

IN THE SUPREME COURT OF THE STATE OF NEVADA

JIMMY MITCHELL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49627

FILED

JAN 23 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 each of sale of a controlled substance and possession of a controlled substance with the intent to sell. Eighth Judicial District Court, Clark County; Valerie Adair, Judge. The district court sentenced appellant Jimmy Mitchell to serve a prison term of 12 to 40 months for the sale count and a concurrent prison term of 36 to 120 months for the possession count.

First, Mitchell contends that his constitutional and statutory rights to a speedy trial were violated when the district court granted the State's motion to continue the trial. Specifically, Mitchell contends that the State did not have good cause for the three-month delay, and Mitchell was prejudiced because he was incarcerated during the delay-period and suffered "significantly increased anxiety" awaiting trial. We conclude that Mitchell's contention lacks merit.

This court has held that the absence of a key police officer witness is good cause for granting a motion for a continuance.¹ Here, Mitchell's trial was continued for approximately 90 days based primarily on the absence of a key State witness. Although Mitchell invoked his speedy trial rights, we conclude that there was good cause for the delay, the continuance of the proceedings was not significant, and Mitchell was not prejudiced.² Notably, there is no indication in the record that valuable evidence or witnesses were lost due to the delay in the proceedings.³ Accordingly, the district court did not err by granting the State's motion to continue.

Second, Mitchell contends that the jury instruction defining reasonable doubt was unconstitutional because it impermissibly diluted the presumption of innocence. The jury instruction stated in part, "The Defendant is presumed innocent until the contrary is proven." Relying on legal authority from other jurisdictions,⁴ Mitchell argues that the use of

¹See Huebner v. State, 103 Nev. 29, 31-32, 731 P.2d 1330, 1332 (1987).

²See U.S. Const. amend. VI; NRS 178.556; Barker v. Wingo, 407 U.S. 514, 530-33 (1972) (setting forth four-factor analysis for speedy trial claim, including length of delay, the reason for delay, the defendant's assertion of his right, and prejudice to the defendant).

³Cf. Barker, 407 U.S. at 534; State v. Fain, 105 Nev. 567, 779 P.2d 965 (1989) (holding that four and one-half year delay did not violate the appellant's right to a speedy trial because no specific witness, piece of evidence, or defense theory were lost due to the delay).

⁴See e.g., State v. Wilkerson, 91 P.3d 1181 (Kan. 2004).

the word "until" lowers the burden of proof by implying that, ultimately, the presumption of innocence ends and guilt will be proven beyond a reasonable doubt. Recently, this court rejected a similar argument, concluding that the use of the word "until" in a jury instruction did not dilute the presumption of innocence, particularly when the jury instruction was "read as a whole."⁵ Accordingly, the district court did not err in charging the jury.

In a related argument, Mitchell contends that the district court erred in combining the jury instructions defining reasonable doubt and the presumption of innocence. The jury instruction given by the district court correctly stated the law.⁶ We disagree with Mitchell that the mere fact that the statutory definitions were combined into a single instruction warrant reversal of his conviction.⁷

Third, Mitchell claims that the evidence was insufficient to support his convictions. In particular, Mitchell argues that the only evidence against him was the testimony of the police officers. Additionally, relying on legal authority from other jurisdictions, Mitchell argues that there was no evidence presented that Mitchell had the intent to sell the minor amount of drugs at issue. Our review of the record on

⁵See Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005).

⁶See NRS 175.211; NRS 175.191.

⁷See generally Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.⁸

In particular, we note that the State presented evidence that Mitchell provided an undercover police officer with \$20 of rock cocaine, and requested additional money for the assistance he provided in obtaining the cocaine. When Mitchell was apprehended, an additional small amount of cocaine was found on his person in a "small baggie." The jury could reasonably infer from the evidence presented that Mitchell sold cocaine and possessed cocaine with the intent to sell.⁹ It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.¹⁰

Finally, Mitchell contends that his adjudication as a third-offender under NRS 453.337 should have been determined by a jury pursuant to Apprendi v. New Jersey.¹¹ We disagree. Apprendi expressly excludes the fact of prior convictions from its holding.¹² NRS 453.337(2) is a sentencing enhancement applicable to defendants with prior drug

⁸See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

⁹See NRS 453.321; NRS 453.337(1).

¹⁰See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).


¹¹530 U.S. 466 (2000).

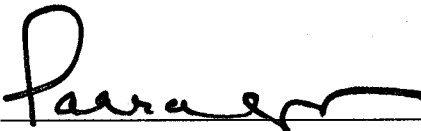
¹²Id. at 490.

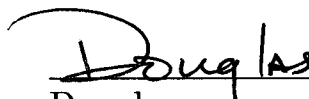
convictions and does not require judicial fact-finding of an element of the charged crime.¹³ Accordingly, Mitchell's constitutional right to a jury trial was not violated.

Having considered Mitchell's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Valerie Adair, 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

¹³See NRS 453.337(1) (setting forth the elements of the crime); cf. Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998).