IN THE SUPREME COURT OF THE STATE OF NEVADA

MERRY STEEN WEST A/K/A MERRY ELLEN STEEN A/K/A MERRY ELLEN HINES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47938

FILED

JUN 06 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of larceny from a person, victim 60 years or older. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court adjudicated appellant Merry Steen West as a habitual criminal pursuant to NRS 207.010 and sentenced her to serve a term of life in prison with the possibility of parole after ten years.

At trial, evidence was presented that West was standing near 88-year-old Arvil Worthington, while Worthington cashed traveler's checks at a bank inside of a grocery store. Worthington, who was wheelchair bound, then wheeled himself to the entrance of the store to wait for a bus. West offered to push him to the bus stop. While pushing his chair, West intentionally fell over Worthington, and retrieved Worthington's money from his shirt pocket. Worthington yelled that West had taken his wallet, and the police were called. West left the store before the police arrived. Following an investigation, she was identified as the assailant and she

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admitted to committing the crime. Worthington was hospitalized during the trial, and a transcript of his preliminary hearing testimony was read to the jury. The jury convicted West of larceny of a person, victim 60 years or older. This appeal followed. West raises nine claims of error on appeal.

Unavailable witness testimony

West claims that the district court violated her right of confrontation by admitting Worthington's preliminary hearing testimony. Specifically, she contends that she was deprived of an adequate opportunity to effectively cross-examine Worthington because West first met her attorney shortly before the hearing began, West wanted her attorney to ask more questions of Worthington, and the district court did not tell her Worthington's testimony could later be used against her at trial.

In Crawford v. Washington, the United States Supreme Court held that, "[w]here testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination."[1] In Grant v. State, this court stated that the admission of prior testimony comports with the Sixth Amendment when a defendant had the opportunity to, and in fact did, thoroughly cross-examine a witness and the witness is actually unavailable for trial.[2] Also, counsel must have represented a defendant at

[1]541 US. 36, 68 (2004).

[2]117 Nev. 427, 432, 24 P.3d 761, 764 (2001).

the preliminary hearing.[3] Here, the prerequisites set forth in Crawford and Grant were met—West was represented by counsel and Worthington was cross-examined at the preliminary hearing. We therefore conclude that the district court did not err in admitting Worthington's preliminary hearing testimony.

West further challenges the manner in which the prior testimony was admitted. At trial, the district court, over West's objection, had West's counsel read the defense counsel portion of the preliminary hearing transcript. West argues that it was improper to compel counsel to participate in the transcript reading. However, West has provided no authority or adequately explained why the district court erred in this regard or how she was unduly prejudiced. Therefore, we conclude she failed to demonstrate that the district court erred in this regard.

West also argues error in that the preliminary transcript included Worthington's statement that he would take a polygraph test. West objected to the use of the preliminary testimony on the ground that it violated her right to confrontation, but failed to object to any reference to a polygraph test. Generally, the failure to object during trial will preclude appellate review of that issue.[4] However, this court may review

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[3]NRS 171.198(6)(b).

[4]Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001) (citing Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482-83 (2000)).

for plain error affecting the defendant's substantial rights.[5] The burden rests with West to show actual prejudice or a miscarriage of justice.[6]

The challenged statements occurred when Worthington was responding to questions from both the State and West concerning the amount of money taken from him. Worthington stated the amount of money he carried when the theft occurred and that he would take a polygraph to confirm his accuracy. When viewed in context, Worthington's statements were his way of demonstrating that his memory was accurate. Here, West fails to demonstrate that the challenged statements affected her substantial rights. Further, there was substantial overwhelming evidence supporting West's guilt, including the defendant's own admission of guilt, Worthington's identification of her, and the videotape of the incident. Therefore, we conclude that West has failed to demonstrate plain error in this regard.

Worthington's out-of-court statements

West argues that the district court erred by admitting several out-of-court statements made by Worthington. First, West argues that statements Worthington made to Officer Skipworth were testimonial in nature and that their admission violated West's right to confrontation under Crawford v. Washington.[7] In particular, West challenges Officer

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[5]Id.

[6]Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[7]541 U.S. 36 (2004).

Skipworth's testimony in which he stated Worthington's account of the theft. The State concedes that these statements to Officer Skipworth were testimonial in nature. Testimonial out-of-court statements may not be admitted in violation of the defendant's right to confrontation.[8] Therefore, the district court erred by admitting these statements, as they were testimonial and Worthington was not subject to cross-examination about them. However, we conclude that any error in admitting them was harmless because these statements added little to the evidence presented to the jury and other evidence adduced overwhelmingly established West's guilt.[9]

West next argues that the district court erred by admitting Worthington's statements to George Beltran, the grocery store manager, which Beltran relayed to the operator during a 9-1-1 call. West argues that these statements were testimonial in nature and that their admission violated her right to confrontation.[10] Testimonial out-of-court statements may not be admitted in violation of the defendant's right to confrontation.[11] However, out-of-court statements made in an attempt to resolve an ongoing emergency are not testimonial and admission of non-

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[8]Id. at 68.

[9]See Bradley v. State. 109 Nev. 1090, 1093, 864 P.2d 1272, 1274 (1993) (citing Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985)).

[10]Crawford, 541 U.S. 36 (2004).

[11]Id. at 68.

testimonial statements do not violate a defendant's right to confrontation.[12] It appears from the record that the actual 9-1-1 call was not played, but that Beltran testified to the statements that he relayed from Worthington to the 9-1-1 operator. When Worthington made these statements, West had not left the store and Worthington was seeking assistance in stopping the person that he believed had taken his money. Therefore, there was an ongoing emergency when these statements were made and thus the statements were not testimonial in nature. Admission of non-testimonial statements did not violate West's right to confrontation. Therefore, we conclude West is not entitled to relief in this regard.

Racial bias

West claims that the district court erred by limiting her ability to present evidence of Worthington's racial bias. In particular, West argues she was precluded from presenting her theory of defense that Worthington misidentified her as the culprit because she was African-American. During voir dire, West asked a prospective juror if "it might be easier to accuse a black women of something than someone else?" The State objected, and the district court sustained the objection and instructed the prospective juror not to answer the question. During her opening statement, West offered that she was misidentified as the culprit because of her race. Following opening statement and outside of the presence of the jury, the State contended that arguing racial bias by

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[12]Davis v. Washington, 547 U.S. 813, 826-28 (2006).

Worthington without presenting evidence of bias was improper. The district court told West that if evidence was presented during trial that racial bias contributed to her arrest, then she would be able to argue that issue. The district court's ruling did not preclude West from presenting evidence of racial bias as her theory of defense. Therefore, we conclude that this claim lacks merit.

West also argues that the venire, which included one African-American out of 40 individuals, did not represent a fair cross-section of the African-American community in Clark County, resulting in a violation of her rights under the United States and Nevada Constitutions. We held in Williams v. State that a defendant is entitled to a jury venire that is "selected from a fair cross-section of the community."[13] However,

> [t]he Sixth Amendment does not guarantee a jury or even a venire that is a perfect cross section of the community. Instead, the Sixth Amendment only requires that "venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."'[14]

Accordingly, random variations in the jury selection process are permissible "as long as the jury selection process is designed to select jurors from a fair cross-section of the community."[15]

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[13]121 Nev. 934, 939, 125 P.3d 627, 631 (2005).

[14]Id. at 939-40, 125 P.3d at 631 (internal quotations and citations omitted).

[15]Id. at 940, 125 P.3d at 631.

At trial, West acknowledged that she had no evidence of exclusion and failed to provide any evidence supporting her claim. We therefore conclude that West failed to demonstrate any deficiencies in the jury selection process in this regard. Therefore, the district court did not err by denying West's request for a new jury panel.

Admission of the surveillance videotape

West challenges the admission of a duplicate surveillance video from the grocery store on the grounds that the videotape was improperly authenticated and violated the best evidence rule. However, West did not object to admission of the videotape based upon a lack of foundation; therefore the admittance of the videotape must be reviewed for plain error.[16] District courts are vested with considerable discretion in determining the relevance and admissibility of evidence.[17] A district court's decision to admit or exclude evidence will not be reversed on appeal unless it is manifestly wrong.[18] We conclude that West has not demonstrated that the district court's decision was manifestly wrong. Here, Beltran testified that he reviewed the original video captured on a hard drive and made a duplicate copy. Officer Skipworth testified that he viewed the original video from the hard drive and that the duplicate

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[16]Leonard, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

[17]Archanian v. State, 122 Nev. 1019, 1029, 145 P.3d 1008, 1016 (2006) (citing Crowley v. State, 120 Nev. 30, 34, 83 P.3d 282, 286 (2004)).

[18]Id. (citing Vallery v. State, 118 Nev. 357, 371, 46 P.3d 66, 76 (2002)).

represented an accurate copy of the original video. We conclude that West has failed to demonstrate plain error respecting the admission of the videotape on the grounds that is was improperly authenticated.

West also argues that admission of the duplicate surveillance videotape violated the best evidence rule. NRS 52.245 provides that duplicates are admissible to the same extent as the original unless a genuine question is raised as to the authenticity of the original, or it would be unfair to admit the duplicate in lieu of the original under the circumstances. Here, West did not challenge the authenticity of the original video. She argues that the quality of the duplicate videotape was much poorer than the original and that admission of the original video would have provided the jury a clear, reliable depiction of the event. West argues that she was prejudiced because a viewing of the original would have allowed a comparison between that and the duplicate. At trial, Officer Skipworth and Beltran both testified that the original surveillance video was of higher quality than the duplicate used in court. Although the record indicated that the duplicate was lesser quality than the original, it appears that the duplicate depicted the challenged events sufficiently. Officer Skipworth and Beltran were able to identify West and Worthington from the videotape and there is no indication that the duplicate videotape unfairly distorted or altered the event depicted. Therefore, West is not entitled to relief in this regard.

West also argues that the district court erred by allowing Officer Skipworth and Beltran to testify to what they observed on the store surveillance video prior to their in-court testimony. Officer Skipworth and Beltran both made in-court narrations of the surveillance

video and made statements that their narrations were aided by viewing the surveillance video prior to trial. Officer Skipworth and Beltran identified West in the videotape. West argues that that these observations constituted hearsay and improper lay opinion. She further contends that the witnesses' narrations violated her right to confrontation because the original was not admitted. At trial, West did not object to the narrations based upon hearsay, improper lay opinion, or her right to confrontation. As such, admission of the statements must be reviewed for plain error.[19] We conclude that West has failed to demonstrate plain error. West was not precluded from questioning the witnesses about their identification of her as the person on the video or from questioning the witness about their perceptions in relation to their previous viewing of the original surveillance video. Further, Worthington identified West as the person who took his money and West confessed to the police that she performed the actions depicted on the video. Therefore, West is not entitled to relief in this regard.

Admission of West's confession

West contends that her confession was improperly admitted because the corpus delecti of the crime was not established independently of her confession. The corpus delicti of a crime must be established independently before a defendant's extrajudicial admissions can be

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[19]Leonard, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

considered.[20] However, the corpus delicti is established by any independent evidence sufficient for a reasonable inference that a crime was committed.[21] Here, Worthington's testimony identifying West as the person who took his money was sufficient to establish the corpus delicti. Therefore, West's confession was properly admitted.

West next argues that the district court erred by limiting questioning of Officer Skipworth concerning what penalties he told West she was facing. Prior to West's confession to the crime, Officer Skipworth discussed the charges and the possible sentencing enhancements for charges where the victim is over 60 years of age. At trial, counsel asked Skipworth if he explained to West that the enhancement for a victim over the age of 60 doubled the penalty. The State objected, and the district court ruled that the jury should not be concerned with the exact penalty, but that it could consider Officer Skipworth's testimony that he told West that she faced a more serious offense. West argues that the district court's ruling precluded her from showing that her confession was involuntary. However, West argued in closing argument that she admitted to the crime only out of fear of the enhanced penalty, and that her fear made her

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[20]See West v. State, 119 Nev. 410, 417, 75 P.3d 808, 813 (2003); Doyle v. State, 112 Nev. 879, 892, 921 P.2d 901, 910 (1996), overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 91 P.3d 16 (2004); Hooker v. Sheriff, 89 Nev. 89, 92, 506 P.2d 1262, 1263 (1973).

[21]Doyle v. State, 112 Nev. at 892, 921 P.2d at 910 (quoting People v. Alcala, 685 P.2d 1126, 1136 (Cal. 1984)); see Myatt v. State, 101 Nev. 761, 763, 710 P.2d 720, 722 (1985).

confession involuntary. Therefore, we conclude that West failed to demonstrate error in this regard.

Judicial misconduct

West argues that the district court interrupted and made disparaging remarks towards defense counsel. She contends that the district court's actions violated her right to counsel because they gave the impression that defense counsel was untruthful. In particular, West challenges the following comment by the district court: "[T]hat isn't the truth — that's a misstatement." However, the challenged statement occurred in response to counsel's statement that the victim would not be present, at which time the district court interrupted to explain the law concerning unavailable witnesses and that Worthington's testimony from the preliminary hearing would be read in court. Further, when the district court interrupted defense counsel, it was most often to ask counsel to restate a question. Considering the context in which the challenged statement and the interruptions were made, we conclude that West failed to demonstrate error in this regard.

Denial of a proposed instruction

West claims that the district court erred by refusing to give the following proposed instruction:

> You may infer that the lost or destroyed evidence which could have been produced by the State and did not [sic] is favorable to the defendant if the evidence was (a) under the State's control and reasonably available to it and not reasonably available to the defendant, and (b) lost or destroyed without satisfactory explanation after

> the State knew or should have known of the existence of the claim.

West argues that police officers should have collected surveillance photographs of Worthington at the bank and evidence from the bank records showing the time Worthington was in the bank. West claims that the photographs and the bank records may have shown that West and Worthington were not in the bank at the same time.

A defendant may seek sanctions against the State for failing to gather evidence, provided the evidence was material and the failure to gather it was due to negligence, gross negligence or bad faith.[22] Evidence is material if the defendant can demonstrate with "reasonable probability" that the outcome of the trial would have been different had the evidence been available to the defense.[23] Here, we conclude that West has not shown that the challenged evidence was material. Testimony at trial placed West at the bank at the same time as the victim. Moreover, Worthington identified West as the assailant and she confessed to the crime. Therefore, West has failed to demonstrate a reasonable probability that a photograph of Worthington at the bank or other bank records would have changed the outcome at trial. Therefore, we conclude that the challenged evidence was not material and that West was not entitled to the proffered jury instruction.

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[22]Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001).

[23]Id.

Habitual criminal adjudication

West argues that her due process rights were violated because the hearing to determine habitual criminal status only lasted four minutes, during which the district court interrupted defense counsel six times. West argues that the short hearing and interruptions did not afford her a hearing consistent with due process standards. West also argues that the district court abused its discretion by adjudicating her a habitual criminal because many of the convictions occurred at the same time, the convictions were stale, and the convictions were nonviolent. The record reveals that the district court allowed counsel and West to present arguments concerning sentencing. During the hearing, West argued that 11 convictions should be counted as one because they were charged on the same information. "[W]here two or more convictions result from the same act, transaction, or occurrence and are prosecuted in the same indictment or information, those convictions may be used only as a single prior conviction for purposes of habitual criminal adjudication."[24] However, other than claiming error, West failed to explain why these 11 convictions could not be used separately to support a habitual criminal adjudication.

Further, West did not argue that the convictions were stale and she did not object to use of any of the convictions because of a lack of adequate documentation on the part of the State. As such, her challenge regarding the staleness of the prior convictions and lack of documentation

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[24]Rezin v State, 95 Nev. 461, 463, 596 P.2d 226, 227 (1979).

is reviewed for plain error.[25] The district court may dismiss counts brought under the habitual criminal statute when the prior offenses are stale, trivial, or where adjudication of habitual criminality would not serve the interests of the statute or justice.[26] The habitual criminal statute, however, makes no special allowance for non-violent crimes or for remoteness of the prior convictions; these are merely considerations within the discretion of the district court.[27] Therefore, the district court properly exercised its discretion when considering the staleness of West's convictions. The record indicates that the district court conducted an independent review at sentencing of the proof of West's prior convictions. We therefore conclude that the habitual criminal adjudication was not automatic and that the district court properly exercised its discretion.[28]

Regarding the sufficiency of the documentation of the convictions, the State presented certified judgments of conviction for fifteen convictions, and documentation of parole revocation for five more convictions, which occurred in Nevada, Texas, and California. Upon

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[25]Leonard, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

[26]See Sessions v. State, 106 Nev. 186, 190, 789 P.2d 1242, 1244 (1990).

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

[28]See Hughes v. State, 116 Nev. 327, 332-33, 996 P.2d 890, 893-94 (2000) (district court exercised sufficient discretion in habitual criminal determination based on the record as a whole); see also Clark, 109 Nev. at 428-29, 851 P.2d at 427-28.

review of the documentation provided, we conclude that it sufficiently established a basis upon which to adjudicate West a habitual criminal.

West also argues that she is entitled to a jury determination respecting her habitual criminal status. We disagree. We have held that a defendant is not entitled to a jury determination of criminal habituality.[29] Therefore, we decline her invitation to revisit this issue.

West further argues that the district court sentenced her for uncharged conduct in violation of Denson v. State.[30] West specifically challenges the district court's statement that West preyed on people every day of her life and that the public needed to be protected from her. In Denson, we ruled that the district court has wide discretion regarding sentencing and may consider uncharged acts.[31] However, the district court may not punish the defendant for uncharged acts in addition to the offenses of which she was convicted.[32] There is no suggestion that the district court punished West for any uncharged act but rather considered her entire record in sentencing her. We therefore conclude that West's claim lacks merit.

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[29]See O'Neill v. State, 123 Nev. ____, 153 P.3d 38 (2007); see also Howard v. State, 83 Nev. 53, 422 P.2d 548 (1967) (holding that the Nevada Constitution does not require that status as a habitual criminal be determined by a jury.).

[30]112 Nev. 489, 915 P.2d 284 (1996).

[31]Id. at 494, 915 P.2d at 287.

[32]Id. at 492, 915 P.2d at 286.

West also argues that her sentencing hearing was unfair because the district court's comments to the jury following the verdict indicated judicial bias against her. In particular, she challenges the district court's statements that the State had alleged over 20 felony convictions, that West "skipped bail," which caused a delay in the trial, and that the reason that this case had gone to trial was the lengthy sentence the State was seeking. The district court further stated "I don't know if it's true; don't know anything about it; that's for another day. We will have to see how it shakes out." West argues that these comments indicate that the district court had predetermined West's status as a habitual criminal. The comments were made after the jury reached a verdict and in response to what the district court perceived were questions the jury had about West and the trial. Considering the district court's comments in context, we conclude that they do not indicate bias or any predetermination of habitual criminality. Therefore, we conclude that no relief is warranted on this claim.

Cumulative Error

West also contends that she is entitled to relief due to cumulative error. However, any error that occurred during the trial resulted in minimal prejudice to her. Even when these errors are considered cumulatively, we conclude that they do not entitle her to relief.[33]

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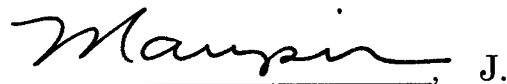
[33]See Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

Accordingly, having considered West's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



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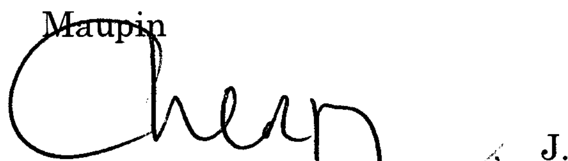
Maupin



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Cherry

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Saitta

cc: Hon. Stewart L. Bell, 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