IN THE SUPREME COURT OF THE STATE OF NEVADA

CAROLYN GARRETT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49647

FILED

APR 14 2009

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of assault (misdemeanor) and one count of injury to other property (gross misdemeanor). Seventh Judicial District Court, White Pine County; Dan L. Papez, Judge.

Appellant Carolyn Garrett was sentenced to serve a term of thirty days in jail for assault. Respecting her conviction for gross misdemeanor injury to other property, Garrett received a suspended sentence of nine months in jail, was placed on three years probation, and was ordered to complete 80 hours of community service. The district court also ordered Garrett to pay restitution in the amount of $302.14.

Garrett's convictions arise from an incident in which she broke the glass out of a neighbor's front door and later threatened the owner of the damaged property with a pitchfork.

On appeal, Garrett raises several claims of error. First, she claims that the trial court erred in admitting evidence of ancillary or additional costs for the repair of the glass that she broke because that evidence increased her conviction from a misdemeanor to a gross misdemeanor. In related claims, Garrett argues that (1) it violated her

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equal protection rights to include the additional costs of having two repairmen travel from Ely to Baker to replace the glass because that unfairly punished her for living in a rural area, (2) the district court erred in failing to instruct the jury on the proper way to calculate the value of property damage, and (3) the district court erred in failing to instruct the jury on the lesser-included misdemeanor offense of injury to property with a value of less than $250. Garrett also claims that she was prejudiced by cumulative error and that the district court erred in refusing to give her 28 days' credit for time served in pretrial incarceration.

Garrett's conviction for gross misdemeanor injury to other property

First, Garrett claims that the district court erred in admitting evidence of ancillary or additional costs that were not necessary to repair the window she broke. Specifically, Garrett argues that the district court erred in permitting the State to present an entire submitted bid for repair from White Pine Glass, a company located in Ely, because that bid included travel costs and the cost of sending an additional worker to Baker from Ely. Garrett argues that this evidence improperly elevated the offense from a misdemeanor to a gross misdemeanor. Garrett did not object to the introduction of this evidence, and thus her claim is reviewed for plain error affecting her substantial rights. See Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006).

This court has stated that when property is damaged rather than destroyed, "the appropriate measure of damages is the cost related to repair or restore the property." Romero v. State, 116 Nev. 344, 348, 996 P.2d 894, 897 (2000). "In some cases, the loss may extend beyond the repair costs," but "[w]here the State is claiming such damages, it must lay the foundation to show why such additional costs are necessitated by the damage created by the actions of the defendant." Id. at 348 n.4, 996 P.2d

at 897 n.4. The overall intent of NRS 193.155 is to "make criminal penalties proportionate to the value of the property affected." Id. at 348, 996 P.2d at 897.

At trial, the State presented a bid from the nearest contractor who was properly licensed to perform the work. Testimony at trial established the basis for the bid, including the time required to travel from Ely to Baker and the company's safety concerns and policies requiring a second employee on out-of-town jobs. The alternative bid offered by the defense was from a person who was not properly licensed to perform the work.[1] Accordingly, we conclude that the district court did not commit plain error in admitting evidence related to White Pine's bid for the repairs.

Second, Garrett claims that her conviction violates the Equal Protection Clause of the Fourteenth Amendment. "The Equal Protection Clause of the Fourteenth Amendment mandates that all persons similarly situated receive like treatment under the law." Gaines v. State, 116 Nev. 359, 371, 998 P.2d 166, 173 (2000). "[W]here no suspect classification or fundamental right is involved, the role of this court is to determine whether the classification bears a rational relationship to the legislative purpose sought to be effected." Armijo v. State, 111 Nev. 1303, 1304, 904 P.2d 1028, 1029 (1995). Garrett does not claim that she is a member of a suspect class or that her conviction violated a fundamental right. Moreover, her claim that she was treated differently than other "similarly situated" persons because she resides in a rural area of the State is flawed. Garrett's sentence was not based on her place of residence but

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[1]See NRS 624.031; 624.215; NAC 624.160; NAC 624.260.

was related to the situs of her crime. Any person who travels to Baker and commits the same crime would be subject to the same penalty. Accordingly, we conclude that Garrett's conviction for gross misdemeanor injury to other property did not implicate the Equal Protection Clause.

Third, Garrett claims that the district court erred in failing to instruct the jury on the proper valuation of property damage as stated in Romero. Garrett did not request such an instruction at trial and she cites no authority requiring the district court to offer such an instruction sua sponte. We conclude that Garrett's claim is without merit.

Fourth, Garrett claims that the district court erred in failing to offer an instruction on the lesser-included offense of misdemeanor injury to other property. Garrett did not request such an instruction at trial. "Generally, a defendant . . . must request an instruction [and] if there is any supporting evidence, 'the court must, if requested, instruct' on a lesser-included offense." Rosas v. State, 122 Nev. 1258, 1264 n.9, 147 P.3d 1101, 1106 n.9 (2006) (quoting Lisby v. State, 82 Nev. 183, 188, 414 P.2d 592, 595 (1966)). Instructions are only mandatory without request when "there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lessor offense or degree." Lisby, 82 Nev. at 187, 414 P.2d at 595. Here, the evidence at trial did not absolve Garrett of the greater offense. As stated above, the only properly licensed contractor who bid on the repairs testified at trial that the repair cost of the window was $302.14. An instruction was only required upon request, and thus we conclude that the district court did not err in this instance.

Cumulative error

Next, Garrett raises a number of claims that she argues, in conjunction with the claims above, worked to cumulatively render her trial

unfair. Specifically, Garrett claims that: (1) the district court coerced the jury into reaching a verdict by repeatedly stating that the trial was expected to last only two days, (2) the district court erred in giving a number of instructions that lessened the State's burden of proof, (3) the district court erred in failing to instruct the jury on the proper way to calculate the value of property damage under Romero, and (4) the district court erred in failing to inform counsel of a question asked by the jury during deliberations and for failing to make a record of the correspondence.

After reviewing the record, we conclude that the only instance of error occurred when the district court failed to record a question from the jury and inform counsel about it before responding to the inquiry. The documents before the court reflect that when the jury inquired about the definition of a deadly weapon, the district court simply referred the jury to the written instructions. Thus, we conclude that any error that occurred was insufficient to warrant reversal of Garrett's convictions. See Daniel v. State, 119 Nev. 498, 511, 78 P.3d 890, 899 (2003) (citing Cavanaugh v. State, 102 Nev. 478, 484, 729 P.2d 481, 484-85 (1986)).

Credit for time served

Finally, Garrett claims that the district court erred when it refused to give her credit for 28 days that she served in the county jail prior to trial. Garrett was originally released on bail but her bail was revoked after she repeatedly arrived at court late. At sentencing, the district court concluded that because Garrett's incarceration was the direct result of her untimely appearance at trial (resulting in dismissal of the jurors and a new trial date), she was not entitled to credit for the 28 days.

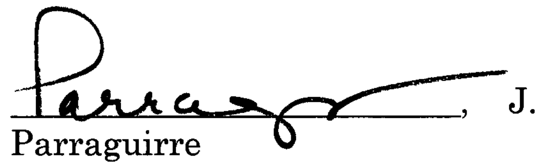
This court will not disturb a district court's determination of sentencing absent an abuse of discretion. See Martinez v. State, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998). NRS 176.055(1) states that "whenever a sentence of imprisonment . . . is imposed, the court may order that credit be allowed against the duration of the sentence . . . for the amount of time which the defendant has actually spent in confinement." This court has concluded that despite the discretionary language of NRS 176.055, "the purpose of the statute is to ensure that all time served is credited towards a defendant's ultimate sentence," Kuykendall v. State, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996), and that credit for time served is "mandatory," Haney v. State, 124 Nev. ___, ___, 185 P.3d 350, 354 (2008). See also State v. Dist. Ct., 121 Nev. 413, 417, 116 P.3d 834, 836 (2005) ("A review of the legislative history of NRS 176.055 suggests that the legislative intent was to allow credit for presentence time spent in the county jail."); Nieto v. State, 119 Nev. 229, 231-32, 70 P.3d 747, 748 (2003) (stating that defendant is entitled to credit for time served as long as confinement was "solely pursuant to the charges for which he was ultimately convicted"). Credit for time served is not available if the period of incarceration was "pursuant to a judgment of conviction for another offense," stemmed from a prior charge, or if the incarceration occurred during a period of probation or parole. NRS 176.055.

None of the listed exceptions apply here. Even though Garrett was incarcerated pursuant to a bench warrant, she was never held in contempt or charged with any other crimes; therefore, we conclude that the 28 days she spent in jail were "solely pursuant to the charges for which [she] was ultimately convicted." Nieto, 119 Nev. at 231-32, 70 P.3d at 748. Accordingly, Garrett was entitled to credit for time served in pretrial confinement. Therefore, we conclude that the district court

abused its discretion when it denied Garrett credit for time served, and we remand this matter for entry of an amended judgment of conviction reflecting 28 days' credit for time served.

Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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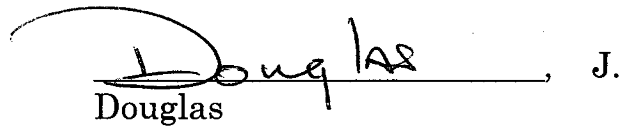

_______________, J.
Douglas

_______________, J.
Pickering

cc: Hon. Dan L. Papez, District Judge
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