IN THE SUPREME COURT OF THE STATE OF NEVADA

NICHOLAS MCWEENY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 59220

FILED

JUL 26 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit burglary (count I), robbery with the use of a deadly weapon (count III), grand larceny of a firearm (count VII), and burglary (count IX); two counts of burglary while in the possession of a deadly weapon (counts II, V); and three counts of grand larceny (counts IV, VIII, XI).[1] Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

First, appellant Nicholas McWeeny contends that the district court erred by failing to conduct "a proper Petrocelli hearing" before granting the State's motion in limine and admitting prior bad act evidence. McWeeny claims the bad act evidence was overly prejudicial and amounted to an impermissible comment on his right to remain silent because, although a jury found him guilty on all counts pertaining to the bad act (a residential burglary), he had not yet been sentenced. We disagree with McWeeny's contention.

[1]The record indicates that appellant was also convicted of home invasion while in the possession of a deadly weapon and home invasion but that sentencing on those counts was "stayed."

"A district court's decision to admit or exclude evidence of prior bad acts rests within its sound discretion and will not be reversed . . . absent manifest error." Somee v. State, 124 Nev. 434, 446, 187 P.3d 152, 160 (2008). McWeeny fails to offer any argument or legal authority in support of his contention that his right to remain silent was violated by the admission of the prior bad act evidence. 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."). Additionally, the district court conducted a hearing on the State's motion and heard arguments from counsel.[2] The State argued that the prior bad act evidence was admissible to show identity, motive, and intent, to which the district court added, common scheme, stating, "you've got some MO evidence." See NRS 48.045(2) (evidence of bad acts may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"). The district court also found that the jury verdict proved the prior bad act beyond a reasonable doubt. We conclude that the factors for admissibility were met, see Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997), modified by Bigpond v. State, 128 Nev. ___, ___, 270 P.3d 1244, 1249-50 (2012), and the district court did not err by granting the State's motion.

Second, McWeeny contends that the district court erred by (1) adjudicating him as a habitual criminal, and (2) imposing an excessive

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[2]The Honorable Valerie Adair, District Judge, presided over the hearing on the State's motion in limine.

and disproportionate sentence which shocks the conscience and amounts to cruel and unusual punishment. We disagree.

The district court has broad discretion to dismiss a count of habitual criminality. See NRS 207.010(2); O'Neill v. State, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007). McWeeny did not object at the sentencing hearing to the use of the prior convictions for habitual criminal adjudication purposes and, on appeal, has not offered any cogent argument or relevant authority in support of his contention. See Maresca, 103 Nev. at 673, 748 P.2d at 6. Further, our review of the record reveals that the district court understood its sentencing authority and considered the appropriate factors prior to making its determination to adjudicate McWeeny as a habitual criminal. See Hughes v. State, 116 Nev. 327, 333, 996 P.2d 890, 893 (2000); see also NRS 207.016(5); O'Neill, 123 Nev. at 15-16, 153 P.3d at 42-43 (once a district court declines to exercise its discretion to dismiss an allegation of habitual criminality, the only factual findings the judge may then make must relate solely to the existence and validity of the prior convictions). We conclude that the district court did not abuse its discretion by adjudicating McWeeny as a habitual criminal.

Additionally, McWeeny has not alleged that the district court relied solely on impalpable or highly suspect evidence or demonstrated that the sentencing statutes are unconstitutional. See Chavez v. State, 125 Nev. 328, 348, 213 P.3d 476, 489-90 (2009). McWeeny's sentence falls within the parameters provided by the relevant statutes[3] and is not so

[3]The district court sentenced McWeeny to serve 12 months in jail for count I, see NRS 199.480(3); NRS 193.140, and concurrent prison terms of 72-240 months for counts II-V, VII-IX, and XI, see NRS 207.010(1)(a); the sentence for count II was ordered to run consecutive to

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unreasonably disproportionate to the gravity of the offense and his history of recidivism as to shock the conscience, Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979); see also Ewing v. California, 538 U.S. 11, 29 (2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). We conclude that the district court did not abuse its discretion at sentencing. See Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_______________, J.
Douglas

_______________, J.
Gibbons

_______________, J.
Parraguirre

cc: Hon. Jerome T. Tao, District Judge
Hon. Valerie Adair, District Judge
Cannon & Tannery
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk

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*...continued*

the sentence imposed in district court case no. C268522. The district court also ordered McWeeny to pay $71,222 in restitution.