

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN MCDERMETT A/K/A KEVIN
FRANCIS MCDERMOTT,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 66678

FILED

APR 13 2015

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

ORDER OF AFFIRMANCE

This is an appeal from Kevin McDermett's convictions of conspiracy to commit burglary, burglary and grand larceny. McDermett was sentenced under the habitual criminal statute, NRS 207.010(a), to 60-150 months for the burglary conviction, and 60-150 months for the grand larceny convictions, all sentences to run concurrently. Additionally, he was sentenced to 364 concurrent days for the conspiracy conviction. McDermett contends the district court erred regarding the admissibility of evidence, jury instructions and the sentence. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Las Vegas Metropolitan Police Officer Lebario conducted a person stop on McDermett and co-conspirator Annalese Langford. At the time of the stop, McDermett was approximately five to ten feet away from Langford. Langford was carrying a suitcase containing merchandise stolen from the Silver Post and Western Barn stores' shared storage room. McDermett denied knowing Langford.

During the course of the police investigation, the stores' manager prepared and gave police an inventory list of the items from the suitcase and those items' values. Police also viewed the stores' surveillance video. The video revealed a man and a woman entering the

stores' storage room by crawling through a hole in the wall shared by the storage room and another property. The video showed the intruders' clothing, but their faces could not be identified. A hammer, with what appeared to be drywall residue, was recovered at the scene. Although pictures were taken of the hole and hammer, no forensic tests were conducted.

McDermett asserts the district court erred regarding two jury instructions. The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of discretion or judicial error. *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason. *Id.*

First, McDermett objected to a jury instruction regarding actual and constructive possession because: (1) possession is not an element of the crimes charged; and (2) giving the instruction may have confused the jury. The district court gave the instruction, stating that it could be relevant given the facts of the case. On appeal, the State argues that the instruction clarified the terms "taking" and "carrying away", which were in an instruction regarding the larceny charge. After reviewing the record, we agree with the State and conclude that the district court did not abuse its discretion in giving this instruction.

Second, McDermett contends the district court erred by declining to give the jury his instruction regarding specific intent.¹ The

¹The instruction stated "A defendant may not be convicted for a specific intent crime by a co-conspirator simply because that crime was a natural and probable consequence of the object of the conspiracy. To prove

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record indicates that the district court gave instructions on each crime charged. In each of those instructions, specific intent was addressed.² Further, McDermett was not charged based upon vicarious conspirator liability nor was he charged with aiding or abetting; Rather, he was charged with directly committing the acts. Therefore, under the facts of this case, McDermett's proposed instruction could have confused the jury. Therefore, we find the district court was correct and did not abuse its discretion.

McDermett next alleges the district court erred by admitting the inventory list into evidence because it was prepared in anticipation of litigation. The district court admitted the list because it was relevant. This court reviews a trial court's decision to admit evidence using an

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the defendant guilty (sic) of a specific intent crime on a theory of co-conspirator liability, the State must prove beyond a reasonable doubt that the defendant possessed the specific intent to commit the charged crime.

Conspiracy to commit Burglary is a specific intent crime[.]

Burglary is a specific intent crime[.]

Grand Larceny is a specific intent crime[.]

Bolden v. State, 124. P.3d 191, 195 (2005)"

²Instruction #19: "[l]arceny is the stealing, taking and carrying away...with the *specific intent to permanently deprive the owner thereof*" (emphasis added); Instruction #23: "[t]he question of whether property *was taken with the intent of depriving the owner permanently thereof* is one of fact..." (emphasis added); Instruction #14: "[e]very person who...enters any room...*with the intent to commit a larceny therein* is guilty of Burglary." (emphasis added); Instruction #9: "...[t]o be guilty of conspiracy, the defendant must *intend to commit...the specific crime agreed to...*" (emphasis added).

abuse of discretion standard. *McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

Documents prepared primarily for the purpose of litigation generally do not fall within the regularly conducted activity or business records' exception to the hearsay rule because they lose one of the indicia of trustworthiness for that exception. *A.L.M.N, Inc. v. Rosoff*, 104 Nev. 274, 284, 757 P.2d 1319, 1325 (1988). A statement, however, is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy. NRS 51.075.

The facts in this case indicate that the inventory list, although made for the purpose of litigation, is trustworthy. Both the stores' manager and owner saw the stolen items on the hood of the police car; the manager contemporaneously wrote a list of those items; the manager immediately went to her office and typed the inventory based upon that hand-written list; the owner observed that the same items were missing from the storeroom, reviewed the list and confirmed the inventory was accurate; and the owner corroborated the information in the inventory through his trial testimony.

This court will affirm a district court's decision to admit evidence even if it gave an incorrect reason for doing so. *Browne v. State*, 113 Nev. 305, 312, 933 P.2d 187, 191 (1997); *Dearing v. State*, 100 Nev. 590, 592, 691 P.2d 419, 421 (1984). Therefore, we conclude that although the district court may have erred in its reason for admitting the inventory

list, it was admissible under NRS.51.075 and the court did not abuse its discretion.³

Next, McDermett asserts that the district court erred by allowing testimony by Officer Lebario that exceeded the scope of cross-examination. On cross-examination, Officer Lebario testified that McDermett appeared to be walking away from Langford and trying to avoid her. The trial court did not abuse its discretion in allowing the State to follow up on this line of questions by asking whether McDermett stated where he was headed. *See* NRS 50.115.

McDermett also asserts that the weight of the evidence was insufficient to support guilty verdicts. In so doing, he raises several issues, including inconsistencies regarding the description his clothing, a chain of custody issue regarding the hammer, and lack of forensic evidence. When the defendant has been found guilty by a jury, and this court is asked to determine the sufficiency of the evidence, our inquiry is limited to "whether, 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." *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 687 (1995).

Our review of the record reveals sufficient evidence to meet this standard. The State presented a video surveillance tape showing two people generally matching McDermett's and Langford's description

³Even if the list was inadmissible, the owner testified he had personal knowledge of the items taken and their value. Defense counsel cross-examined this witness. Therefore, the admission of the list would be harmless error.

entering the storage room and working together to take merchandise found in the suitcase carried by Langford. Testimony placed McDermett and Langford near the crime scene shortly after the crimes took place and established the value of the stolen items. Testimony also described an interaction between McDermett and Langford which could have indicated their familiarity with each other,⁴ pry marks, and a newly-created hole that was used by the burglars to enter the storage room. Admitted photographs corroborated the descriptions of the pry marks and hole.

Next, McDermett asserts that the district court's decision to sentence him under Nevada's habitual criminal statute was erroneous because his prior convictions were stale, trivial and non-violent. He also argues that the length of the sentences is so disproportionate to the crimes that the Eighth and Fourteenth Amendments were violated. McDermett does not allege that the statute is unconstitutional.

This court will not overturn a trial court's adjudication of habitual criminal status absent an abuse of discretion. *Clark v. State*, 109 Nev. 426, 428; 851 P.2d 426, 427 (1993). Further, the habitual criminal statute "makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court." *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). At sentencing, the State presented five felony convictions spanning from 1981 to 2009 for the district court's

⁴Office Lebario testified that he observed McDermett telling Langford "[d]on't worry baby, it's going to be okay."

consideration.⁵ The record reflects that the judge considered the record as a whole during adjudication.

Regardless of its severity, a sentence that is within the statutory limits is not “cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.” *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining that the Eighth Amendment does not require strict proportionality between crime and sentence; it forbids only an extreme sentence that is grossly disproportionate to the crime). The sentences imposed are within the parameters provided by the relevant statutes. See NRS 207.010(a). We are not convinced that the sentence imposed is so grossly disproportionate to the crime and McDermett’s history of recidivism as to constitute cruel and unusual punishment. See *Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion); *Arajakis*, 108 Nev. at 983, 843 P.2d at 805 (1992).


Finally, McDermett argues that the cumulative effect of the errors at trial and sentencing violated his due process rights. To assess this claim, this court considers: (1) whether the issue of guilt is close; (2) the quantity and character of the error; and (3) the gravity of the crime charged. *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000). In


⁵The convictions were: (1) burglary (1981); (2) attempt possession of stolen property (1999); (3) attempt grand larceny (2001); (4) possession of controlled substance with intent to sell (2006); and (5) possession of stolen vehicle and using the identity of another (2009).

this case, we conclude that the errors asserted by McDermett are either without merit or constitute harmless error. Therefore, his due process rights could not be violated due to cumulative error. We therefore,

ORDER the judgments of conviction are AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Silver

cc: Hon. Elissa F. Cadish, District Judge
Law Offices of Martin Hart, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk