IN THE SUPREME COURT OF THE STATE OF NEVADA

KEVIN ROHN GILL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46957

FILED

JUL 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery with the use of a firearm. Second Judicial District Court, Washoe County; Brent T. Adams, Judge. On March 3, 2006, the district court adjudicated appellant Kevin Rohn Gill a habitual criminal and sentenced him to serve a term of life in prison without the possibility of parole.

Gill raises eight issues on appeal. First, Gill argues that insufficient evidence supported his conviction for robbery with the use of a firearm. We disagree. When reviewing the evidence supporting a conviction, this court considers "'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]

Here, evidence at trial showed that Gill, along with his co-defendant James Wright, Jr. and Mechele Robinson, drove in a white

[1]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

08-17594

Cadillac to an area near the Pizza Baron restaurant in Reno in the early morning hours of May 11, 2004. Robinson testified that after parking the car, Wright and Gill exited and were gone for a short period of time. Pizza Baron employees testified that two men entered the restaurant and one of the two men pointed a gun at the manager and took about $560 from the cash register in bills and rolled coins. Two employees described the robbers as African-American men wearing dark hooded sweatshirts, gloves, and bandanas.

Reno Police Department officers responded to a report of the robbery and attempted to pull over a nearby white Cadillac, which Robinson testified was being driven by Wright. The Cadillac briefly stopped, but then sped away. Eventually the Cadillac stopped again. Gill and another man fled the car on foot, and Gill was apprehended and arrested in a nearby field. Officers retrieved a bandana and a large amount of cash from the field. Two sweatshirts, loose coins, coin rolls, portable channel radios, a torn advertisement for the Pizza Baron, dark clothing, a bandana, screwdrivers, gloves, and a loaded handgun were later retrieved from the Cadillac. Police recovered $552 in bills and rolled coins from the field where Gill was apprehended and about $8 in loose change from the Cadillac.

Robinson and Gill were brought back to a nearby K-mart parking lot and shown to two employees from the Pizza Baron. John Heinz stated that Gill was dressed similarly to the robbers. Kellie Tennier testified that Gill seemed to be the same guy that had pointed a gun at them. Both employees stated that Robinson was not involved in the robbery. Detective David Jenkins testified that he interviewed Gill at the Washoe County jail the morning after his arrest. In a recorded interview, Gill confessed that he was one of the two people who robbed the Pizza

Baron the night before and implicated Wright as the other robber. Viewing the above evidence in a light favorable to the State, we conclude that it was sufficient for a rational jury to convict him beyond a reasonable doubt of robbery with the use of a deadly weapon.[2]

Second, Gill argues that the district court committed reversible error by excluding him from part of the voir dire. We disagree. Although a defendant has a right to be present at every stage of a criminal proceeding, this right is not absolute.[3] We have stated that "'[t]he right to be present is subject to harmless error analysis,'" and that a "'defendant must show that he was prejudiced by the absence.'"[4] Specifically, a defendant's right to be present is not violated when the district court conducts individual voir dire and dismisses the interviewed jurors.[5]

During voir dire, jurors Turner and Giuliani indicated that they might be racially biased because of experiences in their pasts. Rather than discuss these experiences in front of the other jurors, and risk tainting the rest of the jury pool, the district court interviewed these two jurors in chambers. Defense counsel waived Gill's presence. The two jurors were questioned and both were dismissed for cause. Two replacement jurors, Lee and McFarland, were then interviewed. At that point, Gill's counsel stated that he had not anticipated interviewing more

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[2]See NRS 200.380; 1995 Nev. Stat., ch. 455, § 1, at 1431 (NRS 193.165).

[3]Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001).

[4]Id. at 368, 23 P.3d at 240 (quoting Kirksey v. State, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996)).

[5]Rose v. State, 123 Nev. ___, ___, 163 P.3d 408, 417 (2007).

than two potential jurors outside the presence of his client, and that in light of comments made by one juror, his client should be present. The district court granted a recess to allow Gill's counsel the opportunity to discuss the jurors' responses with Gill. The record indicates that juror Lee was excused for cause, because upon counsel's return to chambers a replacement juror, Wheeler, was brought in to be questioned. Subsequently, peremptory challenges were made in the defendants' presence and Wheeler was challenged by the State.

Of the five prospective jurors questioned outside of Gill's presence, only McFarland was part of the jury and only after Gill and his attorney were given time to discuss McFarland's answers during voir dire. Gill does not deny that his counsel discussed McFarland's responses with him, but simply contends that because he was not present during questioning, he had no way of knowing whether he would want to dismiss McFarland for other reasons such as a "negative visceral reaction." Gill has failed to demonstrate that he was prejudiced by not being present during McFarland's questioning; therefore, we conclude that he is not entitled to relief on this claim.

Third, Gill argues that the district court erred in excluding him from a discussion of whether or not to dismiss a juror who was acquainted with the mother of his co-defendant, Wright. On the second day of trial, Wright's mother, Mary Stewart, informed an investigator from the district attorney's office that she worked with juror Sunde. Ms. Stewart was interviewed in chambers, with counsel present, and informed the district court that she had worked with Sunde for several years, but that there had only been occasional contact, and she had no reason to believe that Sunde knew she was Wright's mother. Wright's mother stated that she had gone by the name of Stewart for over 12 years. The

district court determined that there was "no indication of any impropriety or jury misconduct or risk that the process may be impaired in any way." The district court also found that there was no factual basis to believe that juror Sunde knew of the relationship between Ms. Stewart and any of the parties or witnesses at trial.

Gill complains that "not allowing [him] to be present during the questioning of Wright's mother and then not allowing Ms. Sunde to be examined by Gill's counsel had a prejudicial impact on Gill and ultimately on the verdict against him when viewed in the contest [sic] of the trial as a whole." Counsel did not object to Gill's absence during the discussion about juror Sunde. The failure to raise an issue with the district court generally precludes appellate consideration of that issue.[6] This court may nevertheless address an assigned error if it was plain and affected the appellant's substantial rights.[7] "To be plain, an error must be so unmistakable that it is apparent from a casual inspection of the record."[8] Review of the record does not reveal plain error. Gill does not offer any evidence that his substantial rights were violated. Therefore, we conclude that no relief is warranted in this regard.

With respect to the district court's alleged denial of his right to question Ms. Sunde, Gill misconstrues the record. The district court specifically inquired whether counsel wanted to examine Ms. Sunde. No

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[6]Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[7]NRS 178.602.

[8]Garner v. State, 116 Nev. 770, 783, 6 P.3d 1013, 1022 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

request was made. Gill cannot now complain that the district court did not allow Ms. Sunde to be questioned. Therefore, we conclude that no relief is warranted in this matter.

Fourth, Gill asserts that a pretrial identification procedure violated his due process rights. As noted above, on the night of the robbery Robinson and Gill were brought back to a nearby K-mart parking lot and shown to two employees from the Pizza Baron. John Heinz stated that Gill was dressed similarly to the robbers. Kellie Tennier testified that Gill seemed to be the same guy that had pointed a gun at them. Both employees stated that Robinson was not involved in the robbery. Gill did not object to presentation of this evidence at trial or file a motion to suppress prior to trial.

An in-court identification that follows an impermissibly suggestive pretrial identification procedure can serve as a basis for reversal of a conviction.[9] However, in this case neither Heinz nor Tennier made an in-court identification. In addition, the evidence of the pretrial identification was not introduced by the State, but was elicited by defense counsel during cross-examination of the State's witnesses. For these reasons, Gill cannot now complain that his due process rights were violated by introduction of the pretrial identification evidence.[10]

Fifth, Gill claims that the district court erred when it determined that his confession was voluntary and that he knowingly and

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[9]Coats v. State, 98 Nev. 179, 180-81, 643 P.2d 1225, 1226 (1982).

[10]Carter v. State, 121 Nev. 759, 769, 121 P.3d 592, 599 (2005) ("A party who participates in an alleged error is estopped from raising any objection on appeal.").

intelligently waived his Fifth Amendment rights. "The inquiry as to whether a waiver is knowing and intelligent is a question of fact, which is reviewed for clear error. However, the question of whether a waiver is voluntary is a mixed question of fact and law that is properly reviewed de novo."[11] "When a defendant waives Miranda rights and makes a statement, the State bears the burden of proving voluntariness, based on the totality of the circumstances, by a preponderance of the evidence."[12] The established criteria to consider when making a voluntariness determination includes "[t]he youth of the accused; his lack of education or his low intelligence; the lack of any advice of constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep."[13]

Gill asserts that when he was interviewed the morning after the robbery he was still under the influence of drugs he had used the night before. At trial, Gill's counsel objected to admission of the confession. Counsel examined Detective Jenkins, who testified that he interviewed Gill at about 10:00 a.m. on the morning of May 11, 2004, at the Washoe County jail. Detective Jenkins testified that Gill appeared a little bit lethargic, but he did not smell any alcohol on Gill's breath. He further testified that he asked Gill whether he was under the influence of anything, and Gill denied having used any alcohol or drugs at the time of the robbery. Detective Jenkins also testified that prior to conducting the

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[11]Mendoza v. State, 122 Nev. 267, 276, 130 P.3d 176, 181 (2006).

[12]Dewey v. State, 123 Nev. ___, ___, 169 P.3d 1149, 1154 (2007).

[13]Id. at ___, 169 P.3d at 1155 (internal citations and quotations omitted).

interview, he observed no evidence of drinking or drug use. He testified that Gill was "well oriented to the time and place . . . [and] appropriately concerned about the content of our conversation and what might benefit him from our conversation."

Gill was advised of his Miranda[14] rights when he was arrested and had acknowledged that he understood them. Before conducting the interview, Detective Jenkins again advised Gill of his Miranda rights and Gill again acknowledged that he understood them. Gill then expressed his willingness to continue speaking with the detective. We conclude that the district court did not err when it found that Gill knowingly and intelligently waived his Miranda rights.

We further conclude that the State established, by a preponderance of the evidence, that Gill's confession was voluntary. There is no evidence in the record that Gill is of an age or intelligence that increased the likelihood that his confession was involuntary. He was read his Miranda rights twice and acknowledged both times that he understood them. He was detained from the time of his arrest in the early morning hours until around 10:00 a.m., when he was interviewed. He slept for much of that time and had to be awakened by Detective Jenkins. There is no evidence of physical punishment such as sleep or food deprivation. And there is no indication that Gill was subjected to repeated or prolonged questioning. Therefore, we conclude that Gill's contentions in this regard are without merit.

Sixth, Gill complains that the district court abused its discretion when it permitted evidence of his prior felony convictions to be

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

used as impeachment evidence. Gill testified on his own behalf and was cross-examined regarding five prior felony convictions. Two of the convictions, a 1994 burglary conviction and a 1995 conviction for possession of a controlled substance for the purpose of sale, occurred more than 10 years before trial. Gill contends that the district court erred in admitting those convictions without an offer of proof by the State that the convictions were not excluded by NRS 50.095(2). Gill also complains that the evidence was more prejudicial than probative.

"[T]he decision whether to admit a prior conviction for impeachment purposes 'rests within the sound discretion of the trial court, and will not be reversed absent a clear showing of abuse.'"[15] With regard to the timeliness of the convictions, the cited statute permits admission of evidence of prior felony convictions for impeachment purposes only if it has been less than 10 years since the witness was released from confinement or from the time that the witness expired his or her parole, probation, or sentence.[16] During Gill's cross-examination, he objected to impeachment with convictions outside the 10-year period. The district court inquired: "[c]ounsel, they have to comply with Section 2(b) of the statute, are you aware of that?" The State replied in the affirmative and continued the questioning. Gill admitted to all five of the convictions.

Review of the record reveals that the June 1994 judgment of conviction pronounced a three-year sentence and the May 1995 judgment

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[15]Pineda v. State, 120 Nev. 204, 210, 88 P.3d 827, 832 (2004) (quoting Givens v. State, 99 Nev. 50, 53, 657 P.2d 97, 99 (1983), overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986)).

[16]NRS 50.095.

of conviction pronounced an additional two-year term to be served consecutive to the "term he is serving in [the burglary case]." The 10 year statutory period began to run in January of 1996. Gill does not claim that he was released from prison prior to that time, or offer support for the proposition that NRS 50.095(2) bars admission of those two convictions. Therefore, we conclude that the district court did not abuse its discretion when it admitted the 1994 and 1995 convictions.

Even if evidence of his prior convictions was not barred by the statute, Gill contends admission of his prior felony convictions was error because (1) the issue of his prior convictions had been raised on direct examination and permitting the State to cross-examine him was redundant and superfluous, and (2) asking about five prior convictions was excessively prejudicial. "[P]rior to the admission of felony convictions for impeachment, a district court must determine whether the probative value of the proposed evidence substantially outweighs its potential for unfair prejudice."[17] While the district court must exclude evidence if it finds that the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury, the statute uses permissive language regarding the court's discretion to admit evidence when its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.[18]

Gill's objection at trial was to the presentation of cumulative or "redundant" evidence. We conclude that pursuant to NRS 48.035, the

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[17]Pineda, 120 Nev. at 210, 88 P.3d at 832 (2004).

[18]NRS 48.035.

district court's ruling was well within its discretion. With regard to Gill's complaint that the evidence was unfairly prejudicial, he did not object to the admission of the evidence on this ground; therefore, the district court's decision to admit the evidence is reviewed for plain error.[19] Gill admitted on direct examination that he had previously been convicted of multiple "drug related" felonies. In addition, one of Gill's defenses at trial was that he was selling cocaine at the time of the robbery and he only ran from the police because of the drugs in his possession. Accordingly, it is unlikely that he was unfairly prejudiced by his admission on cross-examination that he had been convicted of possession and use of controlled substances. Inasmuch as Gill inferred that he had committed drug offenses in the past but did not usually commit crimes like robbery, admission of his prior conviction for burglary had independent probative value as to Gill's veracity. We conclude that Gill's contentions in this regard are without merit.

Seventh, Gill complains that he was prejudiced when the jury was not informed of an alleged "arrangement" between the State and Mechele Robinson. When the State promises consideration in exchange for a witness's testimony, "the terms of the quid pro quo must be fully disclosed to the jury, the defendant or his counsel must be allowed to fully cross-examine the witness concerning the terms of the bargain, and the jury must be given a cautionary instruction."[20] Here, Robinson was compelled to attend trial by a subpoena. The fact that Robinson had previously been subject to a material witness warrant in this case does not

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[19]Edwards v. State, 90 Nev. 255, 264, 524 P.2d 328, 334 (1974).

[20]Sheriff v. Acuna. 107 Nev. 664, 669, 819 P.2d 197, 200 (1991).

by itself suggest that the State entered into any agreement in exchange for her testimony. And there is no suggestion in the record that Robinson received any benefit from the State in exchange for her testimony. Therefore, we conclude that Gill's claim lacks merit.

Finally, Gill contends that despite having eight prior felony convictions, it was an abuse of discretion for the district court to adjudicate him a habitual criminal. He bases his argument on the fact that all but one of his prior convictions were non-violent and all of them occurred more than five years before the present conviction. A trial court judge has the discretion to dismiss a count of habitual criminality.[21] "NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court."[22]

At sentencing, the district court reaffirmed that a finding of habitual criminality is never automatic but is a decision made "after careful review of the circumstances of the offense and prior record of the defendant and all material evidence and facts bearing on the question." This is an accurate statement of Nevada law.[23] The district court stated that it had carefully reviewed the pre-sentence report and Gill's prior record, including the six prior judgments of conviction produced by the State. The district court found that the evidence of guilt at trial was overwhelming and that the prior convictions of the defendants were

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[21]O'Neill v. State, 123 Nev. 9, 16, 153 P.3d 38, 43 (2007).

[22]Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (citing French v. State, 98 Nev. 235, 645 P.2d 440 (1982)).

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

serious and "particularly in the case of Mr. Gill, span decades of criminal behavior." We conclude that in light of Gill's prior convictions supporting the habitual criminal count,[24] the district court did not err in adjudicating him a habitual criminal.

Having considered Gill's claims and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

cc: Hon. Brent T. Adams, District Judge
Eric W. Lerude
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

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[24]Gill has two prior out-of-state felony convictions, as well as convictions in Nevada for armed robbery in 1981, burglary in 1994, possession of a controlled substance for the purpose of sale in 1995, using and/or being under the influence of a controlled substance in August 1998 and October 1998, and possession of a controlled substance for the purpose of sale in 1999.