

IN THE SUPREME COURT OF THE STATE OF NEVADA

EDWARD E. MORRISON,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 44719

**FILED**

MAY 19 2006

by ANETHA BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF AFFIRMANCE

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

The district court adjudicated appellant Edward E. Morrison a habitual criminal and sentenced him to a life term in prison with the possibility of parole after ten years for burglary. Morrison was also sentenced to a concurrent term of five to twenty years for petit larceny.

Morrison raises three issues on appeal. First, he argues that a comment by the district court nullified the presumption of innocence. However, he did not object to the comment. Failure to object will preclude appellate review of an alleged error unless it rises to the level of plain error.<sup>1</sup> In conducting a plain error analysis, we must consider whether error exists, if the error was plain or clear, and if the error affected the

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<sup>1</sup>See NRS 178.602; Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); Leonard v. State, 117 Nev. 53, 63-64, 17 P.3d 397, 403-04 (2001).

defendant's substantial rights.<sup>2</sup> The burden rests with Morrison to show actual prejudice or a miscarriage of justice.<sup>3</sup>

Here, while explaining the trial process, the district court initially advised the jury that after applying the law to the facts, it would decide "whether the State has met its burden in proving the defendant guilty or not guilty beyond a reasonable doubt." Every defendant is cloaked with the presumption of innocence until the contrary is proved by competent evidence beyond a reasonable doubt.<sup>4</sup> We conclude that the district court's advisement was erroneous and that it was plain and clear. However, to warrant relief, the error must affect Morrison's substantial rights. At the conclusion of the evidence, the district court properly instructed the jury:

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

The district court further instructed the jury on the statutory definition of reasonable doubt.<sup>5</sup> Despite the district court's initial erroneous advisement respecting the State's burden of proof, we conclude that this error did not affect Morrison's substantial rights in light of the district

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<sup>2</sup>See Anderson v. State, 121 Nev. \_\_\_, \_\_\_, 118 P.3d 184, 187 (2005); Kaczmarek v. State, 120 Nev. 314, 328, 91 P.3d 16, 26 (2004).

<sup>3</sup>See Green, 119 Nev. at 545, 80 P.3d at 95.

<sup>4</sup>See NRS 175.201.

<sup>5</sup>See NRS 175.211.

court's subsequent proper instructions. Therefore, we deny relief on this issue.

Morrison next asserts that the evidence is insufficient to sustain his convictions for burglary and petit larceny. The standard of review on appeal for challenges to the sufficiency of the evidence "is whether, viewing the evidence in a light favorable to the prosecution, a reasonable jury could have been convinced of the defendant's guilt beyond a reasonable doubt."<sup>6</sup> A guilty verdict will not be set aside unless no rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>7</sup> "[I]t is exclusively within the province of the trier of fact to weigh evidence and pass on the credibility of witnesses and their testimony."<sup>8</sup>

Taken into custody on suspicion in an unrelated offense, Morrison consented to a search of his backpack, which contained two women's sweat suits (with Macy's department store price tags attached), an evening dress, and cosmetics. Police detectives contacted a Macy's loss prevention officer about the clothing and discovered that a person matching Morrison's description had recently been involved in an incident at the store. The loss prevention officer observed Morrison acting suspiciously, namely that Morrison walked around the women's department with several articles of clothing draped over his arm and then moved behind a partition out of the surveillance camera's view. He emerged from behind the partition carrying a full plastic Macy's bag, with

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<sup>6</sup>Garcia v. State, 121 Nev. \_\_\_, \_\_\_, 113 P.3d 836, 841 (2005).

<sup>7</sup>Id.

<sup>8</sup>Lay v. State, 110 Nev. 1189, 1192, 886 P.2d 448, 450 (1994).

the clothing no longer draped over his arm. Morrison bypassed the cash registers and left the store. Morrison was charged with burglary and petit larceny. At trial, all but one of the clothing items discovered in Morrison's backpack were identified as coming from the Macy's store.

Morrison challenges the sufficiency of the evidence on two grounds. First, he complains that the loss prevention officer's testimony was nonsensical. The officer testified before Morrison moved behind the partition he did not appear to have a plastic Macy's bag on his person. He then testified twice that Morrison "appeared to conceal the [plastic Macy's] bag over the clothing he had selected." Morrison argues that the officer's explanation of Morrison's attempt to conceal the plastic bag over the clothes was confusing and illogical. We conclude, however, that the officer's testimony as a whole coupled with the testimony of the two detectives who investigated the case and the surveillance videotape presented to the jury provided sufficient evidence upon which a reasonable jury could have found Morrison's guilty beyond a reasonable doubt.

Morrison also challenges the sufficiency of the evidence on the ground that the loss prevention officer's testimony at trial was inconsistent with that presented at the preliminary hearing. The officer testified at trial that one of the clothing items, an evening dress, impounded by the police from Morrison's backpack was not Macy's merchandise. Although Morrison failed to include the preliminary hearing transcript in his appendix,<sup>9</sup> he asserts that the officer repeatedly

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<sup>9</sup>See Thomas v. State, 120 Nev. 37, 43 n.4, 83 P.3d 818, 822 n.4 (2004) (recognizing that appellant bears the responsibility of providing this court with relevant portions of the record essential to the determination of issues raised on appeal).

testified at the preliminary hearing that he observed Morrison "select" a dress. However, even assuming the discrepancies in the officer's testimony were as Morrison describes, they were not brought to the jury's attention. Considering the evidence presented on the whole, we conclude that it sufficiently supports the jury's findings of guilt beyond a reasonable doubt.

Finally, Morrison argues that the district court abused its discretion in adjudicating him a habitual criminal by failing to weigh appropriate factors for and against imposing the habitual criminal enhancement. Specifically, he argues that the district court's comments during sentencing do not reflect any rational consideration of the appropriateness of the enhancement. He further contends that the district court abused its discretion in adjudicating him a habitual criminal because the prior felonies upon which the enhancement was premised were stale and trivial.

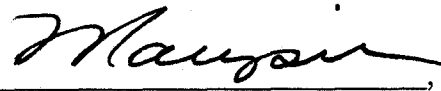
We have held that "as long as the record as a whole indicates that the sentencing court was not operating under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication and that the court exercised its discretion, the sentencing court has met its obligation under Nevada law."<sup>10</sup> Here, we conclude that the district court did not abuse its discretion in relying on Morrison's five prior felony convictions in adjudicating him a habitual criminal. We further conclude that the record demonstrates that the district court properly exercised its discretion in determining that such an adjudication was warranted in this case.


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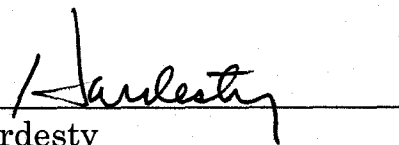
<sup>10</sup>Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000).

Having considered Morrison's claims and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Hardesty

cc: Hon. Stewart L. Bell, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General George Chanos/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk