IN THE SUPREME COURT OF THE STATE OF NEVADA

LARRY WILSON BRIGHT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48684

FILED

JAN 04 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 one count of possession of a controlled substance. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant Larry Wilson Bright to serve a prison term of 12 to 48 months.

Bright first contends that the district court erred by refusing to declare a mistrial following improper references to his prior criminal record. Specifically, Bright contends that, despite the district court's order, two officers testified that they had prior contact with Bright and the hotel security officer testified that Bright had an outstanding arrest warrant. Bright contends that the admission of this testimony denied him a fair trial.

The decision to grant or deny a motion for a mistrial is within the district court's sound discretion and will not be disturbed on appeal absent a clear showing of an abuse of discretion.[1] Four factors must be

[1]Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

considered in determining whether an inadvertent reference to a prior criminal activity is unduly prejudicial: "(1) whether the remark was solicited by the prosecution; (2) whether the district court immediately admonished the jury; (3) whether the statement was clearly and enduringly prejudicial; and (4) whether the evidence of guilt was convincing."[2]

In this case, the comments were not intentionally solicited by the State and were not clearly and enduringly prejudicial. Moreover, the evidence against Bright was overwhelming. Bright dropped several individually wrapped "rocks" of cocaine when detained by hotel security. Police officers later searched Bright and found several more wrapped bundles of cocaine. We conclude that the district court did not err by denying Bright's motion for a mistrial.

In a related argument, Bright contends that the district court failed to give either a contemporaneously or written limiting instruction on the admission of the testimony referencing his criminal history evidence. The test regarding failure to give a limiting instruction is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'"[3]

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[2]Id. at 942, 920 P.2d at 995-96 (citing Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983)).

[3]Tavares v. State, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)).

In this case, the record does not demonstrate that the failure to give a limiting instruction had a substantial or injurious effect in determining the jury's verdict. We note that Bright was charged with possession of a controlled substance with intent to sell, but was only convicted of the lesser-included offense of possession of a controlled substance. Further, as previously stated, the State presented overwhelming evidence in support of the lesser-included offense. Accordingly, the error was harmless under the facts of this case.

Bright next contends that the district court erred in instructing the jury on the lesser-included offense of possession of a controlled substance. Citing to Alford v. State[4] and Green v. State,[5] Bright contends that NRS 175.501 is unconstitutional because it allows a defendant to be convicted of an uncharged lesser-included offense without adequate pretrial notice. More specifically, Bright argues that "[a] defendant should not be placed in the precarious position of crafting a defense that assails the greater offense but not a lesser offense – only to find out, after it is too late, that the jury will have an option of convicting on the lesser offense." Likewise, Bright argues that "it is unfair for a

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[4]111 Nev. 1409, 906 P.2d 714 (1995) (holding that the State was not allowed to proceed on a felony murder theory because it was not alleged before trial and therefore defendant had no opportunity to prepare a defense).

[5]94 Nev. 176, 576 P.2d 1123 (1978) (no amendment to an information is allowed during the trial if the amendment charges a different offense or prejudices the substantial rights of the defendant).

defendant to prepare a defense that addresses both a primary and lesser offense – when a better, singular defense to the primary charge existed – only to find out at the settling of instructions that the government did not want the jury instructed on a lesser charge."

Pursuant to NRS 175.501, a defendant "may be found guilty of an offense necessarily included in the offense charged." A necessarily included offense is one that must occur in order for the crime charged to occur.[6] "'No sale of narcotics is possible without possession, actual or constructive.'"[7] This court has previously recognized that a trial court may issue an instruction on the lesser-included offense of possession of a controlled substance when the defendant was charged with the greater offense of possession of a controlled substance with the intent to sell.[8]

Here, the offense of possession of a controlled substance with intent to sell necessarily contained all of the elements of the possession offense. Bright was afforded adequate statutory notice under NRS 175.501 that he could be convicted of the lesser-included offense and therefore his constitutional rights were not violated. Accordingly, we

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[6]See Barton v. State, 117 Nev. 686, 694-95, 30 P.3d 1103, 1108-09 (2001), overruled on other grounds by Rosas v. State, 122 Nev.___, 147 P.3d 1101 (2006).

[7]See Lisby v. State, 82 Nev. 183, 187-88, 414 P.2d 592, 594 (1966) (quoting People v. Rosales, 38 Cal. Rptr. 329, 331 (Cal. Ct. App. 1964)).

[8]Id.

conclude that the district court did not err in instructing the jury on the offense of possession of a controlled substance.

Bright next contends that the district court erred in rejecting his proposed jury instruction in favor of jury instruction no. 15 which he alleges diluted the State's burden of proof.[9] Jury instruction no. 15 stated: "In your deliberation you may not discuss or consider the subject of punishment, as that is a matter which lies solely with the court. Your duty is confined to the determination of the guilt or innocence of the [d]efendant." Bright contends that this instruction "prompted the jury to convict where the evidence, though inadequate to prove guilt beyond a reasonable doubt, nonetheless indicated that the defendant may not have been 'innocent.'"[10]

The district court has discretion "[i]n charging the jury [and] shall state to [the jury] all such matters of law [it] thinks necessary for their information in giving their verdict."[11] In considering a claim that a jury instruction was improper, this court has held that the district court's decision to give a particular jury instruction does not warrant reversal unless the instruction given was arbitrary or exceeded the bounds of law.[12]

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[9]Bright proposed that the jury be instructed that their task was to determine whether the prosecutor proved the charged offense beyond a reasonable doubt.

[10]United States v. Deluca, 137 F.3d 24, 37 (1st Cir. 1998).

[11]NRS 175.161(2).

[12]Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

We conclude that jury instruction no. 15 did not dilute the presumption of innocence. Moreover, the district court gave the jury a separate instruction on the presumption of innocence.[13] Jury instruction no. 9 provided, in relevant part, that: "The [d]efendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged." Accordingly, we conclude that the district court did not abuse its discretion in instructing the jury on the State's burden of proof.

Finally, Bright contends that the district court erred by failing to dismiss the charges based on the State's failure to preserve evidence. Specifically, Bright contends that the State failed to preserve surveillance tapes of Bright being escorted to the hotel security office.

The State's failure to preserve potentially exculpatory evidence may result in dismissal of the charges if the defendant can show "bad faith or connivance on the part of the government" or "that he was prejudiced by the loss of the evidence."[14] There is no indication in the record that the State lost the surveillance tapes in bad faith.

In this case, the prosecutor explained to the district court that the employee who was supposed to preserve the surveillance tapes was no

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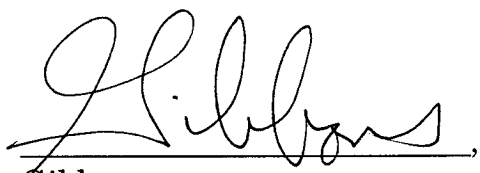
[13]See Cupp v. Naughten, 414 U.S. 141, 146-47 (1973) (recognizing "that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge").

[14]Howard v. State, 95 Nev. 580, 582, 600 P.2d 214, 215-216 (1979).

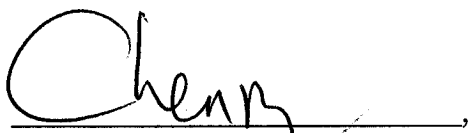
longer employed by the casino, and that the tapes could not be located. Further, there is no indication that the surveillance tapes would have been exculpatory because they merely depicted Bright being led to the hotel security office. Accordingly, we conclude that the district court did not err in failing to dismiss the charges based on the State's failure to preserve evidence.

Having considered Bright's contentions and concluded that they lacked merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Gibbons



_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Donald M. Mosley, 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