

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAWRENCE GREEN A/K/A  
LAWRENCE DEAN GREEN,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 43721

**FILED**

**FEB 16 2006**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of two counts of burglary and two counts of grand larceny. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Lawrence Green was charged with two counts of burglary and two counts of grand larceny. A jury convicted Green on all four counts. Green was adjudicated a habitual criminal, and sentenced to four concurrent terms of life with parole eligibility after a minimum of ten years.

Green now appeals, citing improper introduction of prior bad acts, insufficient evidence to convict him of grand larceny, and abuse of discretion and bias in sentencing. Although we find some error by the district court, we conclude that those errors were harmless, and we therefore affirm the jury verdict and the sentence imposed.

Prior bad acts evidence

Green contends that his due process rights to a fair trial were violated when evidence of his prior trespass from Albertson's was introduced at trial, in direct contradiction to the previous order of the court on the State's motion to admit such prior bad acts. We disagree.

The prosecutor was present at the hearing where the original district court judge orally denied the State's motion to admit the evidence of Green's prior bad acts. It is difficult to overlook such conduct by a prosecutor; however, Green's trial counsel did not research the district court minutes and discover the oral ruling, and he failed to object to the evidence at trial.

Failure by the defense to object to the admission of testimony of uncharged bad acts generally precludes review by this court.<sup>1</sup> However, this court may address plain error and constitutional error sua sponte.<sup>2</sup> "Normally, a defendant must show that an error was prejudicial in order to establish that it affected his substantial rights."<sup>3</sup>

We conclude that the conduct of the prosecutor here does not rise to the serious and flagrant level of misconduct in Garner v. State, where this court found misconduct by the prosecution "so serious and flagrant as to require court intervention to protect the defendant's right to a fair trial."<sup>4</sup> Having found that it could consider the misconduct in Garner despite a lack of objection, this court went on to provide a general standard for determining prejudicial effect:

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<sup>1</sup>Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064 (1997); see also NRS 47.040(1).

<sup>2</sup>Dzul v. State, 118 Nev. 681, 688, 56 P.3d 875, 880 (2002); NRS 47.040(2).

<sup>3</sup>Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1131 (2001).

<sup>4</sup>78 Nev. 366, 373, 374 P.2d 525, 529 (1962).

If the issue of guilt or innocence is close, if the state's case is not strong, prosecutor misconduct will probably be considered prejudicial.

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On the other hand, if the evidence of guilt is overwhelming, the misconduct or reception of inadmissible evidence will sometimes be considered harmless.<sup>5</sup>

As to the prejudicial effect of the evidence, since the prior bad act was merely a "trespass" by store security, as opposed to any of Green's prior felony convictions, and in light of the overwhelming evidence of Green's guilt, we conclude that any prejudicial effect was minimal.

Further, we conclude that the evidence as introduced, if objected to at trial, could have been admissible under NRS 48.045(2) for the purposes of showing intent or identity, since it was mentioned in connection with one security guard who recognized Green in the store from the previous incident. The fact that Green had previously been trespassed from Albertson's was also relevant to intent, since it showed that Green knew he was not permitted in the stores.

Therefore, despite the error of the prosecutor in ignoring the prior ruling by the district court, the misconduct was, at most, harmless error, and did not interfere with Green's right to a fair trial.

#### Sufficiency of the evidence

Green argues that there was insufficient evidence as to the value of the goods taken to support the convictions for grand larceny. We conclude, however, that there was sufficient evidence presented to support the jury's verdicts.

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<sup>5</sup>Id. at 374, 374 P.2d at 530.

“The standard of review for sufficiency of evidence upon appeal is whether the jury, acting reasonably, could have been convinced of the defendant’s guilt beyond a reasonable doubt. Where there is substantial evidence to support the jury’s verdict, it will not be disturbed on appeal.”<sup>6</sup>

Under NRS 205.220(1)(a), grand larceny requires that the value of the personal property stolen exceed \$250. There was testimony that the amount from the first incident was \$352.98, and from the second incident \$305.33. The first amount had been noted on a security report, as testified to by the guard that wrote the report. That amount was corroborated by both the second guard and the store manager, who both recalled the amount being around \$350. The assistant manager who rang up the goods after the second incident testified that the amount was \$305.33; she recalled that amount from looking at a copy of the receipt that she recognized since it included her employee number.

No actual receipts were entered into evidence. However, we conclude that the evidence produced at trial was sufficient for a jury to find, beyond a reasonable doubt, that the amount of each incident exceeded the statutory minimum for grand larceny. Therefore, we affirm the jury verdicts.

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<sup>6</sup>Kazalyn v. State, 108 Nev. 67, 71, 825 P.2d 578, 581 (1992) (internal citations omitted).

## Sentencing

This court allows the sentencing judge wide discretion in sentencing, and the sentence will not be disturbed on appeal absent an abuse of that discretion.<sup>7</sup> “So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with the sentence imposed.”<sup>8</sup>

Green contends that the district court abused its discretion in adjudicating him a habitual criminal, since his prior felony convictions were remote in time and nonviolent, and further erred by failing to make particularized findings that it was “just and proper” for him to be adjudicated a habitual criminal.

“The decision to adjudicate a person as a habitual criminal is not an automatic one.”<sup>9</sup> It may be an abuse of discretion for a court to adjudicate an offender a habitual criminal if the convictions used to support that adjudication are remote in time and non-violent.<sup>10</sup> However, the statute “makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court.”<sup>11</sup> In exercising its discretion, a trial court considering habitual criminal status must make a “judgment on the

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<sup>7</sup>Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993).

<sup>8</sup>Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

<sup>9</sup>Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

<sup>10</sup>Id. (citing Sessions v. State, 106 Nev. 186, 789 P.2d 1242 (1990)).

<sup>11</sup>Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (rehearing denied March 19, 1993).

question of whether it [i]s just and proper” for the offender to be adjudicated as a habitual criminal.<sup>12</sup>

The district court judge initially adjudicated Green a habitual criminal without making any specific findings that such an adjudication was “just and proper.” However, the district court judge then went on to make specific findings as to the need for public protection from Green, how Green resorted to criminal acts soon after being released from a prior prison term, and how Green had even committed one of his felonies while in prison. Although the words “just and proper” were never used, we conclude that the district court judge did not abuse his discretion in considering Green’s prior felonies and adjudicating him a habitual criminal.

Green also claims the district court judge acted with bias and prejudice in adjudicating him a habitual criminal, thus violating NRS 1.230(1)<sup>13</sup> and requiring a new sentencing hearing.

In Cameron v. State, this court dealt with accusations of bias and prejudice by a trial judge under NRS 1.230.<sup>14</sup> This court held that such bias or prejudice was not present where there was insufficient evidence to show that the judge “had any personal feelings of animosity”

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<sup>12</sup>Clark, 109 Nev. at 428, 851 P.2d at 427.

<sup>13</sup>“A judge shall not act as such in an action or proceeding when he entertains actual bias or prejudice for or against one of the parties to the action.”

<sup>14</sup>114 Nev. 1281, 968 P.2d 1169 (1998).

toward the defendant,<sup>15</sup> or that the judge had “closed his or her mind to the presentation of all the evidence.”<sup>16</sup>

Despite the callousness of some of the statements made by the district court judge at sentencing, there was no evidence to suggest that the district court judge had closed his mind to the presentation of all the evidence. The statements were generated based on a review of Green’s criminal record, and, although harsh, did not rise to the level of “actual bias or prejudice” under NRS 1.230.

Finally, Green asserts that his sentence was inconsistent with due process of law under State v. District Court,<sup>17</sup> since the district court relied on “materially untrue assumptions” at sentencing. Green argues that those untrue assumptions were demonstrated by the several harsh statements made by the district court judge, and were unsupported by the instant offenses and Green’s criminal history.

This court has recognized that United States Supreme Court “cases clearly establish that constitutionally violative ‘materially untrue assumptions’ concerning a criminal record may arise either as a result of a sentencing judge’s correct perception of inaccurate or false information, or a sentencing judge’s incorrect perception or misapprehension of otherwise accurate or true information.”<sup>18</sup>

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<sup>15</sup>Id. at 1283, 968 P.2d at 1170-71 (“Rather, the district judge was offended by the facts of the crime committed.”).

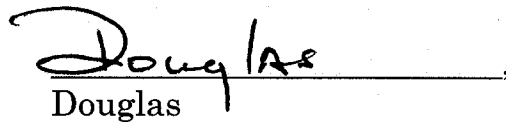
<sup>16</sup>Id. at 1283, 968 P.2d at 1171.


<sup>17</sup>100 Nev. 90, 677 P.2d 1044 (1984).

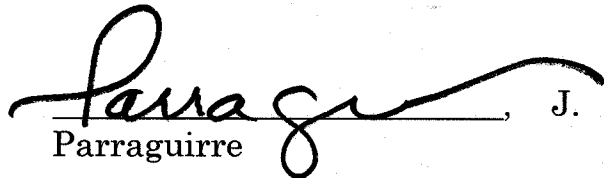
<sup>18</sup>Id. at 96, 677 P.2d at 1048 (emphasis in original).

The district court judge, when sentencing Green, resorted to some hyperbole and exaggeration in describing Green and his criminal record. However, we conclude that such exaggeration did not result from any inaccurate information provided, nor from the district court judge's misperception or misapprehension of the accurate information provided. Based on all of the above, we further conclude that the sentence given was not inconsistent with due process. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

 J.  
Douglas

 J.  
Becker

 J.  
Parraguirre

cc: Hon. Stewart L. Bell, District Judge  
Daniel J. Albregts, Ltd.  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk