IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDRE DESHAWN WINTERS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49340

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.

A jury found appellant Andre Deshawn Winters guilty of burglary and robbery, pursuant to NRS 205.060 and NRS 200.380, respectively. The district court subsequently sentenced Winters as a habitual criminal to two concurrent life sentences without the possibility of parole, to run consecutive to any other sentence Winters was currently serving, and with zero credit for time served.

On appeal, Winters argues that (1) the district court abused its discretion when it overruled his challenge pursuant to Batson v. Kentucky, 476 U.S. 79 (1986); (2) his constitutional rights were violated because (a) statements attributed to him were allegedly acquired in violation of Miranda v. Arizona, 384 U.S. 436 (1966), (b) a statement attributed to him that he used the money to "party" was improper, (c) his sentencing was continued without justification, and (d) his sentence was based on false evidence; and (3) the district court erred in its application of the habitual criminal sentencing statutes.

For the reasons set forth below, we conclude that Winters' contentions fail and therefore we affirm the conviction. As the parties are

familiar with the facts of this case, we do not recount them except as necessary to our disposition.

DISCUSSION

Batson challenge

Winters argues that the district court abused its discretion, thereby violating his equal protection and due process rights, when it overruled his Batson challenge to the State's use of peremptory challenges to excuse two minority jurors. 476 U.S. at 86.

"In Batson v. Kentucky, the United States Supreme Court held that the use of peremptory challenges to remove potential jurors on the basis of race is unconstitutional under the Equal Protection Clause of the United States Constitution." Diomampo v. State, 124 Nev. ____, ____, 185 P.3d 1031, 1036 (2008). When a defendant raises a Batson objection, the district court undertakes a three-pronged test to decide whether illegal discrimination occurred:

> (1) the defendant must make a prima facie showing that discrimination based on race has occurred based upon the totality of the circumstances, (2) the prosecution then must provide a race-neutral explanation for its peremptory challenge or challenges, and (3) the district court must determine whether the defendant in fact demonstrated purposeful discrimination.

Id. at ____, 185 P.3d at 1036. On appeal, this court affords great deference to the "trial court's decision on the ultimate question of discriminatory intent." Id. at ____, 185 P.3d at 1036.

In this case, the State's race-neutral explanations were satisfactory. While two jurors were victims of crimes, the minority juror, whom the State excused, was visibly upset by being present in court, while

the nonminority juror was not. Next, while two jurors worked within the justice system, their experiences were vastly different. The minority juror excused by the State interacted directly with inmates and had opinions based upon those interactions. In contrast, the nonminority juror did administrative work and never entered a courtroom.

Winters argues that the district court erred in its application of the third Batson prong because the district court relied upon its own observations and conclusions, rather than analyzing the State's race-neutral explanations or how the State posed its questions to the jurors. We conclude that this argument fails. The district court's observations are integral to determining whether the State's explanations are credible or whether purposeful discrimination has occurred. See Snyder v. Louisiana, _____ U.S. _____, _____, 128 S. Ct. 1203, 1208 (2008) (noting that it is within the district court's providence to evaluate "whether the prosecutor's demeanor belies a discriminatory intent," as well as "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor"). Here, the district court's comments were proper because they showed that it found the State's race-neutral explanations to be credible. Accordingly, we conclude that Winters' arguments on this point are without merit because the State provided race-neutral explanations for its peremptory challenges.

Miranda warning

Winters next challenges the district court's decision to admit statements attributed to him in which he confessed to the instant crime. Winters argues that his right to due process, right to protection from self-

incrimination, and right to counsel were violated because these statements were acquired in violation of Miranda and therefore inadmissible.[1]

Pursuant to the Fifth Amendment's privilege against self-incrimination, statements that a suspect makes during a "'custodial interrogation are inadmissible at trial unless the police first provide a Miranda warning.'" Rosky v. State, 121 Nev. 184, 191, 111 P.3d 690, 695 (2005) (quoting State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998)). When giving the Miranda warning, the police must inform the defendant that he has the right to remain silent and that anything he says can be used against him. Colorado v. Spring, 479 U.S. 564, 577 (1987). Thus, the Miranda warning "conveys to a suspect the nature of his constitutional privilege and the consequences of abandoning it." Id. Accordingly, "a suspect's awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege." Id. A district court's "custody and voluntariness determinations present mixed questions of law and fact subject to this court's de novo review." Rosky, 121 Nev. at 190, 111 P.3d at 694.

