IN THE SUPREME COURT OF THE STATE OF NEVADA

BRUCE HARRISON BIRCH, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 53535
BRUCE HARRISON BIRCH, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 53536 ✓
BRUCE HARRISON BIRCH, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 53537

FILED

MAR 11 2010

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

ORDER OF AFFIRMANCE

Docket No. 53535 is an appeal from a judgment of conviction, pursuant to a jury verdict, for possession of a stolen vehicle. Docket No. 53536 is an appeal from a judgment of conviction, pursuant to a jury verdict, for burglary. Docket No. 53537 is an appeal from a judgment of conviction, pursuant to a guilty plea, for attempted grand larceny. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge. We elect to consolidate these appeals for disposition. NRAP 3(b).

Birch argues that the district court abused its discretion in denying his motion for new counsel in all three cases. Birch was being represented by his third attorney after relationships with his prior counsel had deteriorated. Despite being spat on and attacked in court, Birch's

counsel repeatedly assured the district court that despite Birch's behavior, he would zealously represent Birch. Therefore, Birch fails to demonstrate that the district court abused its discretion in this regard. See Garcia v. State, 121 Nev. 327, 337, 113 P.3d 836, 843 (2005).

Docket No. 53535

First, Birch argues that the use of visible physical restraints and a spit hood violated his right to a fair trial. Birch, who admitted that he had Hepatitis C, had spat in his counsel's face during a pretrial hearing. Further, he stabbed his counsel in the hand during a prior trial. Therefore, we conclude that the district court did not abuse its discretion in this regard. See Hymon v. State, 121 Nev. 200, 207, 111 P.3d 1092, 1098 (2005).

Second, Birch argues that his right to due process was violated because he was not present when a juror requested a playback of testimony during deliberations, which the district court refused. We conclude that this argument lacks merit. Birch did not "have an unlimited right to be present at every proceeding," and he failed to show that he was prejudiced by his absence. See Gallego v. State, 117 Nev. 348, 367-68, 23 P.3d 227, 240 (2001).

Third, Birch argues that there was insufficient evidence to sustain his conviction for possession of a stolen vehicle. The evidence adduced at trial shows that Birch placed one shopping bag into the bed of a pickup truck and later retrieved two bags from the bed of the truck. Further, when he was searched incident to an arrest on other charges, keys fitting the truck were discovered on his person. In addition, the owner testified that he reported the truck stolen and had not given Birch permission to use it. We conclude that this evidence was sufficient for a

rational juror to find beyond a reasonable doubt that Birch possessed the truck with reason to believe it had been stolen. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); NRS 205.273(1)(b).

Fourth, Birch argues that the district court abused its discretion in admitting his statement to the police that he steals to support his drug habit. We conclude that this claim lacks merit. While the statement alluded to uncharged conduct, it was also relevant to Birch's motive for committing the instant crime, see NRS 48.045(2), and was not unduly prejudicial, Mclellan v. State, 124 Nev. ___, ___, 182 P.3d 106, 110 (2008).

Fifth, Birch argues that the district court improperly instructed the jury on consciousness of guilt. Because he failed to object, we review this claim for plain error. See Gaxiola v. State, 121 Nev. 638, 647-48, 119 P.3d 1225, 1232 (2005). As the instruction was not inconsistent with Nevada law, see State v. Salgado, 38 Nev. 64, 75-76, 145 P. 919, 923 (1914) (providing that statements that are intended to set up a false defense are admissible to show consciousness of guilt), overruled on other grounds by Bryant v. State, 72 Nev. 330, 305 P.2d 360 (1956), we conclude that Birch failed to demonstrate plain error.

Sixth, Birch argues that the district court erred in denying his motion to suppress. We conclude that this claim lacks merit. Officers did not need to obtain a warrant to inspect and remove keys from the property room at the jail once they had already been subject to search and seizure incident to Birch's arrest. See U.S. v. Turner, 28 F.3d 981, 983 (9th Cir. 1994).

Seventh, Birch argues that his sentence is cruel and unusual punishment and that the district court vindictively punished him for his outburst in court. Having found at least three prior felony convictions, the district court adjudicated Birch a habitual criminal. The sentence imposed is within the statutory limits, see NRS 207.010(1)(a), and Birch has not alleged that the sentencing statutes are unconstitutional. We conclude that the sentence imposed is not grossly disproportionate to the offense for purposes of the constitutional prohibitions against cruel and unusual punishment. See Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). We further conclude that Birch failed to demonstrate that the district court punished Birch for his behavior in court or otherwise abused its discretion in sentencing him. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987).

Eighth, Birch argues that cumulative error warrants relief. Because we conclude that Birch failed to demonstrate error with regard to any claims discussed above, he is not entitled to relief on this basis. Hernandez v. State, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002).

Docket No. 53536

First, Birch argues that the use of visible physical restraints and a spit hood violated his right to a fair trial. For the reasons stated above, we conclude that the district court did not abuse its discretion. See Hymon, 121 Nev. at 207, 111 P.3d at 1098.

Second, Birch argues that his due process rights were violated when he was not present for the exercise of peremptory challenges in chambers and for closing arguments after he had been removed for attacking his counsel. We conclude that this argument lacks merit

because Birch did not "have an unlimited right to be present at every proceeding," Gallego, 117 Nev. at 367, 23 P.3d at 240, and he has not shown that he was prejudiced by those absences, see id. at 368, 23 P.3d at 240.

Third, Birch argues that the district court failed to conduct a Faretta[1] canvas when he requested to represent himself at trial. During a statement to the court in which Birch sought new counsel, Birch said, "I would like to represent myself, but I'm not capable at this point." He then requested a continuance of two weeks to prepare. Even if this comment can be construed as a waiver of his right to counsel, we conclude, based on the record, that the district court did not err in summarily rejecting Birch's request because it was untimely and made for the purpose of delay. See Tanksley v. State, 113 Nev. 997, 1001, 946 P.2d 148, 150 (1997); see also Vanisi v. State, 117 Nev. 330, 338, 22 P.3d 1164, 1170 (2001).

Fourth, Birch argues that there was insufficient evidence to sustain his conviction. The evidence adduced at trial shows that Birch entered a Sears store, knelt down beside a tool display, and exited the store with several wrenches and a pair of pliers in his pocket. We conclude that this evidence was sufficient for a rational juror to find beyond a reasonable doubt that Birch entered the Sears store with the intent to commit larceny. See Jackson, 443 U.S. at 319; McNair, 108 Nev. at 56, 825 P.2d at 573; NRS 205.060(1).

Fifth, Birch argues that his sentence is cruel and unusual punishment and that the district court vindictively punished him for his

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[1]Faretta v. California, 422 U.S. 806 (1975).

outburst in court. Having found at least three prior felony convictions, the district court adjudicated Birch a habitual criminal. The sentence imposed is within the statutory limits, see NRS 207.010(1)(a), and Birch has not alleged that the sentencing statutes are unconstitutional. We conclude that the sentence imposed is not grossly disproportionate to the offense for purposes of the constitutional prohibitions against cruel and unusual punishment. See Blume, 112 Nev. at 475, 915 P.2d at 284; Harmelin, 501 U.S. at 1000-01 (plurality opinion). We further conclude that Birch failed to demonstrate that the district court punished Birch for his behavior in court or otherwise abused its discretion in sentencing him. See Houk, 103 Nev. at 664, 747 P.2d at 1379.

Sixth, Birch argues that the district court erred in admitting (1) evidence that during his police interview Birch did not deny culpability or profess his innocence and (2) prior bad act evidence of his drug addiction. We conclude that this argument lacks merit. As Birch waived his right to remain silent and spoke with detectives, the State's questions concerning his failure to deny the charges did not constitute improper comment on his right to remain silent. See Anderson v. Charles, 447 U.S. 404, 408 (1980) (providing that questioning about prior inconsistent statements does not improperly comment on right to remain silent because defendant was not induced to remain silent by warnings); see also Maginnis v. State, 93 Nev. 173, 175, 561 P.2d 922, 923 (1977) (providing that defendant's failure to speak or equivocation in the face of accusation of having committed crime may be offered as implied admission of guilt). While the statement about his drug use alluded to uncharged conduct, it was also relevant to Birch's motive for committing the instant crime. See NRS 48.045(2).

Seventh, Birch argues that cumulative error warrants relief. Because Birch failed to demonstrate error with regard to any claims discussed above, he is not entitled to relief on this basis. Hernandez, 118 Nev. at 535, 50 P.3d at 1115.

Docket No. 53537

First, Birch argues that his sentence constituted cruel and unusual punishment and that the district court abused its discretion by relying on stale convictions and impalpable and highly suspect evidence in sentencing him. However, the 19-48 month sentence imposed is within the statutory limits. NRS 193.130(2)(d); NRS 205.222(2); NRS 193.330(1)(a)(4). Birch has not alleged that the sentencing statutes are unconstitutional, and we conclude that the sentence imposed is not grossly disproportionate to the offense for purposes of the constitutional prohibitions against cruel and unusual punishment. See Blume, 112 Nev. at 475, 915 P.2d at 284; Harmelin, 501 U.S. at 1000-01. Nor has Birch shown that the district court improperly relied on stale convictions or impalable evidence in sentencing him. McGervey v. State, 114 Nev. 460, 467, 958 P.2d 1203, 1208 (1998); Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

Second, Birch contends that he should have been made to plead guilty to only one offense with two sentencing options instead of one felony and one misdemeanor offense. We conclude that this claim lacks merit. Birch acknowledged in his plea agreement and during the plea canvass that he was pleading guilty to both charges and that the district court would dismiss one at sentencing. As his judgment of conviction reflects only one charge, he cannot show that he was subject to redundant

convictions. See Salazar v. State, 119 Nev. 224, 228, 70 P.3d 749, 751 (2003).

Third, Birch contends that the district court erred in permitting the State to amend the information. We conclude that this argument lacks merit becuase Birch waived any challenge to the denial of his due process rights by pleading guilty. See Tollett v. Henderson, 411 U.S. 258, 267 (1973); Webb v. State, 91 Nev. 469, 470, 538 P.2d 164, 165 (1975). Therefore, we conclude that this claim lacks merit.

Having reviewed the record on appeal, and for the reasons set forth above, we

ORDER the judgments of conviction AFFIRMED.

/ Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Patrick Flanagan, District Judge
Karla K. Butko
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk