IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE LEWIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50135

FILED

MAR 04 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of possession or control of a dangerous weapon or facsimile by an incarcerated person. Eighth Judicial District Court, Clark County; Michael Villani, Judge. The district court sentenced appellant Clyde Lewis to serve a prison term of 12 to 32 months.

First, Lewis contends that insufficient evidence was presented at trial to support his conviction. Lewis specifically claims that the State failed to show that he had constructive possession of the weapon and knowledge of its existence.

"[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness." Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). Accordingly, the standard of review for a challenge to the sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307,

319 (1979)). Circumstantial evidence is enough to support a conviction. Lisle v. State, 113 Nev. 679, 691-92, 941 P.2d 459, 467 (1997), holding limited on other grounds by Middleton v. State, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998).

Here, Lewis was charged with two counts of possession or control of a dangerous weapon or facsimile by an incarcerated person. Count 1 alleged that Lewis possessed "a slashing tool comprised of an approximately three-fourth razor melted into a blue ink pen," and Count 2 alleged that Lewis possessed "a shank comprised of an eight-inch nail sharpened to a point with a cloth-wrapped handle." During the trial, Correctional Officer Denise Clark testified that she was attending refresher training at the High Desert State Prison when the prison was placed in lock down and she was instructed to help search for a weapon. Officer Clark searched Lewis' cell and found a blue ink pen with a handle melted onto one side and a razor melted onto the other side when she looked between two canteen bags. Both canteen bags were marked with Lewis' name and back number and their contents matched an order slip made out in Lewis' name. Officer Clark also found a piece of metal that had fabric wrapped around one end and was sharpened on the other end when she searched a footlocker that contained Lewis' mail and clothing. The footlocker's contents were very neatly arranged and the metal weapon was found in a pair of folded pants about halfway down. Officer Clark secured the weapons and prepared notices of charges for both Lewis and his cellmate. Lewis' cellmate testified that he did not know that there were any "shanks" in his cell and he had no idea of where they came from. The jury found Lewis not guilty of Count 1 and guilty of Count 2.

We conclude that a rational juror could infer from the testimony presented at trial that Lewis had constructive possession and knowledge of the shank that was found in his footlocker. See NRS 212.185(1). 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. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Second, Lewis contends that he "is a victim of vindictive and unconstitutional prosecution." Lewis claims that the State sought to punish him for exercising his right to seek repairs for his damaged television, other similarly situated inmates were not prosecuted for the same conduct, and the district court hindered his ability to fully defend his case by denying his request to call other similarly situated inmates as witnesses. In view of these claims, Lewis appears to contend that the State's prosecution was both vindictive and selective.

"A claim for vindictive prosecution arises when the government increases the severity of alleged charges in response to the exercise of constitutional or statutory rights." United State v. Spiesz, 689 F.2d 1326, 1328 (9th Cir. 1982). "To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such." United States v. Montoya, 45 F.3d 1286, 1299 (9th Cir. 1995) (internal quotation marks and citation omitted). "Once a presumption of vindictiveness has arisen, the burden shifts to the prosecution to show that independent reasons or intervening circumstances dispel the appearance of vindictiveness and justify its decisions." Id. (internal quotation marks and citation omitted). "The standard of review for

vindictive prosecution is unsettled in the Ninth Circuit. The court has variously applied abuse of discretion, clearly erroneous, and de novo standards." Id. at 1291.

A claim for selective prosecution arises when the State bases its "decision to prosecute upon an unjustifiable classification, such as race, religion or gender." Salaiscooper v. Dist. Ct., 117 Nev. 892, 903, 34 P.3d 509, 516 (2001). "To establish a prima facie case [of selective prosecution], the defendant must show that a public officer enforced a law or policy in a manner that had a discriminatory effect, and that such enforcement was motivated by a discriminatory purpose." Id. at 903, 34 P.3d at 516-17. A discriminatory effect may be proven by showing that other similarly situated persons were not prosecuted for the same conduct. Id. at 903, 34 P.3d at 517. A discriminatory purpose may be established by showing that the State "chose a particular course of action, at least in part, because of its adverse effects upon a particular group. If [the] defendant proves a prima facie case, the burden then shifts to the State to establish that there was a reasonable basis to justify the unequal classification." Id.

Here, Lewis failed to make a prima facie case for either vindictive prosecution or selective prosecution. Lewis' assertion that the State initiated criminal charges against him after he filed kites and a small claims action regarding his damaged television is not objective evidence of an appearance of vindictiveness, and Lewis has not shown that the State based its decision to prosecute him on an unjustifiable classification. Accordingly, we conclude that Lewis is not entitled to relief on this contention.

Third, Lewis contends that the State violated the Double Jeopardy Clause by seeking multiple punishments for the same offense.

Specifically, Lewis claims that the State's case was initiated after he had been subjected to prison disciplinary proceedings for possession of the dangerous weapons and punished by being placed into segregation for a year. In support of this contention, Lewis cites to United States v. Halper, 490 U.S. 435 (1989), abrogated by Hudson v. United States, 522 U.S. 93 (1997).

As the State correctly notes in its Fast Track Response, the Ninth Circuit has considered the application of Halper in a prison discipline context and concluded that

> the prohibition against double jeopardy does not bar criminal prosecution for conduct that has been the subject of prison disciplinary sanctions for two independent reasons: 1) even if the sanctions were "punishment," they were integral parts of [the defendant's] single punishment for [his underlying conviction]; and 2) the sanctions are not punishment for purposes of double jeopardy because they are solely remedial.

U.S. v. Brown, 59 F.3d 102, 104 (9th Cir. 1995); see also Garrity v. Fiedler, 41 F.3d 1150, 1152 (7th Cir. 1994) (holding "that prison discipline does not preclude a subsequent criminal prosecution or punishment for the same acts" and listing cases from other circuits which have held the same). Based on this authority, we conclude that Lewis' double jeopardy rights were not violated by the criminal prosecution that followed the prison's disciplinary sanction for the same offense.

Fourth, Lewis contends that the district court erred by not allowing evidence of Officer Clark's misconduct to be admitted at trial. Lewis specifically claims Officer Clark was the prosecution's key witness and evidence of her misconduct proved that she had a motive to testify falsely. In support of his contention, Lewis cites to NRS 50.085; Butler v.

State, 120 Nev. 879, 102 P.3d 71 (2004); and Lobato v. State, 120 Nev. 512, 96 P.3d 765 (2004).

Our review of the record on appeal reveals that Lewis filed a pretrial motion to admit evidence of officer misconduct. The district court heard argument on the motion and "noted it may be a potential area of cross as to [the] issue of bias for any impeachment purposes." The district court granted Lewis' motion, but stated "there may be limitations at the time of trial. Allegations against [Officer Clark] would not be brought unless some benefit was received by her. [The] matter can be revisited in terms of an offer of proof in a hearing outside the presence of the jury." Lewis did not revisit the matter. These circumstances belie Lewis' contention and we conclude that it is without merit.

Having considered Lewis' contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Hon. Michael Villani, District Judge
Law Offices of Martin Hart, LLC
Attorney General Catherine Cortez Masto/Carson City
Attorney General Catherine Cortez Masto/Las Vegas
Clark County District Attorney David J. Roger
Eighth District Court Clerk