

IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL ANTHONY MORALES,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 45191

FILED

MAR 22 2007

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On May 4, 2005, the district court convicted appellant Paul Anthony Morales of burglary while in possession of a firearm, conspiracy to commit robbery, two counts of robbery with the use of a deadly weapon, and possession of a firearm by an ex-felon. Morales was adjudicated a habitual criminal and sentenced to three terms of life in prison with the possibility of parole for burglary and the two robbery counts. He was also sentenced to a term of one to four years in prison for the conspiracy to commit robbery and a term of one to five years for possession of a firearm by an ex-felon. The district court ordered the sentences to run concurrently with each other and consecutively to a sentence imposed in another case.

Morales first claims on appeal that the district court erred in adjudicating him a habitual criminal on three grounds. After returning guilty verdicts respecting the burglary, conspiracy to commit robbery, and robbery offenses, the jury was informed of an additional charge—a count of possession of a firearm by an ex-felon. The State introduced certified copies of judgments of conviction relating to two prior felony convictions, which according to the jury instruction involved a 1994 felony conviction

for assault with a deadly weapon, possession of a firearm by an ex-felon, and possession of a stolen vehicle and a 1989 felony conviction for burglary and possession of a stolen vehicle. Morales did not challenge the admission of his prior felony convictions during the guilt phase of his trial. Shortly thereafter, the jury returned with a guilty verdict on this count as well. Immediately after releasing the jury, the district court proceeded to sentencing at Morales's request.

The notice of intent to seek habitual criminal adjudication cited the convictions used to support the possession of a firearm by an ex-felon plus two 1992 California felony convictions for the unlawful taking of a vehicle and evading an officer. The prosecution did not reintroduce the judgments of conviction for the two prior felonies supporting the charge of possession of a firearm by an ex-felon. The record does not specifically indicate that a judgment of conviction respecting the 1992 California felony convictions was introduced. The district court noted that it had reviewed a presentence investigation report from a previous case in which the district court sentenced Morales two months previously. Morales expressly did not object to the district court's review of this report.

Morales argues that the State introduced no evidence of his prior felony convictions at sentencing. He points to no authority suggesting that the State was required to introduce again the prior convictions supporting the possession of a firearm by an ex-felon at the sentencing hearing under these circumstances. However, even assuming the State should have done so, "an unexcused failure to object in the trial court to the State's failure to make an affirmative showing of the validity of the prior convictions relied upon to enhance a penalty under NRS

207.010 preclude[s] the raising of this objection for the first time on appeal."<sup>1</sup> We may review an error if it is plain and affected a defendant's substantial rights.<sup>2</sup> "[T]he burden is on the defendant to show actual prejudice or a miscarriage of justice."<sup>3</sup> We conclude under the circumstances of this case that the district court did not err in adjudicating Morales a habitual criminal on this basis.

Morales also argues that the habitual criminal adjudication was improper because it is impossible to discern whether the district court properly exercised its discretion pursuant to NRS 207.010 as the record fails to elucidate the nature of the prior convictions relied upon. Morales does not suggest that the district court considered prior felony convictions other than those enumerated in the notice of intent to seek habitual criminal adjudication. The district court stated that the habitual criminal adjudication was discretionary but that Morales "really fit the definition of habitual criminal." Based on the district court's comments, coupled with the lack of a record demonstrating that the State introduced evidence of his prior felony convictions, Morales argues that the sentencing hearing was insufficient to adjudicate him a habitual criminal. In Hughes v. State, we 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

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<sup>1</sup>Baymon v. State, 94 Nev. 370, 372, 580 P.2d 943, 944 (1978); see Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 804 (1992).

<sup>2</sup>Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

<sup>3</sup>Id.

obligation under Nevada law."<sup>4</sup> Although the district court's comments were brief, the record reveals that the district court was aware of its discretion to dismiss the count of criminal habituality and declined to do so. Consequently, we conclude that the district court did not error in adjudicating Morales a habitual criminal on this basis.

Morales suggests that the district court could have considered factors other than his prior felony convictions to adjudicate him a habitual criminal in violation of Apprendi v. New Jersey.<sup>5</sup> In Apprendi, the United States Supreme Court announced that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."<sup>6</sup> However, Morales's claim is mere speculation. Moreover, in O'Neill v. State, we recently held that habitual criminal adjudication pursuant to NRS 207.010 does not violate Apprendi.<sup>7</sup> As we reaffirmed in O'Neill, our case law respecting the application of this statute is "concerned with ensuring that district courts . . . are aware of the statutory discretion to dismiss a count of habitual criminality under NRS 207.010."<sup>8</sup> This court explained that "a district court may consider facts such as a defendant's criminal history, mitigation evidence, victim impact statements and the like in determining whether to

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<sup>4</sup>116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000).

<sup>5</sup>530 U.S. 466 (2000).

<sup>6</sup>Id. at 490.

<sup>7</sup>123 Nev. \_\_\_, \_\_\_, \_\_\_ P.3d. \_\_\_, \_\_\_ (Adv. Op. 2, March 8, 2007).

<sup>8</sup>Id.

dismiss" a count of criminal habituality.<sup>9</sup> Therefore, consideration of such facts does not operate to increase punishment beyond the statutory maximum.<sup>10</sup> Consequently, we conclude that Morales has not demonstrated that the district court erred in sentencing him as a habitual criminal.

Morales next claims that one of his robbery convictions must be vacated because only one of the sales clerks present during the robbery had the necessary possessory interest in the property stolen. The evidence shows that Morales and Andrew Napolitano entered a Crescent Jewelry store in Las Vegas with guns drawn. Morales and Napolitano ordered the two sales clerks, Vonya Honberger and Melissa Shirley, to get down on the ground. Honberger testified that Morales pointed a gun to her head and she offered him the keys to the jewelry cases. Morales filled a trash can and a big black trash bag with jewelry while Honberger continued to open jewelry cases. Shirley testified consistently with Honberger. However, Shirley remained on the floor during the robbery, but was able to observe Morales's and Napolitano's actions. In addition to watching Morales and Napolitano remove jewelry from several cases, she saw Napolitano take money from the cash register. Honberger and Shirley both testified that they were in fear for their lives during the robbery. After emptying the jewelry cases and the cash register, Morales and Napolitano ran out of the store. Shirley called 9-1-1, and the police responded shortly thereafter.

Morales was charged with robbery with the use of a deadly weapon of both Honberger and Shirley. He argues that the count

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<sup>9</sup>Id.

<sup>10</sup>Id.

involving Shirley must be vacated because she did not unlock any of the display cases or otherwise exercise control over the items taken and thus did not have the possessory interest in the stolen jewelry required for a robbery offense. We disagree.

Unlike Honberger, Shirley was not forced to assist Morales and Napolitano. However, she was an employee of Crescent Jewelers and at the time of the robbery was performing her duties to close the store for the night along with Honberger. Morales pointed a gun at Shirley, ordered her to get down on the floor, and proceeded to remove jewelry from cases and money from the cash register. We conclude that there was sufficient evidence from which a jury could infer that Shirley had the requisite possessory interest in and control of the jewelry and money stolen.<sup>11</sup> Consequently, we conclude that Morales was appropriately convicted of two counts of robbery with the use of a deadly weapon.

Morales further argues that the district court erred in instructing the jury that a firearm was a deadly weapon because this issue should have been determined by the jury pursuant to Apprendi.<sup>12</sup> However, as Morales failed to object to the challenged instruction, he must demonstrate plain error.<sup>13</sup> "Generally, it is the district court's duty to

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<sup>11</sup>See Klein v. State, 105 Nev. 880, 885, 784 P.2d 970, 973 (1989); see also People v. Ramos, 639 P.2d 908, 927-29 (Cal. 1982) (upholding a conviction for two separate counts of robbery where property was taken from coemployees who had joint possession of property), rev'd on other grounds, 463 U.S. 992 (1983).

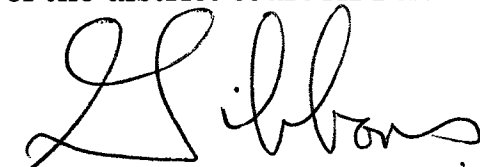
<sup>12</sup>530 U.S. 466.

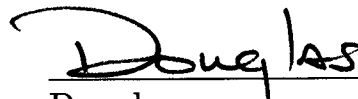
<sup>13</sup>NRS 178.602; Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

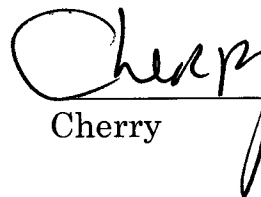
determine whether the instrument is an inherently dangerous weapon,"<sup>14</sup> except in the limited circumstance when a district court cannot determine as a matter of law that an instrument is or is not a deadly weapon.<sup>15</sup> NRS 193.165 specifically provides that an enhanced sentence will be imposed on "any person who uses a firearm or other deadly weapon . . . in the commission of a crime." We conclude that the district court properly instructed the jury as a matter of law that a firearm was a deadly weapon. Therefore, Apprendi is inapposite and provides no basis for relief here.

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

ORDER the judgment of the district court AFFIRMED.

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

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Cherry

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<sup>14</sup>Buff v. State, 114 Nev. 1237, 1243, 970 P.2d 564, 568 (1998); see Milton v. State, 111 Nev. 1487, 1495, 908 P.2d 684, 689 (1995).

<sup>15</sup>See Buff, 114 Nev. at 1243, 970 P.2d at 568; Zgombic v. State, 106 Nev. 571, 576, 798 P.2d 548, 552 (1990).

cc: Hon. Stewart L. Bell, District Judge  
Robert L. Langford & Associates  
Attorney General Catherine Cortez Masto/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk