IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT ELDRIDGE RAGAN,
Appellant,
vs.
WARDEN, NEVADA STATE PRISON,
JOHN IGNACIO,
Respondent.

No. 37148

FILED

AUG 2 9 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is a proper person appeal from an order of the district court denying appellant's post-conviction petition for a writ of habeas corpus. On March 23, 1999, appellant Robert Eldridge Ragan was convicted pursuant to a jury verdict of one count of attempted sexual assault and one count of burglary.[1] A panel of this court dismissed appellant's direct appeal, specifically rejecting appellant's contention that insufficient evidence supported his conviction of attempted sexual assault.[2] Thereafter, appellant filed a timely proper person post-conviction petition for a writ of habeas corpus challenging his conviction in the district court. The district court denied appellant's petition without appointing counsel to represent appellant or conducting an evidentiary hearing.[3] This appeal followed.

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[1]The district court sentenced appellant to serve consecutive terms in the Nevada State Prison of eight to twenty years for attempted sexual assault, and four to ten years for burglary. On June 30, 1999, the district court entered an amended judgment of conviction adding a special sentence of lifetime supervision.

[2]Ragan v. State, Docket No. 33957 (Order Dismissing Appeal, May 25, 2000).

[3]See NRS 34.750; NRS 34.770.

We agree with appellant's contention in his post-conviction petition that the panel misapplied the law in rejecting his insufficient evidence claim on direct appeal. Therefore, we reverse and remand this matter to the district court with instructions to vacate appellant's conviction of attempted sexual assault.

Appellant claimed in his petition below that this court had misapplied the law in deciding his direct appeal and that, as a matter of law, the evidence presented at his trial did not support a finding that he committed all of the elements of attempted sexual assault. We agree.

In rejecting appellant's insufficient evidence claim on direct appeal, the panel described the evidence supporting appellant's conviction as follows:

> [A]ppellant entered a women's restroom, looked over the stall at the partially-disrobed victim, and then violently shook the victim's stall's door in an apparent attempt to gain entry to the stall. Appellant fled as the victim screamed for help.[4]

Based upon this evidence, the panel concluded, "[t]he jury could reasonably infer from the evidence presented that appellant intended to commit sexual assault upon the victim."[5] Having thoroughly reviewed the record, we now conclude that the evidence presented at appellant's trial was insufficient to support the attempted sexual assault conviction as a matter of law.

NRS 200.366(1) provides in pertinent part:

> A person who subjects another person to sexual penetration, or who forces another person to make

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[4]Ragan v. State, Docket No. 33957 (Order Dismissing Appeal, May 25, 2000).

[5]Id.

> a sexual penetration on himself or another . . . against the will of the victim . . . is guilty of sexual assault.

Because appellant was charged with attempted sexual assault, the State was required to prove, in addition to these elements, that appellant not only had the specific intent to subject the victim to penetration as defined by the statute, but that he committed an act tending, but failing, to accomplish that act.[6] We discern no evidence in this record that appellant specifically intended to penetrate the victim sexually, or that he committed an act tending, but failing, to accomplish such an act of penetration. The evidence presented at appellant's trial was not sufficient to support a reasonable inference that appellant possessed the mens rea and committed the acts necessary to establish the essential elements of the crime. To the contrary, "[a]ny inference as to appellant's specific intent must have been based on unbridled speculation."[7]

In our view, appellant's conviction of attempted sexual assault under these circumstances constitutes a fundamental miscarriage of justice; the application of any procedural bars precluding reconsideration of this claim in the instant proceeding would merely perpetuate that injustice. Recently, in Leslie v. Warden, a majority of this court did not hesitate to reach and resolve a procedurally barred claim on the merits when the failure to do so would have resulted in a fundamental miscarriage of justice.[8] In this case, where it is clear from the record that

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[6]See NRS 193.330(1) (an "attempt" under Nevada law is "[a]n act done with the intent to commit a crime, and tending but failing to accomplish it").

[7]Burkhart v. State, 107 Nev. 797, 799, 820 P.2d 757, 758 (1991).

[8]118 Nev. ___, 59 P.3d 440 (2002) (concluding that an aggravating circumstance supporting imposition of the death penalty had been

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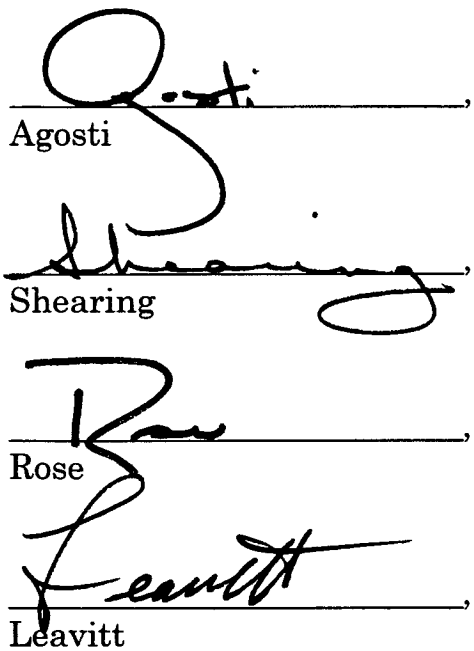
insufficient evidence supports appellant's conviction, the correction of an apparent and fundamental injustice far outweighs the judicial interests furthered by the consistent application of procedural bars.

Accordingly, we reverse the district court's order denying appellant's post-conviction petition, and we remand this matter to the district court with instructions to vacate appellant's conviction of attempted sexual assault.[9]

It is so ORDERED.



_____, C.J.
Agosti

_____, J.
Shearing

_____, J.
Rose

_____, J.
Leavitt

. . . *continued*
misapplied to the appellant on direct appeal and that application of a procedural bar to preclude reconsideration of the issue in a post-conviction proceeding would result in a fundamental miscarriage of justice).

[9]We have reviewed appellant's remaining contentions, and we conclude that they lack merit.

BECKER, J., with whom GIBBONS, J., and MAUPIN, J., agree, dissenting:

I dissent. In my view, the jury could have reasonably found, based on the evidence presented, that appellant intended to commit sexual assault. Therefore, I would affirm the district court's denial of appellant's post-conviction petition.

Becker, J.
Becker

We concur:

Gibbons, J.
Gibbons

Maupin, J.
Maupin

cc: Hon. John M. Iroz, District Judge
Robert Eldridge Ragan
Attorney General Brian Sandoval/Carson City
Humboldt County District Attorney
Humboldt County Clerk