

IN THE SUPREME COURT OF THE STATE OF NEVADA

RODNEY LAMAR MARSHALL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57491

FILED

AUG 01 2012

TRAGIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *H. General*
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of four counts each of robbery and battery with intent to commit a crime. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

Rodney Lamar Marshall was charged with robbery and battery with intent to commit robbery based on five incidents involving five different victims. Each of the incidences involved a battery followed by a robbery and happened within a three-and-a-half-mile radius in Las Vegas between the years of 2006 and 2008. The State charged Marshall by way of indictment of five counts of felony robbery and five counts of felony battery with intent to commit a crime. Marshall pleaded not guilty to the charges. A jury acquitted Marshall of the charges involving one of the victims but found him guilty of robbery and battery concerning the four other victims. The district court adjudicated Marshall as a habitual criminal on all counts and sentenced him to life in prison with a minimum parole eligibility after ten years on each count.¹

¹The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.



On appeal, Marshall argues that: (1) the district court abused its discretion when it denied his motion to sever the counts, (2) the convictions and punishments for robbery and battery for each incident violate the Double Jeopardy Clause, (3) the State failed to present sufficient evidence to support the convictions for the incidents involving two of the victims, (4) the district court abused its discretion in allowing the state to admit evidence that referenced other criminal acts, (5) the district court abused its discretion by sentencing him as a habitual criminal, (6) this court should reverse two of the battery convictions because the statute of limitations had expired, and (7) cumulative error warrants reversal of the judgment of conviction. We conclude that there was no error on any of the issues presented for review. Therefore, we affirm Marshall's conviction on all counts.

Severance

Marshall argues that his constitutional rights to due process and a fair trial were violated because the district court denied his motion to sever. Marshall contends that joinder was not proper under NRS 173.115, as the generalized similarities offered by the State are not sufficient to establish a common scheme or plan. Marshall also contends that joinder was not proper because the evidence would not have been cross-admissible at separate trials and that joinder of the counts was unfairly prejudicial.

NRS 173.115(2) allows joinder when the offenses are “[b]ased on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” While we disagree with the district court that these incidences “constitut[ed] parts of a common scheme or plan,” these incidences were properly joined because they were “connected

together.” NRS 173.115(2); see Fields v. State, 125 Nev. 776, 782, 220 P.3d 724, 728 (2009) (laying out the considerations for overcoming the presumption of inadmissibility that attaches to all prior bad act evidence); Hotel Riviera, Inc. v. Torres, 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) (affirming the district court’s decision on alternate grounds). Marshall was identified at the scenes, lived in the area during the period, and the numerous robberies and batteries were similar in nature. The evidence that all five robberies occurred after serious blows to the head could have been admissible to prove motive or intent to deprive the victims of personal property by force. See NRS 48.045(2). Thus, we conclude that this evidence is sufficient to show that the incidents and evidence related to each one were connected together.

However, even if joinder was permissible under NRS 173.115, the district court should have severed the offenses if the joinder was unfairly prejudicial. Tabish v. State, 119 Nev. 293, 304-05, 72 P.3d 584, 591 (2003). To assess the potential prejudice caused by joinder, the test is whether the prejudice manifestly outweighs the central concern of judicial economy. Id. at 304, 72 P.3d at 591. Here, the district court’s jury instruction adequately addressed the issue of any potential prejudice by limiting the jury’s consideration of the evidence. See id. Marshall’s acquittal on the counts involving one of the victims also demonstrates the jury’s lack of prejudice in each conviction by showing the ability of the jury to compartmentalize the evidence to each separate crime. We therefore conclude that joinder was proper and was not unfairly prejudicial, because any prejudice was outweighed by the concern for judicial economy.

Double Jeopardy Clause

Marshall argues that robbery and battery with intent to commit a crime are the same offense under Blockburger v. United States, 284 U.S. 299 (1932), and therefore his constitutional right against being punished twice for the same crime was violated when the district court sentenced him for both offenses. Marshall requests that this court overrule the holding in Zgombic v. State, 106 Nev. 571, 578, 798 P.2d 548, 552 (1990), superseded by statute on other grounds as stated in Steese v. State, 114 Nev. 479, 499 n.6, 960 P.2d 321, 324 n.6 (1998), that convictions for robbery and battery are two separate offenses. While Marshall failed to object during the proceedings below, “this court has the discretion to review constitutional or plain error.” Somee v. State, 124 Nev. 434, 443, 187 P.3d 152, 159 (2008).

Blockburger controls the determination of whether offenses are the same for purposes of the Double Jeopardy Clause and necessitates that, in order for crimes to constitute separate offenses, each must require proof of fact that the other does not. 284 U.S. at 304. We have previously determined in Zgombic that battery and robbery do not implicate the Double Jeopardy Clause. 106 Nev. at 578, 798 P.2d at 552. We determined that while battery requires the use of force or violence, robbery does not. NRS 200.380(1); NRS 200.481(1)(a); Zgombic, 106 Nev. at 578, 798 P.2d at 552. Moreover, robbery requires the taking of property, which battery does not. NRS 200.380(1); Zgombic, 106 Nev. at 578, 798 P.2d at 552. The crimes of robbery and battery were created by the legislature to punish separate wrongs. The battery with intent to commit robbery and the robbery statutes regulate distinct aberrant social conduct and protect separate societal interests. Therefore, we decline to



find plain error and affirm the district court ruling that the separate punishments for robbery and for battery with intent to commit a robbery do not violate the Double Jeopardy Clause.

Sufficiency of the evidence

Marshall argues that his constitutional rights to due process and conviction only upon presentation of proof beyond a reasonable doubt were violated because there was insufficient evidence to support his conviction for the charges involving Curtis Euart and Benjamin Livermore.

We conclude that substantial evidence supports Marshall's jury conviction for crimes involving Euart. See Moore v. State, 122 Nev. 27, 35, 126 P.3d 508, 513 (2006) (this court will not reverse a verdict that is supported by substantial evidence). In addition to Euart's prior identification of Marshall, the State also presented evidence that the attack occurred in the same area and that the injuries sustained were similar to those sustained by the other four victims. Euart's attacker told him he lived off Tropicana Avenue, where Marshall resided, and police placed Marshall less than a mile from the attack site that day. While Euart later recanted his identification of Marshall, it is the task of the jury to determine the credibility of Euart's testimony, and the jury could have permissibly based the conviction on circumstantial evidence. See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

We further conclude that there was sufficient evidence supporting the conviction for the incident involving Livermore. While Livermore did not see who hit him, he testified that Marshall had been standing just behind him before he was hit and no one else was in that area. Livermore was positive of his identification as he knew Marshall

from the neighborhood. The State also points out that this attack occurred in the same area, the attacker had the same modus operandi, and Livermore sustained similar injuries to those of the other four victims. Therefore, there was sufficient evidence to support the convictions for the charges involving both Euart and Livermore.

Evidence of other criminal acts

Marshall argues that his constitutional rights to due process, equal protection, and to a fair trial were violated by the district court's erroneous decision to allow the State to introduce evidence that improperly referenced other criminal acts involving Marshall. Marshall contends that the district court erred in allowing the State to introduce his booking photographs, a statement he made that the victims were jumping on the bandwagon, and evidence of a hand injury. We disagree.

First, we conclude that the district court did not err in admitting Marshall's booking photographs into evidence. See Chavez v. State, 125 Nev. 328, 344, 213 P.3d 476, 487 (2009) (reviewing a district court's decision to admit or exclude evidence for an abuse of discretion); Manning v. Warden, 99 Nev. 82, 86, 659 P.2d 847, 850 (1983) (referencing criminal history is improper if "a juror could reasonably infer from the facts presented that the accused had engaged in prior criminal activity." (quoting Commonwealth v. Allen, 292 A.2d 373, 375 (Pa. 1972))). The photographs had no indicators or identifiers of being booking photographs. There was also testimony that there are multiple other ways that police departments obtain photos, such as from work cards and driver's licenses. Therefore, the jurors could not have reasonably inferred from the photographs that Marshall had engaged in previous criminal activity.

Second, the introduction of Marshall's statement that the victims were jumping on the bandwagon could reasonably have been interpreted to refer to the five incidents that were prosecuted together. Extraneous prior criminal activity is not necessary for the victims to join the bandwagon in this case. Moreover, the statement is probative of the reluctance of the witnesses to come forward until Marshall was already in jail and did not create the impression that Marshall had been involved in previous criminal activity. See Manning, 99 Nev. at 86, 659 P.2d at 850.

Finally, the State elicited testimony from a detective who referred to an injury sustained to Marshall's hand. Marshall objected to the testimony in an off-record bench conference, and the judge sustained the objection on the record, apprising the jury that there had been an objection to this evidence and that it had been sustained. The jury presumptively followed the courts instructions to disregard the evidence regarding any injury to Marshall's hand. See Summers v. State, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) ("[T]his court generally presumes that juries follow district court orders and instructions."). Marshall therefore failed to show that he suffered any prejudice. Thus, we conclude that the evidence provided by the State did not improperly reference Marshall's past criminal behavior and did not violate his constitutional rights.

Habitual criminal

Marshall argues that his constitutional right to due process was violated because the district court improperly sentenced him as a habitual criminal. We conclude that the district court did not abuse its discretion. In determining whether a finding of habitual criminal was proper, we look to the record as a whole. See O'Neill v. State, 123 Nev. 9,

16, 153 P.3d 38, 43 (2007). Adjudication of a defendant as a habitual criminal is subject 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)). In order to adjudge an individual as a habitual criminal, NRS 207.010(1)(b) only requires proof of three prior felony convictions. At the time of sentencing Marshall had been convicted of five previous felonies—a number more than sufficient to qualify Marshall to be adjudicated a habitual offender. The fact that the felonies were nonviolent is a non-issue because NRS 207.010(1)(b) does not require any form of violence. Additionally, the convictions that range from 7 to 21 years old are neither too remote nor too sporadic. Marshall argues that the district court inappropriately factored in an unsupported California felony, however, we need not address this issue because the requisite three prior felonies alone supported the district court’s determination. While Marshall contends that these incidents should have been treated as one felony in light of the district court’s decision regarding severance, these were a series of separate occurrences that can each be punished separately even though each count was prosecuted in the same indictment. We conclude that the adjudication of Marshall as a habitual criminal serves the purpose of NRS 207.010, “to increase sanctions for the recidivist,” and furthers the interests of justice. See Odoms v. State, 102 Nev. 27, 32, 714 P.2d 568, 571 (1986).

Statute of limitations

Marshall contends that the convictions on two of the battery with intent to commit a crime counts should be reversed because he was charged after the statute of limitations had expired, in violation of his constitutional rights to due process and equal protection. This court has previously determined that “criminal statutes of limitation [are] non-jurisdictional affirmative defenses.” Hubbard v. State, 112 Nev. 946, 948, 920 P.2d 991, 993 (1996). Failing to raise the statute of limitations defense at the trial court waives the use of this defense. Id. We decline to alter this ruling, and we conclude that because Marshall failed to raise the affirmative defense of statute of limitations at the trial level, he waived his use of this defense.

Marshall also urges this court to conclude as a matter of law that his trial counsel was ineffective in failing to raise the statute of limitations issue. However, any claim with respect to a failure to raise statutes of limitation as an issue should be raised in a post-conviction petition—“the more appropriate vehicle for presenting a claim of ineffective assistance of counsel is through post-conviction relief.” Gibbons v. State, 97 Nev. 520, 522-23, 634 P.2d 1214, 1216 (1981).

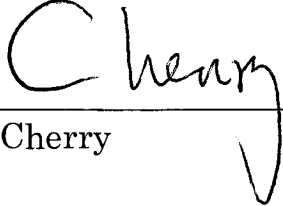
Cumulative error


Marshall argues that the cumulative effect of the errors at trial denied him a fair trial. Cumulative error may deny a defendant a fair trial even if the errors, standing alone, would be harmless. Valdez v. State, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). “When evaluating a claim of cumulative error, we consider the following factors: ‘(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged.’” Id. (quoting Mulder v. State, 116

Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). We conclude that cumulative error does not warrant reversal in this instance when Marshall failed to raise any meritorious issues in this appeal.²

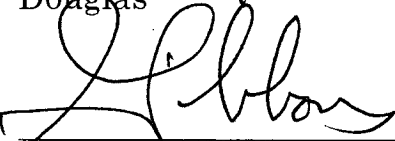
Accordingly, we

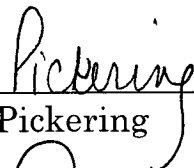
ORDER the judgment of the district court AFFIRMED.

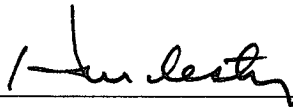

_____, C.J.
Cherry

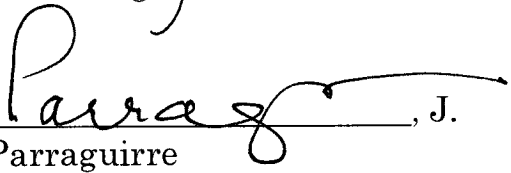

_____, J.
Douglas


_____, J.
Saitta


_____, J.
Gibbons


_____, J.
Pickering


_____, J.
Hardesty


_____, J.
Parraguirre

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

²We conclude that all other arguments on appeal lack merit.