

IN THE SUPREME COURT OF THE STATE OF NEVADA

AARON WADE CRUTCHER A/K/A
HERBIE CRUTCHER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50357

FILED

JUN 09 2008

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of robbery with the use of a deadly weapon and burglary while in possession of a deadly weapon. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge. The district court sentenced appellant Aaron Wade Crutcher to a prison term of 26 to 120 months for the robbery count, with an equal and consecutive term for the deadly weapon enhancement, and a concurrent sentence of 26 to 120 months for the burglary count.

Crutcher first contends that the district court erred in denying his motion to suppress evidence of the gun because the gun was seized in the course of an illegal traffic stop. Specifically, Crutcher cites to State v. Lisenbee¹ in support of his claim that he was illegally detained.

“Any peace officer may detain any person whom the officer encounters under circumstances which reasonably indicate that the

¹116 Nev. 1124, 13 P.3d 947 (2000).

person has committed, is committing or is about to commit a crime.”² “If any peace officer reasonably believes that any person whom he has detained . . . is armed with a dangerous weapon and is a threat to the safety of the peace officer or another, the peace officer may search such person to the extent reasonably necessary to ascertain the presence of such weapon.”³ A search conducted pursuant to a valid consent is exempted from the warrant requirements of the Fourth and Fourteenth Amendments.⁴ To be valid, consent must be voluntarily given and not the product of coercion, express or implied.⁵ The question of whether there was voluntary consent is to be determined from the totality of the surrounding circumstances.⁶

In this case, an officer observed a vehicle failing to slow for pedestrians crossing in a crosswalk. Crutcher was a passenger in the vehicle and the driver was driving without a valid license. The officer was informed that Crutcher was known to carry a weapon. Upon inquiry, Crutcher admitted that he had a gun located in a backpack in the backseat, and gave the officer consent to seize the weapon. Crutcher was allowed to leave following the short detention. Thus, we conclude that the

²NRS 171.123(1).

³NRS 171.1232(1); Terry v. Ohio, 392 U.S. 1 (1968).

⁴Davis v. State, 99 Nev. 25, 27, 656 P.2d 855, 856 (1983).

⁵Id. at 27, 656 P.2d at 856; see Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973).

⁶Davis, 99 Nev. at 27, 656 P.2d at 856.

police officer validly detained Crutcher, and the district court did not err in admitting the gun evidence.

Crutcher next contends that prosecutorial misconduct resulted in cumulative error depriving him of the right to a fair trial. We disagree.

First, Crutcher contends that the prosecutor committed misconduct by impermissibly shifting the burden of proof. During closing arguments, the prosecutor commented that Crutcher did not produce witnesses to support his alibi argument.

"[I]t is generally improper for a prosecutor to comment on the defense's failure to produce evidence or call witnesses as such comment impermissibly shifts the burden of proof to the defense."⁷ However, so long as the prosecutor does not comment on the defendant's decision not to testify, the prosecutor may comment on the defendant's failure to substantiate his theory of the case with supporting evidence and make reasonable responses to the defendant's closing argument.⁸

Here, the prosecutor commented on Crutcher's failure to substantiate his theory of the case. Even had the comment been error, trial counsel objected to the prosecutor's reference to Crutcher's failure to produce alibi witnesses, and the district court admonished and instructed the jury on improper shifting of the burden of proof. Thus, the district court's curative instruction rendered any error harmless.

⁷See Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996).

⁸Evans v. State, 117 Nev. 609, 630-31, 28 P.3d 498, 513 (2001); see also Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001).

Second, Crutcher contends that the prosecutor committed misconduct by eliciting comments on Crutcher's in-custody status and mentioning Crutcher's in-custody status during his opening statement.

"The rule that one is innocent until proven guilty means that a defendant is entitled to not only the presumption of innocence, but also to indicia of innocence."⁹ "Informing the jury that a defendant is in jail raises an inference of guilt, and could have the same prejudicial effect as bringing a shackled defendant into the courtroom."¹⁰ However, where evidence of guilt is overwhelming, even a constitutional error can be harmless.¹¹ Here, although it was improper for the prosecutor to refer to Crutcher's in-custody status, the overwhelming evidence presented at trial renders the error harmless.¹²

Third, Crutcher contends that the prosecutor committed misconduct by attacking Crutcher's character during opening argument. Specifically, Crutcher contends that the prosecutor stated that Crutcher "wanted money. When normal, law-abiding people are faced with this

⁹Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) (citations omitted).

¹⁰Id. at 288, 809 P.2d at 1273.

¹¹Chapman v. California, 386 U.S. 18, 22 (1967).

¹²Crutcher's co-conspirator testified that Crutcher parked his car behind the convenience store, covered his face, and entered the store. When he subsequently appeared, he "bragged" to his friends about the ease of robbing the convenience store. Another friend also testified that Crutcher had confessed to her that he robbed the convenience store. Crutcher's clothing was identified from the store surveillance tapes. Crutcher was found in possession of a gun that the store clerk and his co-conspirator identified as the weapon used in the robbery.

dilemma, they earn it by working for it. The defendant's solution to this problem however was entirely different." Crutcher also contends that the prosecutor further attacked his character by commenting that Crutcher did not express remorse.

Initially, we note that Crutcher did not object to any of the prosecutor's comments below. Failure to raise an objection in the district court generally precludes appellate consideration of an issue absent plain error affecting substantial rights.¹³ Generally, an appellant must show that he was prejudiced by a particular error in order to prove that it affected his substantial rights.¹⁴ We conclude that the prosecutor's comments were minor in nature and did not result in prejudice such that it affected Crutcher's substantial rights.

This court has stated that factors relevant for evaluating a claim of cumulative error "include whether 'the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'"¹⁵ Because there was overwhelming evidence of guilt, any errors were minor in nature, and the crime was violent, we conclude that the cumulative effect of any prosecutorial misconduct did not result in prejudice to Crutcher.

Next, Crutcher contends that several inadmissible statements were admitted and resulted in prejudice. Specifically, Crutcher contends that during Detective Davis's testimony, he commented that Crutcher had

¹³See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

¹⁴Id.

¹⁵Leonard v. State, 114 Nev. 1196, 1216, 969 P.2d 288, 301 (1998) (internal citations omitted).

bragged about the robbery and that the Federal Bureau of Investigations had acquired an interest in the weapon used in the robbery. Further, another witness, Ashley Alcorn, testified that Crutcher had pointed a gun at his own head. We note that Crutcher did not object to the comments below and the statements did not result in prejudice such that it affected Crutcher's substantial rights.

Finally, Crutcher contends that the sentence imposed constitutes cruel and unusual punishment. Specifically, Crutcher contends that his sentence is disproportionate because his co-conspirator who testified against Crutcher suffered no consequences for his actions.

This court has consistently afforded the district court wide discretion in its sentencing decision.¹⁶ This court 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.”¹⁷ Moreover, regardless of its severity, “[a] sentence 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.’”¹⁸

¹⁶See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

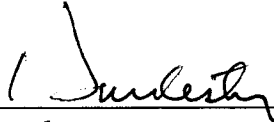
¹⁷Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

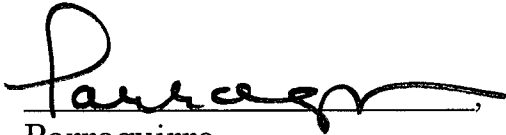
¹⁸Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

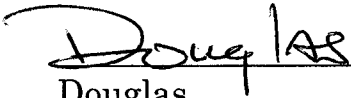
In the instant case, Crutcher does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statutes.¹⁹ Therefore, based on all of the above, we conclude that the district court did not abuse its discretion at sentencing.

Having considered Crutcher's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Richard Wagner, District Judge
Humboldt-Pershing County Public Defender
Attorney General Catherine Cortez Masto/Carson City
Humboldt County District Attorney
Humboldt County Clerk

¹⁹See NRS 205.060(4); NRS 200.380(2); 1995 Nev. Stat., ch. 455, § 1(1), at 1431 (NRS 193.165(1)).