IN THE SUPREME COURT OF THE STATE OF NEVADA

ERNIE ARROYO RIVERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 54922

FILED

JUN 21 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of possession of a stolen vehicle and stop required on signal of a police officer. Eighth Judicial District Court, Clark County; Stefany Miley, Judge.

The district court sentenced appellant Ernie Rivera to 60 to 170 months in prison under the small habitual criminal statute, NRS 207.010(1)(a), for possession of a stolen vehicle and a concurrent sentence of 28 to 72 months in prison for stop required on signal of a police officer. Rivera appeals his convictions on multiple grounds: (1) sufficiency of the evidence, (2) the district court's failure to fully admonish the jury before two adjournments, (3) the district court's refusal to give the jury his proffered instruction pursuant to Crawford v. State, and (4) the district court's adjudication of Rivera under the habitual criminal statute. We conclude that any error in this case does not warrant relief, and we affirm the judgment of conviction.

Sufficiency of the evidence

Rivera argues that the State failed to present sufficient evidence to support his conviction of stop required upon signal of a peace officer. There is sufficient evidence if "'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.'" Higgs v. State, 126 Nev. ___, ___, 222 P.3d 648, 654 (2010) (quoting Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007)). It is the jury's task to weigh the evidence and evaluate the credibility of witnesses. See West v. State, 119 Nev. 410, 418, 75 P.3d 808, 814 (2003).

Rivera was convicted of a category B felony of stop required upon signal of a peace officer in violation of NRS 484B.550.[1] NRS 484B.550(1) provides, in pertinent part, that a "driver of a motor vehicle who willfully fails or refuses to bring the vehicle to a stop, or who otherwise flees or attempts to elude a peace officer . . . when given a signal to bring the vehicle to a stop is guilty of a misdemeanor." A misdemeanor is elevated to a category B felony if the fleeing driver "[o]perates the motor vehicle in a manner which endangers or is likely to endanger any other person or the property of any other person." NRS 484B.550(3)(b). NRS 484B.550(2) further specifies that "[t]he signal by the peace officer . . . must be by flashing red lamp and siren."

Rivera does not dispute that he failed to stop the car that he was driving, that he led the police on a subsequent pursuit, or that he struck two cars during the chase.[2] On appeal, however, Rivera contends that the State failed to prove that the pursuing police officer activated his

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[1]Rivera was convicted under the former version of NRS 484B.550—NRS 484.348. Because the statute did not undergo substantive changes between the time of Rivera's trial and the time of this appeal, we refer to the statute in its current form.

[2]The police officer pursuing Rivera was accompanied by a camera crew from the television show Cops, so the police chase was caught on video and subsequently played for the jury.

flashing red lamp, as opposed to one of the other lights that are located on police vehicles. At trial, the police officer pursuing Rivera testified that his "lights and sirens" were activated throughout the chase. Moreover, Rivera's defense counsel stated at trial that "we concede that he did not stop, the lights and the sirens were going." In fact, the evidence was so undisputed that defense counsel told the jury that Rivera "is guilty of a misdemeanor evasion charge," rather than a felony charge. We conclude that Rivera's argument elevates form over substance and that the State presented sufficient evidence to support his conviction.

Admonishment of the jury

Next, Rivera contends that the district court erred by failing to correctly admonish the jury, pursuant to NRS 175.401, before two out of three separate adjournments. NRS 175.401 directs the district court to admonish jurors at each adjournment that they must not:

> 1. Converse among themselves or with anyone else on any subject connected with the trial;
>
> 2. Read, watch or listen to any report of or commentary on the trial or any person connected with the trial by any medium of information, including without limitation newspapers, television and radio; or
>
> 3. If they have not been charged, form or express any opinion on any subject connected with the trial until the cause is finally submitted to them.

Rivera did not object to the court's admonishments, so we apply plain error review. Higgs, 126 Nev. at ___, 222 P.3d at 662. We recognize that it is critical that the district court admonish the jury at each adjournment; however, reversal is not warranted unless the appellant demonstrates that

he "was prejudiced by the district court's omissions." Blake v. State, 121 Nev. 779, 798, 121 P.3d 567, 579 (2005).

Here, the district court correctly admonished the jurors, pursuant to NRS 175.401, immediately after the jury was sworn. However, the district court's next two admonishments failed to instruct the jurors not to "[r]ead, watch or listen to any report of or commentary on the trial . . . by any medium of information," pursuant to NRS 175.401(2). Rivera argues that because the district court gave incomplete admonishments, "the jury may have felt free to watch [Rivera's appearance on two different episodes of] Cops on television or the internet . . . or surf the internet for information regarding his case."

We conclude that the district court erred by not fully admonishing the jury as required; however, there is no evidence that any juror actually watched television, read the newspaper, listened to the radio, or scoured the Internet for information related to the case. We determine that Rivera's mere speculation of what the jury "may have felt free" to do is not enough to demonstrate prejudice. See Wyman v. State, 125 Nev. ___, ___, 217 P.3d 572, 579 (2009) (stating that "'[a]llegations of prejudice must be supported by non-speculative proof'" (quoting U.S. v. Corona-Verbera, 509 F.3d 1105, 1113 (9th Cir. 2007) (internal quotation omitted))). Therefore, we conclude that the district court's incomplete admonishments do not warrant reversal.

Rivera's proposed jury instruction

Rivera's next argument is that the district court abused its discretion in refusing to give his proposed duty-to-acquit jury instruction for the crime of possession of a stolen vehicle. "The district court has broad discretion to settle jury instructions, and this court reviews the

district court's decision for an abuse of that discretion or judicial error." Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005).

In Crawford, we emphasized "that jurors should receive a full explanation of the defense theory of the case." Id. at 753, 121 P.3d at 588. It was in that context—the defendant being permitted to present his theory of the case—that we further stated that "specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request." Id.

Rivera's proposed jury instruction reads as follows: "If you believe that the Defendant did not know the vehicle was stolen or did not have reason to believe it was stolen you must find him not guilty of possession of a stolen vehicle." However, Rivera does not demonstrate how his proposed instruction supported the defense theory of the case. Moreover, Rivera's proposed jury instruction was the inverse of jury instruction no. 4, which defined the crime of possession of a stolen vehicle, and duplicative of jury instruction no. 11, which defined the State's burden of proof for each element of the charged crimes. Because a defendant is not entitled to duplicative instructions, we conclude that the district court did not abuse its discretion in rejecting Rivera's proposed instruction. See Crawford, 121 Nev. at 754, 121 P.3d at 589.

Adjudication of Rivera under the habitual criminal statute

Rivera contends that the district court abused its discretion in adjudicating him under the habitual criminal statute, NRS 207.010. NRS 207.010 permits the district court to adjudicate a person convicted of a felony as a habitual criminal if that person previously has been convicted of at least two felonies. See NRS 207.010(1)(a) (permitting the district court to sentence a person with two prior felony convictions to 5 to 20 years in prison); NRS 207.010(1)(b) (permitting the district court to

sentence a person with three prior felony convictions to life without parole, life with the possibility of parole after 10 years, or 25 years with the possibility of parole after 10 years). In adjudicating a person as a habitual criminal, the district court is entitled to "'the broadest kind of judicial discretion.'" Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997) (emphasis omitted) (quoting Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993)).

The State presented certified copies of three of Rivera's prior felony convictions of possession of a stolen vehicle, attempted possession of a stolen vehicle, and attempt to commit theft. Rivera's convictions occurred at three separate points in time within the six years prior to his arrest for the crimes at issue in this appeal. Rivera's three felony convictions subjected him to possible adjudication under the more stringent habitual criminal provision in NRS 207.010(1)(b); however, the district court adjudicated Rivera under the more lenient habitual criminal provision in NRS 207.010(1)(a).

Rivera contends that the district court abused its discretion in adjudicating him as a habitual criminal because (1) his convictions of possession of a stolen vehicle and attempted possession of a stolen vehicle should be considered as one conviction because the district court adjudicated him for the convictions at the same time (two days apart); and (2) the attempt-to-commit-theft conviction, which he argues should count as the second felony conviction, was "a nonviolent property crime . . . [and not] the type[ ] of crime[ ] that [is] a serious threat to the community." We conclude that Rivera's argument lacks merit.

We conclude that Rivera's convictions for possession of a stolen vehicle and attempted possession of a stolen vehicle are two

separate convictions because they involve acts that occurred approximately ten months apart, and Rivera was prosecuted in separate informations. See Rezin v. State, 95 Nev. 461, 462, 596 P.2d 226, 227 (1979) (stating that multiple convictions may be treated as one conviction when they "grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information"). Moreover, we have previously determined that "'NRS 207.010 makes no special allowance for non-violent crimes'" but that "'consideration[ ] [of this factor is] within the discretion of the district court.'" Tillema v. State, 112 Nev. 266, 271, 914 P.2d 605, 608 (1996) (quoting Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992)). Accordingly, we conclude that the district court did not abuse its discretion in adjudicating Rivera as a habitual criminal.

Having considered Rivera's contentions and concluded that they do not warrant reversal, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

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