IN THE SUPREME COURT OF THE STATE OF NEVADA

PRISCELLA RENITA SAINTAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49646

FILED

JUN 30 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of burglary, grand larceny, and conspiracy to possess stolen property, and adjudication as a habitual criminal. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Priscella Renita Saintal was convicted on charges of burglary, grand larceny, possession of stolen property valued less than $250, and conspiracy to possess stolen property for stealing items from a Coach store. The district court sentenced Saintal as a habitual criminal, pursuant to NRS 207.010, and sentenced her to serve the following terms in the Nevada State Prison: (1) life with the possibility of parole after ten years for burglary, (2) life with the possibility of parole after ten years for grand larceny, and (3) 12 months for conspiracy to possess stolen property. All sentences were to run concurrently.

On appeal, Saintal presents the following arguments: (1) the district court abused its discretion by denying her motion for a new trial; (2) the district court abused its discretion when it admitted evidence of other bad acts; (3) she was prejudiced when the district court failed to provide correct jury instructions; (4) the State failed to present sufficient evidence to support her convictions for grand larceny and burglary; and (5) her constitutional rights were violated during sentencing.



09-16153

For the following reasons, we conclude that Saintal's arguments are without merit and we affirm the district court's judgment of conviction. As the parties are familiar with the facts, we do not recount them except as necessary to our disposition.

## DISCUSSION

### Motion for new trial

Saintal argues that the district court abused its discretion when it denied her motion for a new trial. Saintal based the motion on her contention that the jury returned inconsistent verdicts because it found both that she was guilty of committing grand larceny, meaning the stolen items were worth more than $250, and that she was guilty of possessing stolen property valued at less than $250. Saintal contends that, in denying the motion, the district court violated her due process and Sixth Amendment rights because the jury should have been asked to resolve the apparent discrepancy.

This court reviews a district court's denial of a motion for a new trial for an abuse of discretion. Nelson v. Heer, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007). Verdicts are inconsistent if the jury finds that the defendant is guilty of two offenses that are mutually exclusive. See Braunstein v. State, 118 Nev. 68, 78, 40 P.3d 413, 420 (2002).

Here, we conclude that the district court did not abuse its discretion when it denied Saintal's motion for a new trial. We agree with the district court's determination that the verdicts were consistent. First, it was reasonable for the jury to conclude that Saintal was guilty of grand larceny for stealing the Coach wallet and the Coach purse, which together were worth more than $250. Second, it was also logical for the jury to find that Saintal was guilty of possessing stolen property valued at less than $250 because she was caught with only the wallet, which was worth less

than $250, in her possession while her husband possessed the stolen purse.

Therefore, because the district court provided a reasonable explanation for the verdicts, we conclude that it did not abuse its discretion when it denied her motion for a new trial. Further, because the verdicts were consistent, we conclude that Saintal's due process and Sixth Amendment rights were not violated.

Evidence of bad acts

Saintal contends that the district court abused its discretion when it decided that evidence of the Coach items found in her husband's car, but not alleged to be stolen, could not be introduced without opening the door to other, non-Coach, merchandise found in the vehicle. Saintal asserts that evidence of the non-stolen Coach items was relevant to prove her innocence, while evidence of the non-Coach merchandise was prejudicial and not probative of any element of the crimes charged.

District courts are granted considerable discretion in determining the admissibility of evidence. Castillo v. State, 114 Nev. 271, 277, 956 P.2d 103, 107-08 (1998), corrected on other grounds by McKenna v. State, 114 Nev. 1044, 1058 n.4, 968 P.2d 739, 748 n.4 (1998). This court reviews decisions to admit or exclude evidence for an abuse of discretion. Baltazar-Monterrosa v. State, 122 Nev. 606, 617, 137 P.3d 1137, 1142. Accordingly, a decision to admit or exclude evidence of prior bad acts will not be disturbed absent a showing of manifest error. Rhymes v. State, 121 Nev. 17, 21-22, 107 P.3d 1278, 1281 (2005).

Generally, evidence of bad acts other than those for which the defendant is charged will not be considered at trial. NRS 48.045(2). Specifically, evidence of uncharged bad acts is inadmissible "to prove the character of a person in order to show that he acted in conformity

therewith." Id. To admit such evidence, the court must first hold a hearing outside the jury's presence, Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d, 503, 507-08 (1985), modified by Sonner v. State, 112 Nev. 1328, 133-34, 930 P.2d 707, 711-12 (1996), and superseded in part by statute as stated in Thomas v. State, 120 Nev. 37, 45, 83 P.3d 818, 823 (2004), to determine whether: "(1) the [evidence] is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

In this case, the district court held a Petrocelli hearing on, in part, whether the State could introduce evidence of items found in Saintal's husband's car that she allegedly did not steal. The district court decided that the evidence was inadmissible because it was not probative enough to outweigh any potential prejudice. However, during opening statements, Saintal referenced the non-stolen Coach merchandise found in her husband's car. Outside of the jury's presence, the district court reiterated that it had previously determined that evidence of the other items found in her husband's car was inadmissible. The district court then instructed Saintal that if she presented evidence of the non-stolen Coach merchandise found in her husband's car, then evidence of the non-Coach merchandise would also be admissible.

We conclude that the district court did not abuse its discretion in so deciding. "'[W]hen one party introduces inadmissible evidence, with or without objection, the trial court may allow the adverse party to offer otherwise inadmissible evidence on the same subject if it is responsive to the evidence in question.'" Taylor v. State, 109 Nev. 849, 856 n.1, 858 P.2d 843, 848 n.1 (1993) (quoting Lala v. People's Bank & Trust Co., 420

N.W.2d 804, 807-08 (Iowa 1988)). Therefore, the district court properly determined that if Saintal presented evidence of the non-stolen Coach merchandise, which it had determined to be inadmissible during the Petrocelli hearing, then the State could present evidence of the non-Coach merchandise.[1] Evidence of the non-Coach merchandise found in Saintal's car was responsive to the non-stolen Coach merchandise. While the non-stolen Coach merchandise was presented to show that Saintal did not steal the purse and wallet in question, evidence of the non-Coach merchandise implied that Saintal had a habit of shoplifting because it was folded neatly as it would be in a store, had brand tags but no price tags, and there was no receipt. Accordingly, Saintal's argument is without merit.

Jury instructions

Saintal next argues that she was prejudiced because the district court failed to provide correct jury instructions regarding lesser-included offenses, her theory of the case, and conspiracy.

The district court is given broad discretion in giving jury instructions, and this court reviews the district court's decision for an abuse of discretion. Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). "Erroneous jury instructions are reviewable [under] a harmless error analysis." Wegner v. State, 116 Nev. 1149, 1155, 14 P.3d

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[1]Saintal further argues that the district court should have given a limiting instruction as to the State's introduction of evidence concerning the non-Coach items found in her husband's vehicle. Generally, a district court must give a limiting instruction to the jury regarding how it can use evidence of prior bad acts. See Tavares v. State, 117 Nev. 725, 731, 30 P.3d 1128, 1132 (2001). We conclude that in this case a limiting instruction was unnecessary because Saintal chose to open the door to the evidence.

25, 30 (2000), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 1267 n.26, 147 P.3d 1101, 1108 n.26 (2006). Harmless error occurs when it is "'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the [erroneous jury instruction],'" Id. (quoting Neder v. United States, 527 U.S. 1, 18 (1999)), or when the "evidence of guilt is overwhelming." McIntosh v. State, 113 Nev. 224, 227, 932 P.2d 1072, 1074 (1997) (citing Kelly v. State, 108 Nev. 545, 552, 837 P.2d 416, 420 (1992)). When the defense has agreed to the jury instructions at issue, the failure to object precludes appellate consideration, save for plain error. Bonacci v. State, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980).

Lesser included offense instruction

Saintal asserts that the district court should have instructed the jury that it could find her guilty of committing either grand larceny or possession of stolen property, but not of both since possession of stolen property is a lesser included offense of grand larceny.

In this case, the district court noted that possession of stolen property was a lesser included offense of grand larceny and it offered to give a jury instruction explaining that Saintal could be found guilty of committing one or the other. Alternatively, the district court stated that it usually did not include an instruction explaining that one offense was a lesser included offense of another charged crime. Instead, the district court found it simpler for the jury if it gave the jury the option of finding the defendant guilty of both offenses, and then dismissed the lesser included offense. Saintal agreed to this proposal.

Because Saintal agreed that the district court would dismiss the possession of stolen property verdict if she were also found guilty of grand larceny, she cannot now raise this issue on appeal unless she

demonstrates plain error. Here, while the jury found Saintal guilty of possession of stolen property, the district court dismissed the count. Therefore, we conclude that the district court did not commit plain error and Saintal's contention on this point fails.

Theory of the case

Saintal contends that the district court erred when it refused to give her proposed jury instruction that stated that if the jury determined that the police were negligent in failing to obtain and preserve evidence, then the jury should presume that the unobtained evidence would have been favorable to Saintal.

When conducting a criminal investigation, "police officers generally have no duty to collect all potential evidence." Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001). However, a failure to gather evidence warrants a sanction if (1) the defense proves that the evidence was material and (2) the district court determines that the failure to gather the evidence resulted from gross negligence or bad faith. Id. If the State's failure to obtain material evidence was caused by gross negligence, then "the defense is entitled to a presumption that the evidence would have been unfavorable to the State." Id. Conversely, if the State's failure to obtain material evidence resulted from mere negligence, then "no sanctions are imposed, but the defendant can examine the State's witnesses about the investigative deficiencies." Id.

The district court denied Saintal's proposed jury instruction because it determined that, pursuant to Randolph, the instruction was only proper if Saintal demonstrated that the police had been grossly negligent in failing to obtain the evidence. The district court found that the police had merely been negligent and, therefore, Saintal's proposed jury instruction was improper. Because the district court correctly applied

the law as stated in Randolph, we conclude that it did not abuse its discretion when it denied Saintal's proposed jury instruction concerning her theory of the case.

Conspiracy jury instruction

Saintal next argues that the district court failed to properly instruct the jury that it had to find specific intent to convict her of conspiracy.

When instructing the jury as to conspiracy, the district court noted that the vicarious co-conspirator liability instruction was incorrect because it did not inform the jury that it needed to find that Saintal had specific intent to commit the crime of her co-conspirator. Therefore, with the parties' approval, the district court orally instructed the jury as to the vicarious co-conspirator's specific intent.

Because the district court corrected the erroneous instruction, we conclude that it did not abuse its discretion. Any error that occurred because the original instruction did not include the element of specific intent was cured by the district court giving the jury the proper instruction. Therefore, we determine that Saintal's argument on this point also fails.

Sufficiency of the evidence

Saintal argues that the State failed to present sufficient evidence to prove that she committed grand larceny or burglary.

In reviewing whether there is sufficient evidence to support a jury's verdict, this court determines ""'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.'"" Mejia v. State, 122 Nev. 487, 492, 134 P.3d 722, 725 (2006) (quoting Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting

Jackson v. Virginia, 443 U.S. 307, 319 (1979))). Where there is substantial evidence supporting the jury's verdict, it will not be overturned on appeal. Hern v. State, 97 Nev. 529, 531, 635 P.2d 278, 279 (1981). Substantial evidence is "'evidence that 'a reasonable mind might accept as adequate to support a conclusion.'" Brust v. State, 108 Nev. 872, 874-75, 839 P.2d 1300, 1301 (1992) (quoting First Interstate Bank v. Jafbros Auto Body, 106 Nev. 54, 56, 787 P.2d 765, 767 (1990), abrogated on other grounds by Countrywide Home Loans v. Thitchener, 124 Nev. ___, ___, 192 P.3d 243, 255 (2008)).

Grand larceny

Saintal argues that the State failed to prove that the Coach purse and wallet had a combined value of more than $250. Saintal asserts that the true value of an item purchased at a Coach factory outlet cannot be determined unless it is scanned by the computer. Saintal argues that it is necessary to scan the price tag to determine if the item is being sold as marked, or for a lower promotional price. Because neither item was ever scanned, Saintal contends that the State could not prove the true value.

To prove that an accused is guilty of committing grand larceny, the State must demonstrate that she stole property valued at $250 or more. NRS 205.220(1)(c). An item's price tag is competent evidence of its value for the purpose of proving value to establish grand larceny. Calbert v. State, 99 Nev. 759, 759-60, 670 P.2d 576, 576 (1983). While Saintal attempts to distinguish her case from Calbert by noting that the price tags in Calbert were found on the items, whereas the price tags in the instant case were found either on the ground near Saintal's car or in her husband's hands, we conclude that this argument fails. As in Calbert, the price tags were competent evidence of the value of the merchandise because they matched the items stolen. Thus, viewed in the light most

favorable to the State, we conclude that the price tags presented by the State provided sufficient evidence for a jury to reasonably conclude that Saintal was guilty of committing grand larceny.

Burglary

Next, Saintal contends that the State failed to prove that she was guilty of burglary because it did not present evidence that she entered the Coach store with the intent to commit larceny or a felony within.

Pursuant to NRS 205.060, the State in this case had to prove that Saintal entered the Coach store with the intent to commit grand or petit larceny within. We conclude that the State met its burden. Saintal appeared as if she did not want to be bothered while at the store, left the store without the two wristlets that she legitimately purchased, and she and her husband were found with two stolen items. Therefore, by viewing the evidence in the light most favorable to the State, we conclude that a reasonable juror could conclude that Saintal entered the Coach store with the intent to commit larceny.

Sentencing

Last, Saintal argues that the district court violated her right to due process when it sentenced her as a habitual criminal.[2] Specifically,

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[2]Saintal additionally argues that: (1) the prior convictions presented by the State were insufficient to sentence her as a habitual criminal under NRS 207.010, (2) double jeopardy prohibits the district court from increasing punishment during resentencing, (3) her equal protection and trial by jury rights were violated when she was sentenced as a habitual criminal because the jury should have determined the prior convictions, and (4) two life sentences for one incident is cruel and unusual punishment when she has only been to jail once before. We conclude that all of these contentions are without merit.