Here, Agent Beasley questioned Winters while Winters was being held on other charges. Agent Beasley informed Winters that he wanted to talk to Winters about a Nevada State Bank robbery and not

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[1]Winters additionally argues that his confession was involuntary. While a confession is only admissible if it is voluntary, Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987), after reviewing the record we conclude that the evidence supports that Winters' confession was voluntary.

about other crimes for which the State had charged Winters. Agent Beasley administered a Miranda warning, and Winters signed a form indicating that he understood his rights. Winters now argues that Agent Beasley "limited" the scope of the Miranda warning by telling Winters that he only wanted to question him about the Nevada State Bank robbery and that he should have been given another Miranda warning before being questioned about the instant case.

We conclude that Winters' argument fails. Similar to Spring, we conclude that Winters' constitutional rights were not violated because he did not have a right to be made aware of every possible subject before being questioned. Winters argues that his case is distinguishable from Spring because, in Spring, the officers did not "limit" the scope of the questioning. We need not reach the issue of whether Winters' case is distinguishable because we determine that questioning Winters about the instant bank robbery was within the scope of Agent Beasley's Miranda warning. Agent Beasley told Winters that he was not going to question Winters about other cases, beyond the Nevada State Bank robbery, for which Winters had been charged. At the time of the questioning, Winters had not been charged with the Wells Fargo Bank robbery. Accordingly, Winters' argument fails because he did not have the right to be made aware of every possible subject before being questioned.

Statement that money was used to "party"

Winters also argues that the district court violated his right to due process when it admitted a statement attributed to him that he spent the stolen money on, among other things, "partying." Specifically, Winters argues that the answer was irrelevant, more prejudicial than probative,

and that "partying" was evidence of bad character or a bad act pursuant to NRS 48.045(2).

Relevant evidence is that "having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Relevant evidence is admissible unless its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). Further, evidence of other "crimes, wrongs or acts" is inadmissible to prove a person's character to show that he "acted in conformity therewith." NRS 48.045(2). However, such evidence may be admissible for other purposes, including proving "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Id.

"The decision to admit or exclude such evidence is within the sound discretion of the district court and the district court's determination will not be disturbed unless manifestly wrong." Tabish v. State, 119 Nev. 293, 310, 72 P.3d 584, 595 (2003). If the district court abuses its discretion, then this court analyzes the admission for harmless error. Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998). "An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) (internal quotations omitted).

Although the testimony that Winters used the money to "party" might have been irrelevant, we conclude that the district court did not abuse its discretion by admitting it. First, we determine that it was not more prejudicial than probative because the testimony came at the end

of the trial, after the jury had listened to substantial evidence against Winters. Accordingly, even if the testimony was admitted in error, it was harmless. The jury was unlikely to be swayed by the use of the term "partying." Additionally, we conclude that use of the term "partying" does not fall within the scope of NRS 48.045(2). There was no evidence presented that would have led the jury to believe that Winters had been involved in another crime or bad act because he was "partying." Accordingly, we conclude that, on this point, Winters' argument is without merit.

Continuance of sentencing

Winters also contends that the district court was not justified in continuing his sentencing based on the state's presentence investigation report (PSI) not being filed. Winters asserts that the district court should have used a federal PSI, written by a United States probation officer, which was available.[2]

Pursuant to NRS 176.135, when a person is convicted of a felony, the Division of Parole and Probation must prepare and present a PSI to the court. NRS 176.135(1). When the defendant is convicted of a felony other than a sexual offense, the PSI "must be made before the imposition of sentence . . . unless . . . [a PSI] on the defendant has been made by the Division within the 5 years immediately preceding the date initially set for sentencing on the most recent offense." NRS 176.135(3).

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[2]Alternatively, Winters asserts that the district court should have used a state PSI allegedly filed in 2003 for a different case. Because Winters did not raise this argument during the initial sentencing hearing and this PSI was not included in the record, we decline to address this contention.

Therefore, we conclude that the district court did not err by continuing the sentencing based on the state PSI not being filed. While the federal PSI was available, it was not written by the Division of Parole and Probation, as required by NRS 176.135. Therefore, there was not a proper PSI available and the continuance was warranted.

Alternatively, Winters argues that the continuance, which ultimately resulted in an approximately three-month delay in his sentencing, violated his right to a speedy trial and to due process. We disagree. Not only was there no evidence that the delay was caused by bad faith, see Doggett v. United States, 505 U.S. 647, 651 (1992), there is also no evidence that Winters was prejudiced by the delay, as he was incarcerated for the entire duration on other charges. See Prince v. State, 118 Nev. 634, 641, 55 P.3d 947, 951 (2002). Accordingly, we conclude that Winters' argument is without merit.[3]

Factual basis for sentencing

Winters next challenges the district court's sentence because he argues that it was based on false information. Winters asserts that (1) the State made false statements about his record during the sentencing hearing; and (2) when compared to the federal PSI, the state PSI included false information.

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[3]Because we conclude that a delay in sentencing did not affect Winters' right to a speedy trial, we also conclude that his due process rights and his right to be sentenced without undue delay, pursuant to NRS 176.015, were not violated by the continuance. See Prince, 118 Nev. at 641, 55 P.3d at 951. Moreover, Winters' due process rights were not violated because only a purposeful or oppressive delay by the State violates a defendant's due process rights, and we conclude that the State did not purposefully delay the sentencing. Id.

We have consistently afforded the district court wide discretion in its sentencing decision. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). 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." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Regardless of its severity, a sentence that is 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.'" Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)).

We conclude that although the State at times mischaracterized Winters' record during the sentencing, none of the discrepancies were so great as to have resulted in prejudice. Rather, the State's mischaracterizations primarily dealt with Winters' juvenile record, indicating, for example, that Winters was arrested and convicted of burglary at age eight, when the federal PSI indicates that the case was closed by the police. Further, we disagree with Winter's contention that he was prejudiced because the district court based its decision on the State's characterization of him as a "killer" and mentioning an attempted murder charge that was dismissed when Winters was sent back to a juvenile detention center. The record demonstrates that the district court was well aware that Winters was not a killer and based Winters' sentence

on his extensive criminal record.[4] Moreover, we conclude that the district court was presented with evidence sufficient to support sentencing Winters to two concurrent life sentences. Finally, while Winters contends that the state PSI is false because it differs from the federal PSI, we note that Winters offered no proof that the federal PSI is correct while the state PSI is not.[5] Accordingly, we conclude that Winters' argument is without merit.

Habitual criminal sentencing

Finally, Winters challenges his sentence, arguing that the district court erred in its application of the habitual criminal sentencing statutes because a burglary conviction pursuant to NRS 205.060 is not a

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[4]Specifically, the district court stated that:

> Maybe nobody was physically injured and nobody was shot when the women were robbed at gun point, and maybe nobody died in the drive-by shooting in 1992, and nobody died in the fire bombing arson in 1994, and Ms. Strawbridge (ph) didn't die when she was robbed in 1999, and none of these women in Judge Glasses' case died when they were robbed at gun point, but how much are we supposed to put up with.
>
> . . . .
>
> I realize this case didn't involve violent injury to somebody, but we're talking about a series of repetitive violent crimes without anything that I can see having any affect on changing Mr. Winters' behavior.

[5]Moreover, we have compared the state and federal PSIs and conclude that the differences are immaterial for the purpose of this appeal.

predicate for sentencing as a habitual criminal pursuant to NRS 207.012.[6] In response, the State asserts that it intended to adjudicate Winters pursuant to NRS 207.010 for the burglary count and pursuant to NRS 207.012 for the robbery count.[7]

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[6]In his reply brief, Winters suggests, for the first time on appeal, that he was not given proper notice of the fact that the State would seek sentencing under the habitual criminal statutes because the State listed three prior convictions in its notice of habitual criminality but then announced during the sentencing hearing that it was no longer going to use one of the prior felony convictions. We reject Winters' argument. Winters did not properly raise the issue of notice because he did not make that argument in his opening brief, nor was it made in response to an argument in the answering brief. See NRAP 28(c). Further, Winters did not object on the basis of notice during the sentencing hearing when the State informed the district court that it was not employing one of the prior convictions given in the notice, so he did not preserve the issue for appeal. See, e.g., Lioce v. Cohen, 124 Nev. ____, ____, 174 P.3d 970, 981 (2008).

[7]Winters raises two additional arguments on appeal regarding his sentencing. First, he contends that since equal protection requires that laws be applied uniformly, a jury should have determined his prior convictions because criminal defendants charged as being ex-felons in possession of a firearms are entitled to a jury determination of the prior conviction. This argument is without merit. Defendants charged as ex-felons in possession of a firearm are entitled to a jury determination of the prior conviction because it is an element of the offense; Winters' charges include no such requirement. See O'Neill v. State, 123 Nev. 9, 16-17, 153 P.38, 43 (2007) (holding that the district court could sentence appellant as a habitual criminal without submission of the issue before a jury upon presentation and proof of the requisite number of prior convictions)). We further reject Winters' argument that O'Neill does not apply in the instant case. Second, Winters contends that he should be resentenced by a different district court because the district court sentenced Winters as a habitual criminal for the burglary, despite that sentence not being sought by the State. Because we affirm the district court, we need not reach this argument.

NRS 207.010 defines the term "habitual criminal" and sets forth the applicable punishment. NRS 207.012 defines the term "habitual felon" and sets forth the applicable punishment. These statutes provide different requirements of proof. To be sentenced as a habitual criminal pursuant to NRS 207.010, the State must prove that the defendant has been previously three times convicted, either in Nevada or elsewhere, of any crime that would amount to a felony in Nevada, or that he has been previously five times convicted, either in Nevada or elsewhere, of petit larceny or "of any misdemeanor or gross misdemeanor of which fraud or the intent to defraud is an element." To be sentenced as a habitual criminal under NRS 207.010(2), it is within the district court's discretion to decide whether to include a count given in an indictment or information. Conversely, NRS 207.012 permits sentencing as a habitual felon if the State proves that the defendant has been convicted of, among other felonies, robbery under NRS 200.380, and if before the commission of that felony, he was twice convicted of any other crime listed in NRS 207.012(2).

For the purpose of NRS 207.010 and NRS 207.012, "a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony." NRS 207.016(5). If the State proves that the defendant is a habitual criminal pursuant to NRS 207.010 or a habitual felon pursuant to NRS 207.012, then the district court must sentence him to: (1) life without the possibility of parole, (2) life with the possibility of parole after 10 years has been served, or (3) for a definite term of 25 years with the possibility of parole after 10 years has been served. NRS 207.010(1)(b); NRS 207.012(1)(b).

This court affords great deference to the sentencing judge. See Norwood, 112 Nev. at 440, 915 P.2d at 278. "So long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded upon facts supported only by impalpable or highly suspect evidence, this court will refrain from interfering with sentence imposed." Morales v. State, 96 Nev. 702, 703, 615 P.2d 254, 255 (1980).

Here, in informing Winters of its intent to enhance his sentence, the State's notice of habitual criminality noted both NRS 207.010 and NRS 207.012. The notice did not specify which habitual criminal statute the State wanted to apply to Winters' burglary count, as opposed to his robbery count. Further, when the district court sentenced Winters as a habitual criminal, it did not state which habitual criminal statute it was applying. While Winters is correct that burglary pursuant to NRS 205.060 is not a predicate to sentencing as a habitual felon pursuant to NRS 207.012, it is a predicate to sentencing as a habitual criminal pursuant to NRS 207.010. During the sentencing hearing, the State presented three certified copies of Winters' prior felony convictions: (1) a 1999 robbery conviction, (2) a 2003 possession-of-a-controlled-substance conviction, and (3) a 2005 conviction for three counts of robbery with use of a deadly weapon.[8] The State thereby met its burden of proof to

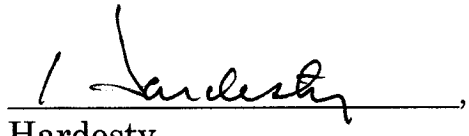
[8]Although Winters was convicted of three counts of robbery with the use of a deadly weapon, it only counts for one conviction for the purpose of NRS 207.010. See Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226. 227 (1979).

sentence Winters pursuant to NRS 207.010 for the burglary count.[9] Accordingly, the district court's decision was based on proper evidence and, because life without the possibility of parole is a possible sentence pursuant to NRS 207.010, the district court did not abuse its discretion. Therefore, we reject Winters' challenge of the district court's application of the habitual criminal sentencing statutes.

CONCLUSION

For the reasons set forth above, we conclude that Winters' arguments on appeal fail. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



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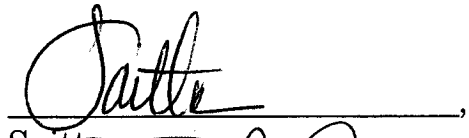

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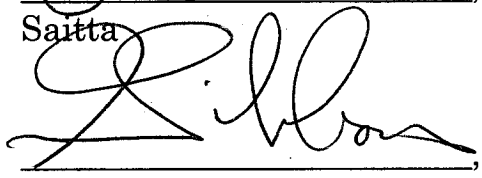

_____, J.
Gibbons

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

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[9]We additionally note that the State met its burden to sentence Winters pursuant to either NRS 207.010 or NRS 207.012 for the count of robbery.