IN THE SUPREME COURT OF THE STATE OF NEVADA

VITO BRUNO,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46418

FILED

JUN 30 2006

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of grand larceny and attempt to obtain money under false pretenses, and two counts of burglary. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court adjudicated appellant Vito Bruno as a habitual criminal and sentenced him to serve four concurrent prison terms of 5-20 years.

First, Bruno contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of grand larceny, attempt to obtain money under false pretenses, and one of the two counts of burglary. Specifically, Bruno claims "there is simply a total lack of competent evidence that Nordstrom ever suffered theft of the jacket that [he] and his wife attempted to return" to both Nordstrom and Neiman Marcus, or that he illegally obtained the jacket. In a related argument, Bruno contends that his confession to the crime to an investigating police officer should have been excluded at trial because there was insufficient corpus delicti. We disagree.

A review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier

of fact.[1] In particular, we note that although there was some confusion about the exact size and material, Bruno was observed carrying away an expensive black Zegna jacket from Nordstrom's sportswear department. There is no indication that Bruno returned with the jacket or paid for the missing jacket. The following day, Bruno attempted to return the black Zegna jacket to Neiman Marcus for a cash refund. Bruno did not present a receipt for the purchase of the jacket. Neiman Marcus took possession of the jacket, and Bruno was told that a check would be issued and mailed to him. Soon after, a loss prevention officer with Neiman Marcus verified that the jacket belonged to Nordstrom.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Bruno committed the crimes of grand larceny, burglary, and attempt to obtain money under false pretenses.[2] 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, sufficient evidence supports the verdict.[3] Moreover, we note that circumstantial evidence alone may sustain a conviction.[4] Therefore, we conclude that the State presented sufficient evidence to sustain the convictions. And finally, because there was

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[1]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[2]See NRS 205.220(1)(a); NRS 205.060(1); NRS 205.380(1)(a); NRS 193.330(1).

[3]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

[4]See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

sufficient evidence, we also conclude that the corpus delicti rule was not violated by the admission of Bruno's confession to the crimes.[5]

Second, Bruno contends that the district court erred in overruling his pretrial objection and failing to exclude inculpatory out-of-court statements made by his codefendant/wife, Sandra Shults. During the State's case-in-chief, Officer Daniel Coe was testifying about his investigation, and the following exchange took place:

> Q. Did [Shults] indicate to you whether she knew if that jacket was stolen?
>
> A. She did say she knew the jacket to be stolen.

Citing to Bruton v. United States for support,[6] Bruno claims that the statement's admission violates his constitutional right to confrontation. We disagree.

This court has stated that "[t]he United States Constitution's Sixth Amendment right of confrontation prevents the use at a joint trial of a non-testifying defendant's admission if it incriminates another defendant."[7] In this case, we conclude that the district court did not err. Officer Coe's testimony does not offend Bruton's protective rule: it is not facially inculpatory because it does not expressly refer to Bruno. Only when linked with other evidence introduced at trial could the

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[5]See generally Doyle v. State, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004).

[6]391 U.S. 123 (1968).

[7]Rodriguez v. State, 117 Nev. 800, 809, 32 P.3d 773, 779 (2001); see also U.S. Const. amend. VI; Bruton, 391 U.S. at 135.

codefendant's statement be considered inculpatory.[8] Nevertheless, even assuming error, we conclude it would have been harmless beyond a reasonable doubt.[9] As noted above, there was substantial evidence of Bruno's guilt, including his confession, "and a defendant's own statements may be considered in assessing whether a Bruton error, if any, was harmless."[10] Therefore, there was no reversible error.

Third, Bruno contends that Chief Judge Hardcastle erred in denying his motion to disqualify Judge Bell after the conclusion of the trial and prior to his sentencing hearing. Bruno based his motion on comments made by Judge Bell after the jury verdict, and by the judge's participation as the former District Attorney and as private counsel for one of the parties involved in a prior conviction of Bruno's used by the State to support habitual criminal adjudication. Judge Bell filed an affidavit in response to Bruno's motion. Chief Judge Hardcastle denied Bruno's motion, finding that his motion was "untimely and unfounded." We agree.

"NRS 1.235(1)(a) and (b) allow only one window of opportunity in which to make a 'for cause' challenge; either twenty days before the date set for a trial or hearing of the case, or three days before the date set

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[8]See Richardson v. Marsh, 481 U.S. 200, 208 (1987) (recognizing that statement that is not facially incriminating but "became so only when linked with evidence introduced later at trial" does not amount to Bruton violation).

[9]See Harrington v. California, 395 U.S. 250, 251-54 (1969) (holding that Bruton error may be harmless).

[10]Rodriguez, 117 Nev. at 809 & n.12, 32 P.3d at 779 & n.12.

for the hearing of any pretrial matter, whichever occurs first."[11] This court, however, has also stated that it would be inequitable to not allow an affidavit to be filed late where the party seeking disqualification did not have the relevant information until after trial had started.[12]

In this case, Bruno cannot demonstrate that the district court's comments about the evidence adduced at trial indicated either an actual or implied bias, or were reasonable grounds for disqualification. Moreover, with regard to the district court's alleged involvement in prior cases of his, Bruno's motion was untimely. Bruno concedes that he was aware of the grounds prior to trial, but "those grounds did not support his disqualification from presiding at trial. The grounds were relevant only to his sentencing." Nevertheless, Bruno did not move for disqualification until after the district court presided over numerous pretrial motions and hearings and the entirety of the trial. Therefore, we conclude that Chief Judge Hardcastle did not err in denying Bruno's motion.

Finally, Bruno contends that the district court abused its discretion at sentencing by adjudicating him as a habitual criminal. Bruno claims that two of the six felony convictions offered by the State in support of habitual criminal adjudication were "unconstitutionally obtained," and allegedly, "procured by a threat." Bruno, however, admits to the other four felony convictions. Bruno argues that sentencing him as

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[11]Valladares v. District Court, 112 Nev. 79, 84, 910 P.2d 256, 260 (1996).

[12]See Matter of Parental Rights as to Oren, 113 Nev. 594, 598-99, 939 P.2d 1039, 1042 (1997).

a habitual criminal amounts to cruel and unusual punishment in violation of both the United States and Nevada Constitutions.[13] We disagree.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[14] This court has consistently afforded the district court wide discretion in its sentencing decision.[15] The district court's discretion, however, is not limitless.[16] Nevertheless, we will refrain from interfering with the sentence imposed "[s]o 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."[17] Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment unless the statute itself is unconstitutional, or the sentence is so unreasonably disproportionate to the crime as to shock the conscience.[18]

The district court has broad discretion to dismiss a habitual criminal allegation.[19] Accordingly, the decision to adjudicate an individual

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[13]See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6.

[14]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

[15]Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[16]Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

[17]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[18]Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

[19]See NRS 207.010(2).

as a habitual criminal is not an automatic one.[20] The district court "may dismiss a habitual criminal allegation when the prior convictions are stale or trivial or in other circumstances where a habitual criminal adjudication would not serve the purpose of the statute or the interests of justice."[21] The habitual criminal statute, however, "makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions; instead, these are considerations within the discretion of the district court."[22] This court explained that "Nevada law requires a sentencing court to exercise its discretion and weigh the appropriate factors for and against the habitual criminal statute before adjudicating a person as a habitual criminal."[23]

In the instant case, Bruno does not allege that the district court relied on impalpable or highly suspect evidence, and he cannot demonstrate that the relevant sentencing statute is unconstitutional. We note that the sentence imposed was within the parameters provided by the relevant statute.[24] At the sentencing hearing, after hearing arguments from counsel, the district court stated, "I think it was abundantly clear to me that this defendant is a habitual criminal. I mean, he commits crimes year after year after year and he's done it his whole life." Nevertheless, despite Bruno's eligibility for life imprisonment under the large habitual

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[20]Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

[21]Hughes v. State, 116 Nev. 327, 331, 996 P.2d 890, 892 (2000).

[22]Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

[23]Hughes, 116 Nev. at 333, 996 P.2d at 893.

[24]See NRS 207.010(1)(a).

criminal statute,[25] the district court imposed the minimum possible sentence, finding that Bruno was not "unrehabilitatible." Therefore, based on all of the above, we conclude that the district court understood its sentencing authority and did not abuse its discretion in adjudicating Bruno as a habitual criminal. Moreover, we conclude that Bruno's sentence does not constitute cruel and unusual punishment.

Having considered Bruno's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.[26]

Douglas, J.
Douglas

Parraguirre, J.
Parraguirre

Shearing, Sr. J.
Shearing

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

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[25]See NRS 207.010(1)(b).

[26]The Honorable Miriam Shearing, Senior Justice, participated in the decision of this matter under general orders of assignment entered January 6, 2006.