Saintal contends that she was not provided with 15 days notice, as required by NRS 207.016(2). We disagree.

"Generally, the failure to . . . object on the record precludes appellate review." Grey v. State, 124 Nev. ____, ____, 178 P.3d 154, 163 (2008). "However, 'this court has the discretion to address an error if it was plain and affected the defendant's substantial rights.'" Id. (quoting Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). It is within the district court's discretion whether to sentence a defendant as a habitual criminal pursuant to NRS 207.010. See NRS 207.010(2). The State must provide notice of its intent to pursue punishment as a habitual criminal. Id. If notice is filed after the defendant is convicted, then sentencing cannot occur for 15 days. NRS 207.016(2).

Here, before trial, the State filed a notice of intent to seek punishment as a habitual criminal pursuant to NRS 207.012. The notice listed five prior felonies for which Saintal had been convicted. On May 3, 2007, Saintal's sentencing hearing was held. At the hearing, the district court found that Saintal's prior convictions did not qualify her for sentencing as a habitual criminal pursuant to NRS 207.012. Therefore, the district court sentenced Saintal to 48 to 120 months for burglary, 48 to 120 months for grand larceny to run consecutively to the first count, and 12 months for conspiracy to possess stolen property to run concurrently to the first two counts.

On May 4, 2007, the State filed a corrected notice of intent to seek punishment as a habitual criminal pursuant to NRS 207.010. On May 11, 2007, the State moved the district court to reconsider Saintal's sentencing, arguing that it had mistakenly cited NRS 207.012 in the original notice of intent, instead of NRS 207.010. On May 15, 2007, the district court granted the State's motion. The district court stated that,

based on this court's decision in the unpublished order of George v. State, Docket No. 44338 (Order Affirming in Part, Reversing in Part and Remanding, May 09, 2009), Saintal had been put on notice of the State's intent to seek punishment as a habitual criminal when it filed the original notice before trial began.[3] Further, that the State had cited the incorrect statute did not diminish the effect of the notice. Therefore, the district court determined that it had jurisdiction to sentence Saintal as a habitual criminal and sentenced her to 10 years to life for burglary, 10 years to life for grand larceny, and 12 months for conspiracy to possess stolen property, all to run concurrently.

We conclude that although 15 days did not pass between when the State filed its corrected notice of intent, and when the district court sentenced Saintal as a habitual criminal, reversible error did not occur. Saintal failed to object during the sentencing hearing that she had not benefited from the 15 day notice period provided for in NRS 207.016. Therefore, she did not properly preserve the issue on appeal. Moreover, Saintal was not prejudiced by the district court sentencing her as a habitual criminal when only 11 days had passed since the State filed its corrected notice of intent. As did the district court, we conclude that Saintal was put on notice of the State's intent to pursue punishment as a habitual criminal when it filed the original notice of intent. Although the State included the incorrect statute in the notice, that does not lessen its

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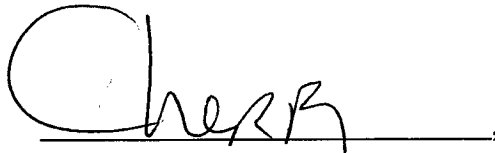
[3]Saintal contends that her right to due process was violated because the district court relied on an unpublished order. We disagree. The George order did not create new law, but rather explained how the habitual criminal statutes functioned. Therefore, the district court did not violate Saintal's rights by referencing an order that it used to comprehend the applicable statutes.

effect. Additionally, Saintal has not argued, either on appeal or below, that the full 15-day notice period was necessary for her to prepare her defense against being sentenced as a habitual criminal.

Therefore, we conclude that Saintal was not prejudiced by her sentence as a habitual criminal and, therefore, plain error did not occur. To hold otherwise would be to elevate form over substance. See, e.g., Fiegehen v. State, 121 Nev. 293, 302, 113 P.3d 305, 310 (2005).

Accordingly, for the reasons given above, we

ORDER the judgment of the district court AFFIRMED.



_____, J.
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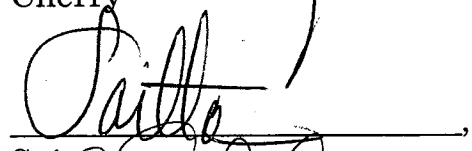

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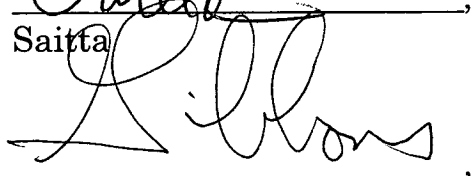

_____, J.
Gibbons

cc: Eighth Judicial District Court Dept. 7, 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