IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH LESLIE EMERSON A/K/A EMERSON LESLIE, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 53623
KENNETH LESLIE EMERSON, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 54609

FILED

MAY 07 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Docket No. 53623 is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery with substantial bodily harm and assault on an officer. Docket No. 54609 is an appeal from a district court order denying appellant Kenneth Leslie Emerson's motion to correct an illegal sentence. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Sufficiency of the evidence

Emerson contends that insufficient evidence supports his convictions because if certain incompetent evidence had not been introduced, the jury may not have convicted him of the battery charge and if his witness had been allowed to testify, the assault charge would have been negated. These contentions lack merit. When reviewing the sufficiency of the evidence, this court must consider all of the evidence admitted at trial, regardless of whether the evidence was admitted

erroneously. Lockhart v. Nelson, 488 U.S. 33, 41 (1988). And, the mere existence of conflicting testimony does not render the evidence insufficient. See, e.g., Gaxiola v. State, 121 Nev. 638, 650, 119 P.3d 1225, 1233 (2005) ("The jury determines the weight and credibility to give conflicting testimony."). Further, when viewed in the light most favorable to the State, the evidence adduced at trial 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). At trial, the jury watched a videotape depicting the charged battery, the hotel manager identified Emerson on the video, and the victim, who knew Emerson prior to the attack, identified him as his attacker. The victim testified that his injuries included a broken orbital bone and continuing eye problems, panic attacks, and dizzy spells. In addition, three of the arresting officers testified that Emerson swung and punched his arms while they were attempting to take him into custody and Officer Prager specifically testified that one "swing" would have hit him if he hadn't moved. See NRS 0.060 (defining substantial bodily harm); NRS 200.481(1)(a) (defining battery); NRS 200.471(1)(a) and (b)(1) (defining assault and officer). The jury's verdict will not be disturbed on appeal, where, as here, substantial evidence supports the verdict. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Untimely endorsed witness

Emerson contends that the district court erred by denying his request to call a late-endorsed witness to testify on his behalf and thereby denying him his constitutional right to call witnesses in his own defense. See U.S. Const. amend. VI; Nev. Const. art. 1, § 8. We review "a district

court's decision whether to allow an unendorsed witness to testify for abuse of discretion." Mitchell v. State, 124 Nev. ___, ___, 192 P.3d 721, 729 (2008).

In order to protect a defendant's constitutional rights, a strong presumption exists in favor of allowing late-disclosed witnesses to testify. Sampson v. State, 121 Nev. 820, 827, 122 P.3d 1255, 1260 (2005). However, the right to present testimony is not absolute and must be balanced against "countervailing public interests." Taylor v. Illinois, 484 U.S. 400, 414 (1988); Sampson, 121 Nev. at 827-28, 122 P.3d at 1260.

Emerson concedes that the witness was not timely endorsed, see NRS 174.234(1)(a)(1), although Emerson almost certainly knew that the witness, his girlfriend, was an eye-witness. See Taylor, 484 U.S. at 418 ("In responding to discovery, the client has a duty to be candid and forthcoming with the lawyer."). Furt her, Emerson did not inform his counsel that the witness wanted to testify until listening to the testimony of almost all of the State's witnesses. See id. at 414 ("[T]here is something suspect about a defense witness who is not identified until after the 11th hour has passed."). And, the record does not indicate that the State anticipated the witness; thus, her testimony would have resulted in unfair surprise to the State. See Sampson, 121 Nev. at 828, 122 P.3d at 1260. Under these circumstances, we conclude that the district court did not abuse its discretion by prohibiting Emerson's late-endorsed witness from testifying. See NRS 174.234(1)(a)(1); NRS 174.295(2); Sampson, 121 Nev. at 828, 122 P.3d at 1260 ("Fairness during trial is not one-sided and applies to both the defendant and the State."). Moreover, even if the district court erred by excluding the testimony, we conclude that any error

was harmless. See Chapman v. California, 386 U.S. 18, 24 (1967); Knipes v. State, 124 Nev. ___, ___, 192 P.3d 1178, 1183 (2008).

Motion to Suppress

Emerson contends that the district court erred by failing to hold an evidentiary hearing and make factual findings regarding his motion to suppress and by denying the motion. This court reviews legal questions regarding suppression issues de novo, and the trial court's factual determinations for sufficient evidence. Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002). In his motion to suppress Emerson asserted that because the warrantless search of his bag was unconstitutional and the search led to his identification, his subsequent arrest was illegal and the charge arising from that arrest should be dismissed. We agree that the district court erred by failing to hold an evidentiary hearing and make factual findings. See State v. Ruscetta, 123 Nev. 299, 304-05, 163 P.3d 451, 455 (2003). However, even assuming that the search was unconstitutional and the subsequent arrest was illegal, we conclude that Emerson was not entitled to dismissal of the charges arising from his arrest because Emerson's intervening act of assaulting the arresting officer sufficiently "purge[d] the primary taint" of any prior unconstitutional conduct, thus allowing admission of evidence of his criminal conduct. See Wong Sun v. United States, 371 U.S. 471, 488 (1963) (the test to determine admissibility is not whether the evidence "would not have come to light but for the illegal actions of the police," but rather whether the evidence has come about by exploitation of that illegality or "by means sufficiently distinguishable to be purged of the primary taint"); United States v. Bailey, 691 F.2d 1009, 1017 (11th Cir. 1982) (if a defendant's response to an illegal stop "is itself a new, distinct

crime, then the police constitutionally may arrest the defendant for that crime"); U.S. v. Dawdy, 46 F.3d 1427, 1430-31 (8th Cir. 1995) (even if defendant's initial stop and arrest were invalid, defendant's resistance in response provided independent grounds for subsequent arrest); United States v. Garcia, 516 F.2d 318, 319-20 (9th Cir. 1975) (where evidence of a defendant's illegal conduct arises from illegal police conduct but is not the intended result, the defendant's illegal conduct is sufficiently distinguishable from the police's illegal conduct so that it is not subject to suppression). Accordingly, the district court did not err by denying the motion to suppress. See Picetti v. State, 124 Nev. ___, ___ n.14, 192 P.3d 704, 709 n.14 (2008).

Photograph

Emerson contends that the district court erred by showing the jury a photograph that was "obviously" a prior booking photo and by failing to give a limiting instruction regarding the photograph. Emerson did not object to admission of the photo or the lack of an instruction, and we conclude that Emerson has failed to demonstrate plain error affecting his substantial rights. See Tavares v. State, 117 Nev. 725, 729, 30 P.3d 1128, 1130-31 (2001), modified on other grounds by Mclellan v. State, 124 Nev. 263, 270, 182 P.3d 106, 110-11 (2008).

Authentication of the video

Emerson asserts that the district court erred by admitting the video tape of the charged battery into evidence because it was not properly authenticated. See NRS 52.015. Emerson did not object to admission of the video tape, thus we review this assertion for plain error. Herman v. State, 122 Nev. 199, 204, 128 P.3d 469, 472 (2006). Nothing in the record raises any concerns regarding the authenticity of the video and Emerson

specifically informed the court that he had no objection to its admission. Under these circumstances, we conclude that Emerson has failed to demonstrate plain error affecting his substantial rights.

Lay witness opinion testimony

Emerson alleges that the district court erred by allowing Officer Tripp and the motel manger to narrate the security video while testifying and to opine that Emerson was the person in the video. We review the district court's decision to admit or exclude evidence for an abuse of discretion. Johnson, 118 Nev. at 795, 59 P.3d at 456. First, the record does not support Emerson's assertion that Tripp and the manager narrated any portion of the surveillance video.[1] Thus, this contention is belied by the record and is without merit. Second, we conclude that the district court did not abuse its discretion by allowing the manager and Tripp to identify Emerson on the video because the manager testified that he was familiar with Emerson prior to the date of the attack, Tripp observed Emerson at the time of his arrest, and Tripp and Prager testified that Emerson appeared to have lost weight between the time of the attack and trial. See Rossana v. State, 113 Nev. 375, 380-81, 934 P.2d 1045, 1048 (1997) ("Generally, a lay witness may testify regarding the identity of a person depicted in a surveillance photograph if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury." (internal quotation marks omitted)); United States v. Barrett, 703 F.2d 1076, 1086 (9th Cir. 1983) (lay opinion testimony regarding the identity of a defendant is

[1]Tripp testified generally about what the video depicted, but did not describe the video as it was being played.

appropriate where the witness was familiar with the defendant's appearance at the time of the crime and the defendant's appearance has been altered by the time of trial).

Speedy trial

Emerson contends that his statutory right to a speedy trial was violated because the district court required him to waive his right when he filed his petition for a writ of habeas corpus.[2] NRS 34.700(1)(b) requires a defendant, when filing a pretrial petition for a writ of habeas corpus, to waive the 60-day limitation for bringing him to trial, or consent to a continuation of the trial if the petition is not decided within 15 days before the date set for trial. Here, the district court explained this requirement to Emerson who then decided to waive his right to a speedy trial. To the extent Emerson argues that NRS 34.700(1)(b) is unconstitutional, this court has specifically held to the contrary. See Randolph v. Sheriff, 93 Nev. 532, 569 P.2d 408 (1977). Accordingly, we conclude that this contention is without merit.

Habitual criminal adjudication

Emerson contends that the district court erred by adjudicating him a habitual criminal because the documents submitted by the State did not prove that his California conviction was for a felony or that he was formally adjudicated. This contention lacks merit because the documents

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[2]To the extent Emerson alleges that his constitutional right to a speedy trial was violated, he does not make any cogent argument in support of this allegation and we therefore decline to address it. See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

submitted by the State demonstrate that Emerson was convicted of a felony in California. And we note that neither Emerson nor his counsel challenged the California conviction at sentencing, and defense counsel conceded that Emerson "qualifie[d] numerically" for habitual criminal treatment. Accordingly, we conclude that the district court did not err in this regard.

Motion to correct illegal sentence

Emerson contends that the district court has jurisdiction to grant a motion to correct an illegal sentence while the case is on appeal. However, the district court denied Emerson's motion to correct an illegal sentence on non-jurisdictional grounds; therefore, the issue of whether the district court has jurisdiction to grant a motion to correct an illegal sentence is not properly raised in this appeal. See Nev. Const. art. 6, § 4; Whitacre Inv. Co. v. State, Dep't Transp., 113 Nev. 1101, 1105, 946 P.2d 191, 193 (1997) (the supreme court does not have constitutional permission to render advisory opinions).

Emerson also asserts that the district court erred by denying his motion to correct an illegal sentence because the State failed to prove his prior felony conviction from California and the court was thus without jurisdiction to sentence him as a habitual criminal. We disagree because, as discussed above, the district court correctly determined that the State had sufficiently proved Emerson's prior felony convictions at the time of sentencing; thus the district court was within its jurisdiction to sentence

Emerson as a habitual criminal.[3] See NRS 207.010(1)(a); Edwards, 112 Nev. at 708, 918 P.2d at 324. And to the extent appellant's motion was a motion to modify his sentence, we conclude that the district court did not err by denying the motion because Emerson failed to demonstrate that the sentence was the result of a mistaken assumption about his criminal background which worked to his extreme detriment. See Edwards, 112 Nev. at 708, 918 P.2d at 324.

Having considered Emerson's contentions and concluded that no relief is warranted, we

ORDER the judgment of conviction and the order denying Emerson's motion to correct an illegal sentence AFFIRMED.

/ Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. David B. Barker, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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[3]Emerson did not contend that the sentence imposed was in excess of the statutory maximum. See Edwards v. State, 112 Nev. 704, 708, 918 P.2d 321, 324 (1996).