IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES H. GREEN A/K/A JAMES HENRY GREEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51874

FILED

MAY 29 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
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ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery with the use of a deadly weapon, victim 60 years of age or older. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

A jury convicted appellant James H. Green of battery with use of a deadly weapon, victim 60 years of age of older (a category B felony), for which the district court sentenced him to a maximum of ten years, with a minimum parole eligibility of four years, for the underlying offense, and an equal and consecutive term for the statutory enhancement for a victim over 60 years of age.

Green offers four contentions on appeal: (1) his conviction on count two of the criminal complaint was inconsistent with his acquittal for the same crime on count one, where the counts involved a different alleged victim in the same altercation with Green; (2) the district court erred in preventing defense counsel, on cross-examination of an investigating officer, from inquiring about certain statements Green claimed to have made to the officer; (3) two of the prosecutor's questions of Green at trial were reversible misconduct; and (4) the sentence was excessive. Finding no error, we affirm.

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The parties are familiar with the facts, and we do not recount them here except as necessary for our disposition.

Green's claim that there were inconsistent verdicts does not raise a cognizable claim of error

Green does not appear to dispute that his actions in his altercation with Stanley Cullimore and Joseph Foster met the requirements for battery with a deadly weapon under NRS 200.481. Nor does he dispute that both Cullimore and Foster were over 60 years of age, thus meeting the requirements for statutory enhancement of his sentence under NRS 193.167. Green does, however, claim that his acts were justified by self-defense.

Self-defense requires proof that the defendant "(1) . . . was not the aggressor in the encounter; (2) [he] was confronted with actual and immediate danger of unlawful bodily harm or he reasonably believed that there was immediate danger of such a harm; and (3) the use of such force was necessary, in a proportionately reasonable amount, to avoid this danger." Runion v. State, 116 Nev. 1041, 1046, 13 P.3d 52, 55 (2000). "If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense." Id. at 1052, 13 P.3d at 59 (explaining sample instruction for cases where a defendant asserts self-defense). Green testified at trial that his altercation with Cullimore and Foster led him to fear imminent danger of great bodily injury or death, specifically, that he believed he had to use the force he did to avoid great bodily injury, even death.[1] Under Runion, the

[1]Green testified on direct examination that, "I didn't have no choice, you know, I feared for my life . . . I'm fearing for . . . my safety, my life . . .

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State thus had to prove beyond a reasonable doubt that Green did not act in self-defense, both in his altercation with Cullimore (count one), and in his altercation with Foster (count two).

Green does not, and cannot, argue that considering count two by itself, there was insufficient evidence to negate Green's self-defense claim as to Foster. While Green testified that Cullimore was the aggressor, and that he actually and reasonably feared for his life in his altercation with Cullimore and Foster, the jury was not required to believe him. The jury also heard both Cullimore and Foster testify that Green, not Cullimore, started the fight. The jury also observed, and heard testimony regarding, Cullimore and Foster's age and infirmities. Both Cullimore and Foster were well over 60 years of age, and roughly two decades older than Green. Cullimore was an amputee, and Foster walked with a cane. The jury could also have credited the fact that neither Cullimore nor Foster was armed, while Green was in possession of a deadly weapon.

The jury could reasonably have concluded that Green was never in danger of losing his life, nor of great bodily injury, especially once he extricated himself from the scuffle on the ground. The jury also could reasonably have concluded that, even if Green had been justified in displaying the box cutter to end the affray, or even in cutting Cullimore or Foster once, his repeated slashing of Cullimore and Foster was excessive

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. . . continued

I did what any rational person would do. I mean I responded rationally. I didn't have no choice. It was either me or them."

force that precluded Green from succeeding in a self-defense claim, at least as to Foster.

Notwithstanding this evidence, Green insists that to acquit him on count one the jury necessarily found that Green acted in self-defense in his altercation with Cullimore. This finding on count one, Green reasons, means that the jury had insufficient evidence to find him guilty on count two – as the jury must necessarily have found that Green acted in self-defense in his altercation with Foster, as well. Green then concludes that the jury's verdict on count two must be reversed because it was inconsistent with its verdict on count one.

We recognize that at times juries reach inconsistent verdicts, for example, where a defendant is found not guilty on one count of an indictment that is an essential element of another count on which the jury finds the defendant guilty. See, e.g., United States v. Powell, 469 U.S. 57, 69 (1984); Dunn v. United States, 284 U.S. 390 (1932). However, Green's assertion that the verdicts are necessarily inconsistent here is incorrect. The facts were sufficiently distinct between Green's altercation with Foster and Cullimore, respectively, that the jury rationally could have found that the State proved beyond a reasonable doubt that Green had not acted in self-defense in cutting Foster, but that the State had not proven the same with respect to Cullimore.

More importantly, even assuming that the verdicts here are inconsistent, Green's cited authority does not support reversal of the conviction on count two. "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." Dunn, 284 U.S. at 393 (emphasis added). Dunn has been repeatedly reaffirmed. For example, in Powell, the Court stated:

> As the Dunn Court noted, where truly inconsistent verdicts have been reached, the most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. The rule that the defendant may not upset such a verdict embodies a prudent acknowledgment of a number of factors . . . . [I]nconsistent verdicts—even verdicts that acquit on a predicate offense while convicting on the compound offense—should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

469 U.S. at 64-65 (internal quotations and citations omitted). Accord Greene v. State, 113 Nev. 157, 173-74, 931 P.2d 54, 64 (1997), overruled on other grounds by Byford v. State, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); Bollinger v. State, 111 Nev. 1110, 1116-17, 901 P.2d 671, 675 (1995).

Because the evidence was sufficient to support the jury's verdict of guilty on count two by itself, Green's claim of error fails.

The district court did not err in preventing defense counsel from asking a testifying officer about certain statements Green claimed to have made to the police

Green next complains that the district court erred in sustaining the State's hearsay objection to his question of a testifying officer about what Green had told the officer on the evening of the altercation. Green offers no legally sound basis for finding this was error. While Green suggests that his statements could have been admitted as an excited utterance pursuant to NRS 51.095, he offered no factual predicate

at trial for admitting these statements as an excited utterance, and we see none in the record. In addition, Green himself was permitted to, and did, testify on direct examination that he told the officers that he had acted in self-defense. Thus, Green cannot establish prejudice, making the error, if any, harmless. Jackson v. State, 84 Nev. 203, 207, 438 P.2d 795, 798 (1968).

Green has not raised a claim of reversible prosecutorial misconduct with respect to two questions the prosecutor asked Green at trial

Green objects to two separate questions asked by the prosecutor during his cross-examination of Green. First, in beginning his cross-examination, the prosecutor asked Green, "[s]o suffice it to say you've had an opportunity to kind of figure out how your testimony is going to make you come out looking like you got the better end of this." Defense counsel objected to this question. The district court sustained the objection.

Later, the prosecutor asked Green whether he had told the police he had acted in self-defense, presumably to establish that Green had told multiple stories to the police on the night of the altercation. Defense counsel objected. Counsel engaged in an off-the-record sidebar conversation with the court. Following the sidebar, the prosecution discontinued the objected-to line of questioning.

There is no basis for a finding of prosecutorial misconduct here. "It is not enough that the prosecutor's remarks are undesirable . . . . [T]he relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." Greene, 113 Nev. at 169, 931 P.2d at 62 (citations omitted).

While the prosecutor's question at the beginning of his cross-examination of Green was rhetorical and argumentative, the district court

properly sustained defense counsel's objection. With respect to Green's objection to the prosecutor's question about Green's statements to the police on the night of the altercation, Green provides no argument, and no facts, to support his conclusion that such a question was improper. This alone is sufficient for us to reject his contention. Burks v. State, 92 Nev. 670, 673, 557 P.2d 711, 712-13 (1976).

The above contains, in its entirety, Green's claim of prosecutorial misconduct. Neither instance, whether considered separately or together, "so infected the proceedings with unfairness as to make the results a denial of due process." Greene, 113 Nev. at 169, 931 P.2d at 62 (citations omitted). Thus, we hold there was no reversible error.

The district court's sentence was not excessive

In claiming that his sentence was excessive, Green reprises his argument that the jury's verdicts were inconsistent. He appears to claim that the district court, in making its sentencing decision, was bound by the factual findings of the jury—at least as far as those factual findings were necessarily implied by comparing the verdicts, and as interpreted by Green. Green argues that "[o]bviously, the Court's sense of the facts was different from the jury's . . . [thus] the Court sentenced Green under a false impression about the facts." Green offers no other argument, and cites no authority, for his novel proposition that the district court must ignore the evidence presented at the sentencing hearing, and be bound in its sentencing by the facts impliedly found by the jury in reaching its verdict(s).

This court affords the district court wide discretion in its sentencing decision. See, e.g., Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). We will not interfere with the sentence imposed as

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." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). In addition, a sentence within 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." Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quotation and citation omitted).

The record does not offer any basis for a finding that the district court relied on impalpable or highly suspect evidence. Further, Green does not allege that either of the statutes under which he was sentenced is unconstitutional, nor does he allege that his sentence was not imposed within the parameters provided by those statutes. Thus, we conclude that his claim that the sentence imposed was excessive is without merit.

For the foregoing reasons, we ORDER the judgment of conviction AFFIRMED.

Parraguirre, J.

Douglas, J.

Pickering, J.

cc: Eighth Judicial District Court Dept. 7, District Judge
Draskovich & Oronoz, P.C.
James Henry Green
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk