IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL PETER CAVARRETTA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46861

FILED

OCT 22 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary and robbery. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge. The district court adjudicated appellant Michael Peter Cavaretta a habitual criminal and sentenced him to serve two concurrent terms of life in prison with the possibility of parole after ten years.

First, Cavaretta argues that there was insufficient evidence supporting his robbery conviction. The relevant inquiry is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[1]

The evidence at trial included the following: Macy's loss prevention agents testified that via surveillance camera, they observed Cavaretta enter the store, grab some clothing from a rack, and exit the store, at which point they radioed mall security officers. Mall security

[1]Koza v. State, 100 Nev. 245, 251, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original).

07-23175

officers testified that after receiving the radio call, they went to the parking area outside the Macy's exit and used their vehicle to block a car that was parked in the fire lane just outside the Macy's doors. At that time, they saw Cavaretta leave Macy's with clothing in his arms and Cavaretta place the clothing into the waiting vehicle they had blocked. Security officers and Macy's loss prevention agents also testified that Cavaretta attempted to get into the waiting vehicle and that when they tried to pull him away from the vehicle he was combative and physically resisted.

Cavaretta contends that the mall security agents who apprehended him had no possessory interest in the merchandise. However, the property belonged to Macy's, and the loss prevention agents and mall security officers had a possessory interest in the clothing via their relationship to Macy's as employees and/or agents.[2]

Cavaretta also contends that he did not take the merchandise in or from the presence of the mall security officers. However, the officers testified that when they drove up to Macy's, they observed Cavaretta exit with the merchandise, place it in his vehicle, and attempt to get away.[3] When they attempted to stop Cavaretta, he pushed them. This was sufficient for the jury to conclude that Cavaretta used force to retain the

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[2]See generally Klein v. State, 105 Nev. 880, 884-85, 784 P.2d 970, 973-74 (1989); People v. Gilbeaux, 3 Cal.Rptr.3d 835, 841-42 (Cal. Ct. App. 2003) (holding that in a store robbery, janitors cleaning the store were employees for robbery purposes although they were employees not of the store, but of a cleaning company with whom the store had a contract).

[3]See Barkley v. State, 114 Nev. 635, 637 n.1, 958 P.2d 1218, 1219 n.1 (1998).

merchandise and/or facilitate his escape.[4] Accordingly, we conclude there was sufficient evidence to support the robbery conviction.

Second, Cavaretta argues that there was insufficient evidence to support his burglary conviction. We disagree. Witnesses testified that Cavaretta ran or walked briskly into Macy's, grabbed merchandise from a rack without determining the size or price, exited the store, and placed the merchandise into a vehicle that was waiting in the fire lane outside the doors. This was sufficient for a rational jury to conclude that Cavaretta entered the store with the intent to commit a felony therein and therefore to convict him of burglary.[5]

Third, Cavaretta argues that the district court improperly allowed two witnesses to testify that he was given Miranda[6] warnings. He also argues that the testimony of the witness who overheard the Miranda warnings indicated the warnings were incomplete, and his statements to Las Vegas Metropolitan Police Department detectives at the scene should therefore have been suppressed. Witness testimony established that after Cavaretta was handcuffed at the scene and LVMPD detectives responded, Cavaretta told detectives that he entered the store intending to grab some merchandise and flee. Cavaretta did not object to any of the relevant testimony at trial, nor did he object to the admission of his statements.

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[4]See NRS 200.380(1).

[5]See NRS 205.060(1).

[6]Miranda v. Arizona, 384 U.S. 436 (1966).

We therefore review this issue for plain error.[7] We conclude that, even if Cavaretta's statements should have been suppressed and/or the witnesses should not have been permitted to testify regarding the Miranda warnings, any error was harmless in light of other evidence presented.

Fourth, Cavaretta argues that the State did not sufficiently prove his prior felonies, and his adjudication as a habitual criminal is therefore improper.[8] We note that at his sentencing, Cavaretta did not object to admission of the documents the State submitted and did not claim that the convictions were not his. We therefore review this issue for plain error.[9]

Cavaretta asserts that the State did not provide the district court with a copy of a certified judgment of conviction for a 1985 California conviction for assault with a deadly weapon. He further claims that the documents presented, which included endorsed copies of court minutes and a case disposition form indicating that Cavaretta pleaded guilty to assault with a deadly weapon, indicate that the conviction may have been a misdemeanor. However, for the purposes of the habitual criminal statute, a prior conviction constitutes a prior felony if the crime would have been a felony in Nevada.[10] In Nevada, assault with a deadly weapon

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[7]See Mitchell v. State, 114 Nev. 1417, 1426, 971 P.2d 813, 819 (1998), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002); NRS 178.602.

