulated by my colleagues.

I.

Every criminal trial stands at the nexus of the three branches of our constitutional system of government: the legislative, tasked with defining the elements of a crime and the rules of evidence to be followed at trial (but not prosecuting the crime); the executive, tasked with charging and prosecuting the crime (but not writing the statutes defining what conduct can constitute a crime); and the judicial, tasked with interpreting the rules of the trial and ensuring that they are followed without passion or prejudice (but not either writing the laws or prosecuting the crime). *See* Nev. Const. art III, §1 ("The powers of the Government of the State of Nevada shall be divided into three separate departments, the Legislative, the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.").

The division of these powers into separate and co-equal branches with the power to check-and-balance each other has proven to be

the greatest guarantee of freedom, and most secure bulwark against tyranny, known to human history. The essential hallmark of a despot is the power to arbitrarily determine the scope of the rights that citizens possess at any moment. There have been historical epochs during which certain tyrants have graciously granted long lists of rights to subjects, lists that have been arguably as long as, or even longer than, those enumerated in our Bill of Rights. But what can be given with one hand can be just as easily taken away with the other, and history demonstrates that the generosity of dictators runs only so far.

Thus our founders considered structural limits on the exercise of power—including dividing power not only into separate branches but also among fifty sovereign states along with the federal government—to be a far stronger and more lasting protector of liberty than depending on the kindness of the powerful. Under our system, no one branch of government can unilaterally deprive a citizen of his or her liberty; deprivation requires a delicate balance between the actions of all three. But that balance can be easily upset, and appellate courts must always be aware of the limits of their own role in our constitutional framework so as not to exceed our bounds, as well as constantly vigilant against potential excesses by our sister branches.

For example, if the legislative branch writes a statute that is unconstitutionally vague, imposes *ex post facto* punishment, or is directed at penalizing the exercise of free speech, then the balance is upset and courts ought to step in and say so. If the executive branch commits prosecutorial misconduct, engages in race-based selective prosecution, or hides evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), then the balance is upset and courts ought to step in and say so. If the judicial

branch overreaches by engaging in legislative functions by rewriting statutes, engaging in executive functions by acting as the prosecutor in violation of *Azbill v. State*, 88 Nev. 240, 495 P.2d 1064 (1972), or fails in its own duty by admitting improper evidence or permitting biased jurors to be seated in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), then the balance is upset, and appellate courts ought to step in. Only when the proper balance is struck and each branch operates within its legitimate constitutional limits is the government entitled to deprive a defendant of liberty.

II.

The appeal at hand is framed narrowly and on its face appears to raise no overt constitutional arguments: for example, Whitney doesn't allege that he was convicted under an unconstitutional statute; that any *Brady* or *Batson* violation occurred; or that the prosecutor committed misconduct. But there's frequently more than meets the eye in criminal appeals.

Whitney raises three arguments: that the district court erred in refusing to suppress his DNA swab; that the district court erred in refusing to grant a pre-trial petition for writ of habeas corpus; and that the evidence introduced at trial was insufficient, as a matter of law, to sustain his conviction for attempted burglary. The first argument is easily disposed of based upon the clear factual findings made by the district court to which we must give deference on appeal, and the second argument is resolved by the principle that a pre-trial challenge to the sufficiency of the evidence is subsumed by a later conviction by a jury based upon the same evidence.

To me, the more interesting question is whether the prosecutor introduced sufficient evidence to prove each and every element set forth in the statutes defining the crime of attempted burglary. By issuing its verdict, the jury found that the prosecutor did. That finding constricts the scope of our review on appeal: we can reverse only if, 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. *See Gaxiola v. State*, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005).

Implicit in this principle is the idea that our review is not strictly limited to only the specific evidence (witness statements and documents) actually admitted. It also reaches to encompass any inference that can reasonably be made based upon that evidence. The intellectually complex question in every case like this is how far a jury can go in making leaps before an inference becomes "irrational" or "unreasonable," and how far a reviewing court can go to say that an inference was one that only an "irrational" jury could have made even though this particular jury made it. We ought to give a wide berth to juries on questions like this, because giving too little leeway comes perilously close to just retrying the case ourselves on appeal and substituting our views for those of the jury whom I assume, as a first principle, to be generally no less wise or insightful (and perhaps much more so) about human behavior and the interpretation of factual events than we are.

The case at hand is made of inferences. Whitney wasn't caught at the scene red-handed, no eyewitness saw him commit the crime, and he never confessed to the crime. Rather, Whitney's DNA was found on clothes used at the scene to cover up motion-sensor lights that would

have illuminated the crime (and might have prevented it), he matched the description of the intruder, and he was proven to be well-acquainted with the neighborhood. When asked to describe his whereabouts at the time of the crime or to explain how his clothes ended up where they were, he gave a number of conflicting and inconsistent explanations, some of which were directly contradicted by other witnesses.

With all of this in hand, I'd say that the jury acted rationally and reasonably in concluding that Whitney was the perpetrator. The clothes alone are enough for me; if there's no other explanation the jury was willing to accept as to how Whitney's clothes ended up being used as an essential tool in the commission of this crime, then the jury had enough to convict. It's true that there may exist other theoretical explanations for how the clothes ended up at the scene, such as, for example, that someone else found clothes that Whitney recently wore somehow lying around in the street and used them to commit the crime without his knowledge. But sorting out which of two plausible explanations ought to be more believable than the other is the classic example of the very thing we employ juries to do; and that's before we even get to his shifting and inconsistent explanations and attempts at an alibi, all of which the jury was entitled to reject wholesale and, even more, conclude were reflections of consciousness of guilt.

Cases occasionally arise in which a chain of inferences appears so unlikely that it becomes our constitutional duty to find that the prosecutor hasn't quite accomplished his job and to reverse the conviction. *See Barber v. State*, 131 Nev. ___, 363 P.3d 459 (2015). When we review those cases, we ought to be exceedingly careful and tread lightly because they can pit the jury's view of things against what the judicial mind

assumes that a jury ought to find "rational" and "reasonable." But that's a question for another day, because this case isn't one of those.

Tao, J.
Tao

cc: Hon. Alvin R. Kacin, District Judge
Lockie & Macfarlan, Ltd.
Attorney General/Carson City
Elko County District Attorney
Elko County Clerk