IN THE SUPREME COURT OF THE STATE OF NEVADA

PAUL DAVIS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52945

FILED

FEB 03 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary and possession of a controlled substance. Eighth Judicial District Court, Clark County; Jackie Glass, Judge. Appellant raises five issues on appeal.

First, appellant argues that the district court erred by denying his motion to sever the burglary and drug charges. We agree. Based on the victims' descriptions of the suspect who burgled their motel office and residence, appellant was apprehended two weeks later during a traffic stop. During a pat-down search for weapons, a bag of cocaine fell out of appellant's pant leg onto the ground. Because the earlier burglary and subsequent possession are not based on the same transaction, connected together, or part of a common scheme or plan, we conclude that the district court erred by denying appellant's motion to sever. See NRS 173.115; Weber v. State, 121 Nev. 554, 570-573, 119 P.3d 107, 119-121 (2005). Nevertheless, the error is "harmless unless the improperly joined charges had a substantial and injurious effect on the jury's verdict." Id. at 570-71, 119 P.3d at 119. Considering the overwhelming evidence of guilt

supporting each offense, we conclude that no relief is warranted. See Brown v. State, 114 Nev. 1118, 1124-25, 967 P.2d 1126, 1130 (1998).

Second, appellant asserts that the district court erred by denying his motion to suppress the cocaine recovered during the pat-down search. Based on the facts outlined above, we conclude that the pat-down search was properly conducted and the district court did not err by refusing to suppress the evidence. See State v. Conners, 116 Nev. 184, 186-87, 994 P.2d 44, 45-46 (2000); see also Minnesota v. Dickerson, 508 U.S. 366, 373 (1993).

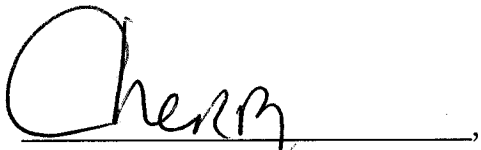
Third, appellant contends that the district court erred by denying his motion for a mistrial based on a victim's reference to an apparent prior criminal act appellant committed. Although the district court did not admonish the jury after the comment, the remark was not solicited by the prosecution or "clearly and enduringly prejudicial" and the evidence against appellant was convincing, including the unequivocal identification of the two victims after the event and at trial. See Allen v. State, 99 Nev. 485, 490-91, 665 P.2d 238, 241-42 (1983). Therefore, we conclude that the district court did not abuse its discretion in this regard. See Geiger v. State, 112 Nev. 938, 942, 920 P.2d 993, 995 (1996).

Fourth, appellant argues that the district court erred by instructing the jury, over his objection, on possession of a controlled substance, a lesser-included offense of the charged crime, because he had no notice that the prosecution would seek a conviction on the lesser-included offense. We conclude that the district court did not abuse its discretion in this regard. See NRS 175.501; Thedford v. Sheriff, 86 Nev. 741, 476 P.2d 25 (1970).

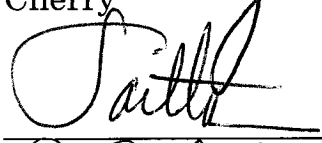
Fifth, appellant contends that his sentence for burglary constitutes cruel and unusual punishment. Based on appellant's prior convictions, he was adjudicated a habitual criminal and sentenced to life in prison with the possibility of parole. Because the sentence falls within statutory limits, see NRS 205.060; NRS 207.010, and is not unduly disproportionate to the crime, the punishment is not cruel and unusual. See Allred v. State, 120 Nev. 410, 421, 92 P.3d 1246, 1254 (2004).

Having considered appellant's arguments and concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



_____, J.
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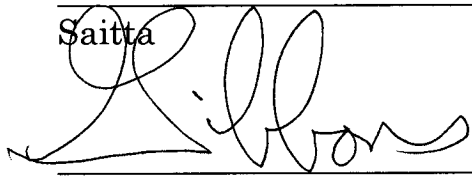

_____, J.
Gibbons

cc: Hon. Jackie Glass, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk