IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARCUS SHAAN FINLEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 67826

FILED

DEC 29 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

Appeal from a jury verdict finding defendant guilty of two counts of attempt burglary. Eighth Judicial District Court, Clark County; James M. Bixler, Judge; Eighth Judicial District Court, Clark County; Jennifer P. Togliatti, Judge.

Appellant Marcus Finley was charged with two counts of attempt burglary after he allegedly tried to gain entry to two homes. As the parties are familiar with the facts, we need not enumerate them here. On appeal, Finley alleges multitudinous errors. After careful consideration of the parties' arguments and the applicable law, we conclude Finley's arguments are without merit.

As an initial matter, we note Finley's arguments regarding his right to a jury trial on his habitual criminal status,[1] the number of

[1]*See* NRS 207.010 (providing district courts with discretion to determine habitual status); *O'Neill v. State*, 123 Nev. 9, 11-17, 153 P.3d 38, 40-43 (2007) (rejecting the argument that a jury must determine habitual criminal status and holding that this determination may be made by the district court).

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peremptory challenges,[2] and his proposed jury instructions[3] are largely barred by existing Nevada law, which we are constrained to follow. The only point we may consider is whether malicious destruction of private property is a lesser-included offense of burglary,[4] and whether the district court was, therefore, required to instruct the jury on that offense. *See Smith v. State*, 120 Nev. 944, 946, 102 P.3d 569, 571 (2004) (a court must instruct the jury on lesser-included offenses). A comparison of NRS 205.060 with NRS 206.310 demonstrates that each offense requires proof of an element the other does not, leading us to conclude malicious destruction of private property is not a lesser-included offense of burglary.[5] *See Blockburger v. U.S.*, 284 U.S. 299, 304 (1932) (offenses are

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[2]*See Nelson v. State*, 123 Nev. 534, 546, 170 P.3d 517, 526 (2007) (the potential for habitual criminal status does not entitle a defendant to more peremptory challenges than is granted by the statute governing the offense actually charged); *Schneider v. State*, 97 Nev. 573, 574-75, 635 P.2d 304, 304-05 (1981) (adjudication as an habitual criminal is status determination, and not a separate offense).

[3]*See* NRS 207.200(1) (defining trespass); *Smith v. State*, 120 Nev. 944, 102 P.3d 569 (2004) (trespass is not a lesser-included offense of burglary); *Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000) (district courts are not required to give instructions on lesser-related offenses, and should not do so if the State has not charged or attempted to prove the lesser-related offense).

[4]We note the supreme court has held that malicious injury to property is not a lesser-included offense of home invasion. *See Truesdell v. State*, 129 Nev. ___, ___, 304 P.3d 396, 402 (2013).

[5]Given existing law, we are not persuaded by Finley's argument that under *McIntosh v. State*, 113 Nev. 224, 932 P.2d 1072 (1997) the district court should have instructed the jury on trespass and malicious destruction of property.

not greater- and lesser- related if each requires an element of proof the other does not). Thus, the district court was not required to instruct the jury on that offense, and given that the State did not charge or argue that offense, we discern no error in the district court's decision. *See Peck v. State*, 116 Nev. 840, 845, 7 P.3d 470, 473 (2000) (district courts need not instruct a jury on lesser-related offenses) (overruled on other grounds by *Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006)).

We next turn to Finley's arguments that the district court abused its discretion on several occasions. First, we conclude the district court did not abuse its discretion by denying a fourth continuance of the trial. *See Wesley v. State*, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996) (we review a district court's decision to grant or deny a continuance for abuse of discretion). Finley requested his continuance on the day trial was scheduled to begin, the trial had previously been continued three times over a span of nearly 18 months, the jury pool was assembled, and Finley's counsel had formerly asserted he was or would be ready for trial. Further, although Finley claims he was prejudiced by the lack of further time to gather witnesses and evidence, he does not explain what additional witnesses or evidence he would or could have gathered at this late date after three prior continuances nor how these witnesses or evidence would have actually created or bolstered a defense.

Second, the district court did not abuse its discretion by refusing to sever the counts. *See Rimer v. State*, 131 Nev. ___, ___, 351 P.3d 697, 707 (2015) (we review a district court's decision regarding joinder for abuse of discretion). Finley's actions occurred on the same day within a short time and distance of each other, and the acts were factually similar in that Finley attempted to gain entry through a window shortly

after the homeowner left the premises. Not only do these facts suggest a pattern, but the evidence and testimony was directly or indirectly relevant to both cases, supporting joinder in the interest of judicial economy. *See id.* at ___, 351 P.3d 697, 708-09. As Finley failed to show manifest prejudice in light of the substantial evidence against him, the district court could refuse to sever the counts. *See Honeycutt v. State*, 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002) (severance is mandated only where the defendant demonstrates joinder would be manifestly prejudicial).

Third, the district court did not abuse its discretion in denying Finley's request to dismiss his court-appointed counsel. *See Young v. State*, 120 Nev. 963, 968, 102 P.3d 572, 576 (2004) (we review a district court's decision regarding substitution of counsel for abuse of discretion). As a threshold matter, a defendant is not entitled to dismiss his court-appointed counsel where the defendant's claims of inadequate representation rest upon the defendant's failure to cooperate with his court-appointed counsel. *See Thomas v. State*, 94 Nev. 605, 608, 584 P.2d 674, 676 (1978). As the record shows that Finley refused on several occasions to communicate with his attorney, and nothing in the record suggests Finley's counsel failed to cooperate with him or adequately act on Finley's behalf, the district court did not err in denying Finley's motion.

As regards Finley's claim that the district court erred by denying his pretrial Petition for Writ of Habeas Corpus, we review this issue for substantial error. *See Sheriff v. Milton*, 109 Nev. 412, 414, 851 P.2d 417, 418 (1993). We conclude the facts testified to at the preliminary hearing gave rise to probable cause supporting the criminal charges. Bowman's and Southern's testimonies regarding Finley's actions supported the State's theory of attempt burglary at both homes and the

State's burden of proof was not high. *See Sheriff v. Middleton*, 112 Nev. 956, 961, 921 P.2d 282, 286 (1996) (noting even slight or marginal evidence will give rise to probable cause sufficient to support a criminal charge); *see also* NRS 205.065 (allowing the trier of fact to infer a person who breaks into a home did so with the intent to commit a felony). Accordingly, the district court did not err in denying the petition.

Nor do we agree the district court otherwise erred in refusing to enforce the plea agreement or in denying Finley's *Batson* challenge. *See Lorenz v. Beltio, Ltd.*, 114 Nev. 795, 803, 963 P.2d 488, 494 (1998) (we review the district court's findings regarding a plea agreement for clear error); *Diomampo v. State*, 124 Nev. 414, 422-23, 185 P.3d 1031, 1036-37 (2008) (giving great deference to the district court's factual findings regarding a *Batson* challenge). Contrary to Finley's assertion, the plea agreement here was not fully executed at the time the State noted the error, as a plea agreement is not binding on the parties until it is approved by the court. *See State v. Crockett*, 110 Nev. 838, 843, 877 P.2d 1077, 1079 (1994). From the record it is clear the agreement contained a mistake mutually recognized by both sides, and the court was under no duty to accept and enforce the agreement with the mistake.[6] Further, Finley's *Batson* argument is without merit, as the State provided a race-neutral reason for the strike and Finley failed to articulate why this reason was a pretext for discrimination. *See Conner v. State*, 130 Nev. ___, ___, 327 P.3d 503, 508-09 (2014), *petition for cert. filed*, (U.S. Mar. 18, 2015) (No.

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[6]A contract may be rescinded in cases where there exists a mutual mistake as to the contract's terms. *See Land Baron Inv., Inc. v. Bonnie Springs Family LP*, 131 Nev. ___, ___, 356 P.3d 511, 517 (2015).

14-1130) (the opponent of a strike has the burden of demonstrating the proponent's explanation is a pretext for discrimination).

Finley's argument regarding the suppression of eyewitness identification also lacks merit. Suppression issues present mixed questions of law and fact, and are therefore reviewed de novo. *Johnson v. State*, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002). We conclude under these facts the show-up procedure was not unnecessarily suggestive and the identification was reliable. *See Stovall v. Denno*, 388 U.S. 293, 301-02 (1967); *Banks v. State*, 94 Nev. 90, 94, 575 P.2d 592, 595 (1978). *See also Johnson v. State*, 131 Nev. ___, ___, 354 P.3d 667. The show-ups were conducted shortly after the crimes occurred, in the vicinity where the crimes occurred, and while the victims' memories were still fresh. Southern witnessed Finley throw rocks through her window and try to slide the window open, confronted him, watched while he was detained, and identified him to officers within minutes. Bowman saw Finley in her backyard, described him to responding officers, and identified him to officers a short time later. Both Bowman and Southern stated they were absolutely certain Finley was the perpetrator. Further, Bowman and Southern separately identified Finley. Given the totality of the circumstances, the district court correctly denied Finley's motion to suppress the identifications.

We likewise conclude Finley's sentence as an habitual criminal does not constitute cruel or unusual punishment. We accord the district court the broadest discretion in adjudicating a defendant a habitual criminal. *LaChance v. State*, 130 Nev. ___, ___, 321 P.3d 919, 929 (2014). NRS 207.010, governing habitual treatment, makes no provision for how recent or violent a felony must be to warrant habitual treatment.

See also Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). And, the district court may also consider the defendant's history in determining the sentence. *LaChance*, 130 Nev. at ___, 321 P.3d at 929. Here, Finley's six prior felonies brought him within the purview of NRS 207.010. Finley had a long history of theft-related offenses and recidivism despite drug treatment, probation, and parole. Under these facts, his sentence does not "shock the conscience." *See Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (concluding a sentence may be cruel and unusual if it is unreasonably disproportionate to the crime).

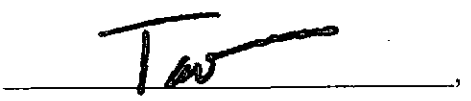
We next consider Finley's argument that the prosecutor committed misconduct, which we review for plain error as Finley failed to object to the conduct at trial. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 94-95 (2003). While a prosecutor may not comment on a defendant's failure to testify, a prosecutor may comment on what elements of the offense the facts in evidence do or do not establish. *See Harkness v. State*, 107 Nev. 800, 803, 820 P.2d 759, 761 (1991); *Klein v. State*, 105 Nev. 880, 884, 784 P.2d 970, 972-73 (1989). Here, the prosecutor made the statement in direct rebuttal to the defense's closing argument that Finley had been looking for a place to relieve himself after being turned away from public restrooms. This was not an improper comment on the defendant's failure to testify or produce evidence on his behalf, but rather an observation regarding the evidence actually in existence. Accordingly, it was not misconduct.

Finally we conclude the evidence was sufficient to support the convictions. The circumstantial evidence against Finley in regards to Bowman's home is sufficient to support the charge, and both eyewitness and circumstantial evidence supports that Finley also attempted to break

into Southern's home. Given the facts, a rational trier of fact could have found the essential elements of attempt burglary beyond a reasonable doubt. *See Higgs v. State*, 126 Nev. ___, ___, 222 P.3d 648, 654 (2010); *see also* NRS 205.065 (a jury may infer that a person who unlawfully breaks or enters a home did so with the intent to commit larceny or a felony). As Finley has failed to show error, we likewise reject his arguments regarding cumulative error. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Silver

cc: Hon. Jennifer P. Togliatti, District Judge
Hon. James M. Bixler, District Judge
Wright Stanish & Winckler
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk