

IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID ANTHONY JOYCE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52213

FILED

MAY 29 2009

TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

On September 27, 2007, appellant David Anthony Joyce and another individual entered a K-Mart located in Las Vegas, Nevada. The two immediately drew the attention of Brian Adams, a Loss Prevention Specialist for K-Mart. Adams monitored Joyce on the store's surveillance system and watched as he picked up an electronic toothbrush. Adams then observed Joyce as he stuffed the electronic toothbrush down the front of his pants.

As Joyce was leaving the store, Adams contacted his supervisor, Emma Dowdy, who reviewed the surveillance videotape. After confirming that Joyce was indeed concealing an electronic toothbrush in the front of his pants, Adams and Dowdy approached Joyce in the parking lot. Dowdy told Joyce that he had been caught stealing and needed to return to the store. Joyce refused and left the scene.

After Adams and Dowdy positively identified Joyce from a photographic lineup, the police effectuated his arrest. Thereafter, Joyce was charged with burglary. Following a jury trial, Joyce was convicted and sentenced as a small habitual criminal under NRS 207.010 to a term of 8 to 20 years in prison. This appeal followed.

On appeal, Joyce presents three main arguments. First, he contends that an improper jury instruction impermissibly reduced the State's burden of proof. Second, Joyce contends that the State failed to present sufficient evidence to support the jury's verdict. Third, Joyce contends that the habitual criminality conviction cannot stand because it was an abuse of discretion to base a determination of habitual criminality on prior convictions that are between 10 and 18 years old. We disagree and therefore affirm the judgment of conviction.

Jury instruction

First, Joyce contends that the district court committed plain error by giving the following instruction to the jury:

The Defendant is presumed innocent until the contrary is proved. This presumption places upon the State the burden of proving beyond a reasonable doubt every material element of the crime charged and that the Defendant is the person who committed the offense.

A reasonable doubt is one based on reason. It is not mere possible doubt but is such a doubt as would govern or control a person in the more weighty affairs of life. If the minds of the jurors, after the entire comparison and consideration of all the evidence, are in such a condition that they can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be actual, not mere possibility or speculation.

If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.

According to Joyce, this instruction impermissibly reduced the State's burden of proof and lessened the presumption of innocence. We disagree.

The district court explicitly instructed the jury concerning the necessary elements of burglary and the requirement that the jury find the defendant guilty beyond a reasonable doubt on each element in order to

reach a verdict of guilt. Furthermore, this court has reviewed and approved similar instructions in Morales v. State, 122 Nev. 966, 970-71, 143 P.3d 463, 466 (2006); Bolin v. State, 114 Nev. 503, 529-30, 960 P.2d 784, 800-01 (1998) abrogated on other grounds by Richmond v. State, 118 Nev. 924, 934, 59 P.3d 1249, 1256 (2002); and Doyle v. State, 112 Nev. 879, 900-01, 921 P.2d 901, 915 (1996) overruled on other grounds by Kaczmarek v. State, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). Finally, Joyce failed to object to the alleged improper instruction at the time that it was given to the jury. Generally, the failure to object precludes appellate review absent plain error. McCall v. State, 91 Nev. 556, 557, 540 P.2d 95, 95 (1975). Joyce must demonstrate that the error was plain and that it affected his substantial rights. Id. We conclude that Joyce has failed to do so.

Sufficiency of the evidence

Joyce next argues that the State failed to provide sufficient evidence in this case to sustain his conviction. Specifically, Joyce contends that: (1) the district court erred in admitting portions of Adams' and Dowdy's testimony, and without this testimony, the State lacked sufficient evidence to sustain his conviction, (2) his constitutional right to confrontation was violated when the district court admitted the testimonial hearsay statements from Adams and Dowdy, and (3) the evidence is insufficient to demonstrate that he entered the store with the intent to steal. We disagree.

“The standard of review [when analyzing the sufficiency of evidence] in a criminal case is 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.” Nolan v. State, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006)

(quoting McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (alteration in original)).

First, Joyce contends that the district court erroneously admitted portions of Adams' and Dowdy's testimony. According to Joyce, if this evidence were stricken, there would be insufficient evidence to support his conviction for burglary. This court reviews a district court's decision to admit or exclude evidence for an abuse of discretion. Thomas v. State, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006).

In this case, Adams testified that he witnessed Joyce taking the electronic toothbrush off the shelf and stuffing it down his pants. Dowdy also testified that she personally reviewed the surveillance videotape and could tell that Joyce had stuffed a Sonic Care toothbrush down his pants.

We conclude that the district court properly admitted Adams' and Dowdy's testimony because each witness had sufficient personal knowledge to testify as to the property that Joyce had stolen.

Second, Joyce contends that his right to confrontation was violated when the State presented the department manager's hearsay statements through Adams and Dowdy. Crawford v. Washington holds that the Confrontation Clause bars the use of testimonial statements made by a witness who is unavailable for trial, unless the defendant had an opportunity to previously cross-examine the witness regarding the witness's statement. 541 U.S. 36, 68 (2004). In addition, the admission of a hearsay statement against a criminal defendant at trial does not violate the Confrontation Clause provided the statement bore adequate indicia of reliability by either (1) falling within a "firmly rooted hearsay exception," or (2) bearing "particularized guarantees of trustworthiness." Ohio v. Roberts, 448 U.S. 56, 66 (1980).

Here, Adams testified that: “[I]t was my manager that identified the Sonic Care toothbrush . . . [f]rom looking on the video and by going to the aisle herself and checking the unit integrity of all the items.”

Dowdy subsequently testified that:

[A]fter the incident happened, we went back in and spoke to the department manager who’s really familiar with that area. If I remember correctly, she checked the inventory that we were supposed to have as opposed to what’s on the counter, and that was the only toothbrush that we were missing.

We conclude that while these statements constitute hearsay, they do not violate Joyce’s right to confrontation because they were not testimonial and bear an adequate indicia of reliability. See Crawford v. Washington, 541 U.S. 36, 68 (2004). First, these statements were not in the form of an affidavit or prior testimony, and were not made during a custodial examination, and thus, are non-testimonial in nature. Second, these hearsay statements contained particularized guarantees of trustworthiness because the department manager was merely acknowledging that she had performed an inventory in order to confirm the theft of an electric toothbrush. The theft of the electric toothbrush is also supported by both the surveillance videotape and the testimony of Adams and Dowdy. Accordingly, these statements bear an adequate indicia of reliability and do not violate the Confrontation Clause.

Third, Joyce contends that the State failed to prove the essential elements of the crime of burglary because the evidence does not demonstrate that he entered the store with the intent to steal. Again, we disagree.

In determining whether a jury verdict is supported by substantial evidence, the critical question “is ‘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.” Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

During trial, Adams testified that he observed Joyce and his accomplice entering the store at a rapid pace. The two immediately split up and Joyce grabbed an electronic toothbrush off the shelf and met back up with his accomplice in the paper products aisle. It was at this point that Joyce stuffed the electronic toothbrush down his pants. The two then purchased a bag of plastic cutlery and exited the store. We conclude that this evidence was such that a rational trier of fact could have found the essential elements of the crime of burglary beyond a reasonable doubt.

Habitual criminal statute


Third, Joyce contends that the district court abused its discretion in applying the habitual criminal statute because his prior convictions arose out of a single criminal episode and were stale and old. See Sessions v. State, 106 Nev. 186, 190-91, 789 P.2d 1242, 1244-45 (1990). Nevada’s habitual criminal statute provides that any person who is convicted of a felony in this state, who has previously been convicted of two other felonies in any state, may be adjudicated a habitual criminal. NRS 207.010(1)(a). This court has further provided that it is within the discretion of the district court to sentence a defendant under the small habitual criminal statute rather than the large habitual criminal statute if the circumstances so warrant.¹ Staley v. State, 106 Nev. 75, 78, 787 P.2d

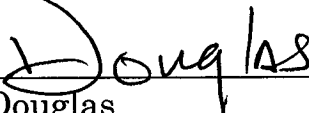
¹Sentences imposed under the major habitual statute must be life sentences with or without parole; sentences pronounced under the minor habitual statute may be not less than ten years nor more than twenty years. See NRS 207.010(1)(a)-(b).


396, 397 (1990) overruled on other grounds by Hodges v. State, 119 Nev. 479, 483-84, 78 P.3d 67, 69-70 (2003).

Here, the State submitted six prior convictions for the district court to use in adjudicating Joyce as a habitual criminal. These convictions arose out of at least three separate criminal transactions. Furthermore, all of Joyce's prior convictions were less than 20 years old. See Tanksley v. State, 113 Nev. 997, 1003-04, 946 P.2d 148, 152 (1997) (concluding that the district court did not abuse its discretion in applying the habitual criminal statute to a defendant with prior felonies that were less than 20 years old). Therefore, we conclude that the district court properly adjudicated Joyce as a habitual criminal, which requires only two prior felony convictions.² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


Parraguirre, J.


Douglas, J.


Pickering, J.

²Joyce also contends that the district court erred in failing to give him a jury trial on the habitual criminal allegations. In light of this court's decision in Howard v. State, Joyce's argument is without merit. 83 Nev. 53, 57, 422 P.2d 548, 550 (1967) (concluding that a defendant who faces adjudication as a habitual criminal and the consequent life imprisonment is not entitled to a trial by jury).

cc: Hon. Michael Villani, District Judge
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Eighth District Court Clerk