IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 53012

ORDER OF AFFIRMANCE

Appellant David Anthony Ealey appeals from a judgment of conviction, pursuant to a jury verdict, of burglary. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Sufficiency of the evidence

Ealey contends that insufficient evidence supports his conviction. This contention lacks merit because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

Ealey was convicted of burglarizing a convenience store which is attached to a fast food restaurant. Although the convenience store has numerous entrance doors, Ealey placed his bicycle next to the door of the restaurant and entered the building through the restaurant. He walked directly to the store, and emerged back into the restaurant approximately three minutes later carrying two cases of beer. Ealey never approached the store clerk to pay for the beer, or to ask to use the restroom, and no one else was in the store at the time. The police apprehended Ealey a short time later, after a brief chase, and discovered that he had no money

or other means of paying for the beer on his person. Based on this evidence, a rational juror could reasonably infer that Ealey entered the store with the intent to commit petty larceny. See NRS 205.060(1) (defining burglary). The jury's verdict will not be disturbed, where, as here, substantial evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Constitutionality of NRS 205.060

Ealey contends that the burglary statute, NRS 205.060, is void, vague, and overbroad because it does not provide adequate notice of what actions are prohibited, fails to distinguish specific intent from general intent, and contains no standards or limitations. We review the constitutionality of a statute de novo. Nelson v. State, 123 Nev. 534, 540, 170 P.3d 517, 522 (2007). Statutes are presumed to be valid and the challenger bears the burden of demonstrating their unconstitutionality. Id.

Ealey's overbreadth challenge fails because NRS 205.060 does not infringe upon constitutionally protected conduct. See Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494-95 (1982) (an enactment which does not reach "a substantial amount of constitutionally protected conduct" is not subject to a facial overbreadth challenge); Silvar v. Dist. Ct., 122 Nev. 289, 297-98, 129 P.3d 682, 687-88 (2006). Further, Ealey has failed to demonstrate that the statute is unconstitutionally vague because the conduct proscribed by NRS 205.060 is clearly defined, persons of ordinary intelligence have fair notice of what conduct is forbidden, and the statute does not encourage discriminatory and arbitrary enforcement. See Nelson, 123 Nev. at 540-41, 170 P.3d at 522. Therefore, we conclude that these contentions are without merit.

Jury instructions

Ealey contends that jury instruction 5 lowered the State's burden of proof because it informed the jury that the State need only prove the "material elements" of the crime charged, did not define the difference between a material element and an immaterial element, and did not inform the jury that the State was required to prove Ealey's guilt with competent evidence. Because Ealey did not object to this instruction we review this claim for plain error. See Berry v. State, 125 Nev. ___, ___, 212 P.3d 1085, 1097 (2009).

We conclude that Ealey has failed to demonstrate that the inclusion of the word "material" lowered the burden of proof and affected his substantial rights. And we note that the jury was adequately instructed on the necessary elements of burglary. Further, we conclude that Ealey has failed to demonstrate that the district court committed plain error by not instructing the jury that the evidence relied on must be competent because it is the function of the court, not the jury, to determine whether evidence is competent. See Jones v. State, 113 Nev. 454, 466-67, 937 P.2d 55, 63 (1997) (the decision to admit or exclude evidence is within the discretion of the district court).

Ealey contends that jury instruction 25 lowered the burden of proof because it instructed the jurors to merely consider the case rather than to make an impartial consideration of the evidence. Ealey did not object to this instruction and we review this claim for plain error. See Berry, 125 Nev. at ___, 212 P.3d at 1097. We have expressly directed the district courts to use the version of the Allen instruction, see Allen v. United States, 164 U.S. 492 (1896), set forth in Wilkins v. State, 96 Nev. 367, 373 n.2, 609 P.2d 309, 313 n.2 (1980). Staude v. State, 112 Nev. 1, 6, 908 P.2d 1373, 1377 (1996), modified on other grounds by Richmond v. State, 118 Nev. 924, 932, 59 P.3d 1249, 1254 (2002). The instruction given

here varied slightly from that version. Nevertheless, because the variations were not material and the jury instructions adequately informed the jury that (1) it was to reach a unanimous verdict, (2) jurors are not partisans, and (3) it must consider the evidence in reaching a verdict, we conclude that no plain error occurred.

Prosecutorial misconduct

Ealey next contends that the prosecutor engaged in three instances of misconduct by misstating evidence and arguing facts not in the record.

First, Ealey asserts that the prosecutor incorrectly argued that the restaurant manager did not get a good look at Ealey's face when Ealey entered the building because Ealey was looking at the convenience store cashier to see what she was doing and if she was looking at him. Ealey lodged an objection to the statement which was overruled. Although we agree that the prosecutor's statement is not supported by the manager's testimony, we conclude that Ealey has failed to demonstrate that the prosecutor's statement was not a reasonable inference based on other evidence admitted at trial. See Bridges v. State, 116 Nev. 752, 762, 6 P.3d 1000, 1008 (2000) (the State may comment on the evidence adduced at trial and invite the jury to make reasonable inferences from that evidence). To the extent the comment is improper, however, we conclude that this statement did not substantially affect the jury's verdict. See Valdez v. State, 124 Nev. ___, ___, 196 P.3d 465, 476 (2008).

Second, Ealey contends that the prosecutor unfairly referred to Ealey as a "pro" because there was no evidence that he had done this type of crime in the past. Ealey did not object to this statement. We conclude that this comment does not constitute plain error because, when read in context, it referred to Ealey's bicycle riding skills. See id. at ___, 196 P.3d at 477. Specifically, the prosecutor stated "He gets on his bicycle

and he takes off. Now, he didn't take off on his bicycle wobbly with two 18-packs of Budweiser adding weight. No; Stephanie told you that when she—when he took off, he took off like a pro." This statement is a proper inference from testimony that Ealey rode away from the store smooth and steady and "he looked like it was natural."[1] See Bridges, 116 Nev. at 762, 6 P.3d at 1008.

Third, Ealey contends that the prosecutor improperly stated that Ealey was hiding behind the donut counter because the manger only testified that he lost track of Ealey as he went into the store. We agree that these statements were improper because the evidence adduced at trial does not support a reasonable inference that Ealey was hiding. Nevertheless, Ealey did not object and we conclude that he has failed to demonstrate that his substantial rights have been affected. Valdez, 124 Nev. at ___, 196 P.3d at 477.

Ealey also contends that the cumulative effect of the prosecutor's misstatements violated his right to due process. We disagree. Although the prosecutor made several statements that were not supported by the evidence adduced at trial, substantial evidence of guilt supported the conviction and the crime charged is not exceptionally serious. See Rose v. State, 123 Nev. 194, 211, 163 P.3d 408, 419 (2007) (explaining the three factors to be considered when evaluating a claim of cumulative error); Browning v. State, 124 Nev. ___, ___, 188 P.3d 60, 72 (2008) ("A criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone." (internal quotation marks omitted)).

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[1]The State contends that the testimony was actually that "he looked like he was a natural."

Habitual criminal issues

Ealey contends that the district court lacked jurisdiction to sentence him as a habitual criminal because the notice of habitual criminality was filed less than 15 days before the date the sentencing hearing was originally scheduled to be held. This contention lacks merit because the original sentencing date was continued and the notice of habitual criminality was filed more than 15 days before the date Ealey's sentence was actually imposed. See NRS 207.016(2). To the extent Ealey contends that the district court abused its discretion by granting the State's request to continue the sentencing hearing, Ealey cites no authority in support of this contention and we therefore decline to address it. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Ealey asserts that the district court abused its discretion by sentencing him as a habitual criminal because the convictions relied upon are stale and/or trivial. We review the district court's decision to adjudicate Ealey as a habitual criminal for an abuse of discretion, see NRS 207.010(2); O'Neill v. State, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007), and conclude that Ealey has failed to demonstrate an abuse of discretion here. See Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) (explaining that the habitual criminal statute "makes no special allowance for non-violent crimes or for the remoteness of conviction)."

Ealey also argues that despite this court's recent holding in O'Neill, 123 Nev. at 16, 153 P.3d at 43, that a defendant does not have a right to a jury trial on a habitual criminal allegation, the right to a jury trial may be guaranteed under the Nevada Constitution. We decline to reexamine our holding in O'Neill at this time.

Finally, Ealey contends that the sentence imposed constitutes cruel and unusual punishment because this case does not exemplify the type of case or defendant that the legislature intended to imprison for the

rest of his life. See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6. Ealey has not alleged that the district court relied on impalpable or highly suspect evidence, see Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976), or that the relevant statute is unconstitutional, see Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996). The 5 to 20 year sentence imposed is within the parameters of the relevant statute, see NRS 207.010(1)(a), and is not "'so unreasonably disproportionate to the offense as to shock the conscience,'" see Blume, 112 Nev. at 475, 915 P.2d at 284 (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)). Accordingly, we conclude that Ealey has failed to demonstrate that the sentence imposed constitutes cruel and unusual punishment.

Having concluded that no relief is warranted, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk