IN THE SUPREME COURT OF THE STATE OF NEVADA

FILED

DAVID WILLIAM STROUSE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44565

MAY 23 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY A. Alvarado
DEPUTY CLERK

ORDER AFFIRMING IN PART, VACATING IN PART, AND REMANDING

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of two counts of robbery. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge. The district court adjudicated appellant David William Strouse a habitual criminal and sentenced him to serve two terms of life imprisonment with the possibility of parole. The district court imposed the terms to run concurrently, and it ordered that credit for time served be applied to the sentence for count one. Strouse presents four issues for our review.

First, Strouse contends that the district court erred when it denied his motion to sever count one from count two. He claims that the motion should have been granted because the victim in count one could identify him as the person who robbed her whereas the victim in count two was unable to identify the robber. And he argues that the two robberies

did not constitute parts of a common scheme or plan. We conclude that Strouse's contention lacks merit.

The joinder of offenses is proper where the activity charged is part of the same transaction or comprises a common scheme or plan.[1] The decision to sever offenses is left to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion.[2] On appeal, errors resulting from misjoinder are subject to a harmless error analysis and will be reversed "only if the error has a substantial and injurious effect or influence in determining the jury's verdict."[3]

Here, the district court denied Strouse's motion to sever after concluding that acts charged could be part of a common plan or scheme. It found that the two separate robberies which comprise counts one and two were committed within one hour of each other. The victims were both women of similar age who were alone in a parking lot. And the robber in both instances ordered his victims to give him their purses and then fled in a car. We note that in count one the robber took the victim's make-up case thinking that it was her purse, and that this failed robbery may have precipitated the robbery in count two. Given the closeness of the acts and

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[1]NRS 173.115; Gibson v. State, 96 Nev. 48, 51, 604 P.2d 814, 816 (1980).

[2]Robins v. State, 106 Nev. 611, 619, 798 P.2d 558, 564 (1990).

[3]Id. (quoting United States v. Lane, 474 U.S. 438, 450 (1985)).

the similarity of the circumstances, we conclude that the district court did not abuse its discretion.[4]

Second, Strouse contends that the evidence presented at trial was insufficient to support his conviction for robbery as alleged in count two. He claims that the victim in count two was unable to identify him as the person who robbed her and that his conviction on this count was the result of "speculation and suspicion" arising from evidence adduced in the prosecution of count one. However, our review of the record reveals sufficient evidence to establish Strouse's guilt for count two beyond a reasonable doubt as determined by a rational trier of fact.[5]

The State presented evidence that the victim in count two, Jasmine Allgood, was robbed by a tall Caucasian male, who stole her purse and fled in a beige or white foreign car that was probably made by a Japanese car company. Because Allgood's credit cards were in her purse, her husband called the credit companies and had the cards cancelled. About two hours after the robbery, Strouse attempted to use Allgood's credit cards to make a purchase in a Reno store. He was videotaped while trying to use the credit cards and the videotape was played for the jury. The following day, the Carson City Sheriff's Department impounded

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[4]See Shannon v. State, 105 Nev. 782, 786, 783 P.2d 942, 944 (1989).

[5]See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (citing Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

Strouse's car. Photographs of the car were admitted into evidence, and Allgood testified that the car depicted in the photographs was consistent with the car that she saw the robber flee in. A detective found Allgood's AT&T calling card during a search of the impounded car.

We conclude that a rational juror could reasonably infer that Strouse was the one who robbed Allgood from the evidence adduced at trial. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[6]

Third, Strouse contends that the district court erred in instructing the jury on the issue of identity. As a general rule, a defendant is entitled to jury instructions on his or her theory of the case so long as some evidence, "no matter how weak or incredible," exists to support it, and if the proposed instruction contains the correct law.[7] However, the district court may refuse jury instructions on the defendant's theory of the case which are substantially covered by other instructions.[8]

Here, the district court concluded that Strouse's proposed instructions on the issue of identity were substantially covered by other

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[6]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev at 56, 825 P.2d at 573.

[7]Brooks v. State, 103 Nev. 611, 613, 747 P.2d 893, 895 (1987).

[8]Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995).

instructions and refused to give them. We have reviewed these instructions. The instruction used by the district court is a correct statement of Nevada law,[9] and it substantially covers the instructions that Strouse proposed. Moreover, we have previously held "that specific eyewitness identification instructions need not be given, and are duplicitous of the general instructions on credibility of witnesses and proof beyond a reasonable doubt."[10] We note that the district court instructed the jury on the credibility of witnesses and on the burden of proof. We conclude that the district court did not err in refusing to give Strouse's proposed instructions.

Fourth, Strouse contends the district court erred by applying credit for time served to only one of his two concurrent sentences. We agree. Despite its discretionary language, we have determined that the purpose of NRS 176.055(1) "is to ensure that all time served is credited towards a defendant's ultimate sentence."[11] To this end, we have held that "credit for time served in presentence confinement may not be denied to a defendant by applying it to only one of multiple concurrent

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[9]See Williams v. State, 93 Nev. 405, 407, 566 P.2d 417, 419 (1977); Collins v. State, 88 Nev. 9, 13, 492 P.2d 991, 993 (1972).

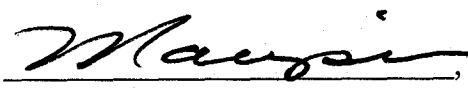
[10]Nevius v. State, 101 Nev. 238, 248-49, 699 P.2d 1053, 1060 (1985).

[11]Kuykendall v. State, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996).

sentences."[12] Based on these precedents, we conclude that the district court erred by not applying 657 days of credit for time served to both of Strouse's concurrent sentences.

Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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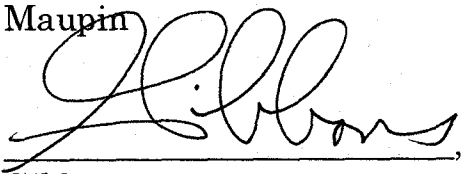
Maupin



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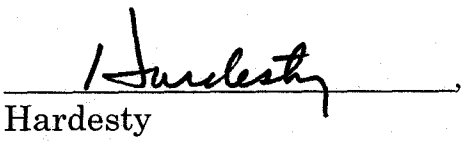

_____, J.
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cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[12]Johnson v. State, 120 Nev. 296, 299, 89 P.3d 669, 671 (2004).