[8]See NRS 207.010.

[9]See Mitchell, 114 Nev. at 1426, 971 P.2d at 819; NRS 178.602.

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

is a felony.[11] We note that at his sentencing, Cavaretta admitted to a physical altercation with the victim but claimed he acted in self-defense and defense of others. We therefore conclude that this conviction was sufficiently proved for the purposes of NRS 207.010.

Cavaretta also asserts that at the time of his conviction in this case, his October 2000 conviction in Florida of grand larceny was not final and was therefore not appropriate for inclusion as a prior felony conviction. Even if this is true, the State sufficiently proved the California felony, as discussed above. Cavaretta does not dispute that the State sufficiently proved two prior Nevada felony convictions: a 2000 conviction for evading a police officer and a 2004 conviction for possession/receiving a forged instrument. Because the State sufficiently proved three prior felony convictions, the habitual criminal charge was proper.

Fifth, Cavaretta argues that the district court relied on improper information in adjudicating him a habitual criminal and sentencing him. He claims that he was not given notice that the State intended to introduce argument regarding telephone conversations he had while in jail, and that the district court should have barred such argument. He claims that the State presented inaccurate information about his Florida and California convictions and improperly argued his previous arrests and misdemeanors. He also claims that the district court improperly relied on considerations of judicial economy and the need to protect merchants from shoplifters.

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[11]See NRS 200.471(2)(b).

In O'Neill v. State, we held that once the State has proved the required prior convictions, "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 dismiss" a habitual criminal charge.[12] Here, the district court properly considered Cavaretta's criminal history in deciding whether to dismiss the habitual criminal charge. As to judicial economy and the protection of merchants, Cavaretta points to no specific comment by the district court that shows the district court considered such issues, and no such consideration is apparent from our review of the record. Nor is it apparent that such consideration would be improper.[13] Even assuming the district court should not have allowed argument about the telephone calls, the district court indicated that it was not relying on that argument in exercising its discretion at sentencing.

Cavaretta also argues that the State did not prove beyond a reasonable doubt that large habitual criminal treatment was warranted, the district court abused its discretion in so adjudicating him, the sentence constitutes cruel and unusual punishment, he was denied due process at sentencing by admission of materially untrue or inaccurate information about his criminal history, and he had a right to a jury trial on the habitual criminal charge. We disagree.

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[12]123 Nev. ___, ___, 158 P.3d 38, 43 (2007).

[13]See Martinez v. State, 114 Nev. 735, 738, 961 P.2d 143, 145 (1998) (holding that a sentencing court may consider "a wide, largely unlimited variety of information to insure that the punishment fits not only the crime, but also the individual defendant.").

The State is not required to prove beyond a reasonable doubt that habitual criminal treatment is warranted; it must only prove the existence of the requisite prior felonies beyond a reasonable doubt.[14] Whether a habitual criminal charge should be dismissed is a matter for the sentencing court's discretion.[15]

As to cruel and unusual punishment, we have held that "[d]espite its harshness, [a] sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience."[16] Here, the sentence was within statutory parameters and does not shock the conscience, given the circumstances of the offense and Cavaretta's criminal history.

We concluded above that the district court did not rely on materially untrue or inaccurate information in sentencing Cavaretta.

As Cavaretta concedes, we have previously ruled that a defendant is not entitled to a jury determination on a habitual criminal charge.[17] We are not persuaded to reconsider our prior holdings in this regard.

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[14]See Hollander v. State, 82 Nev. 345, 348-49, 418 P.2d 802, 804 (1966).

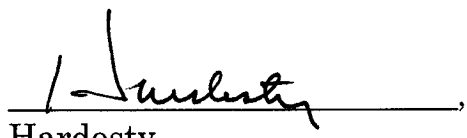
[15]NRS 207.010(2).

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

[17]See O'Neill, 123 Nev. ___, 153 P.3d 38; Howard v. State, 83 Nev. 53, 422 P.2d 548 (1967).

Having considered Cavaretta's arguments and concluded he is not entitled to relief, we

ORDER the judgment of the district court AFFIRMED.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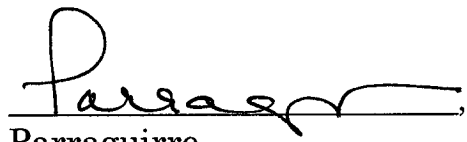
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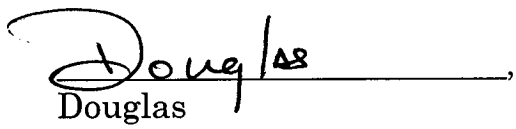
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Douglas

cc: Hon. Douglas W. Herndon, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk