IN THE COURT OF APPEALS OF THE STATE OF NEVADA

RODNEY WILSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70416

ORDER OF AFFIRMANCE

Appellant Rodney Wilson appeals under NRAP 4(c) from a judgment of conviction, pursuant to a jury verdict, of burglary, theft, and possession of a dangerous weapon. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

First, Wilson argues there was insufficient evidence to support the jury's finding of guilt for burglary and theft because the eyewitness to the crime did not make a reliable identification of the perpetrator and an officer who chased the perpetrator only saw him from behind. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. *See Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998); *see also Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

A motel manager who had known Wilson for approximately one year testified Wilson approached him outside of the motel and asked for money. The manager refused and then left the front of the motel to show a customer to a room. A security guard for a business across the street then noticed an African-American male enter the office, leave soon after with a cash register and a bag, and go into a parking lot. The

security guard then viewed a vehicle drive from the parking lot, and he called 911 and provided a description of the vehicle. A police officer saw a vehicle that resembled the description provided to 911, and then followed the vehicle as it attempted to flee. The vehicle crashed, the driver exited the vehicle and fled on foot, and the officer chased him into a baseball field. Additional officers arrived at the field and a K-9 unit discovered Wilson, and Wilson was then taken into custody.

Wilson admitted to an officer he had been driving the vehicle and, when questioned about the motel theft, Wilson responded "times are hard." The stolen cash register and bag were discovered in Wilson's vehicle. The security guard then identified Wilson as the perpetrator at a show-up identification. The police officers transported Wilson back to the motel and the manager had a brief opportunity to speak with Wilson, where Wilson admitted to the manager he had committed the crimes and apologized.

Based upon the evidence presented at trial, we conclude the jury could reasonably find Wilson committed burglary and theft. *See* 2005 Nev. Stat., ch. 126, § 1, at 416 (former NRS 205.060); NRS 205.0832(1). It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. *See Bolden v. State*, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); *see also McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Therefore, Wilson is not entitled to relief for this claim.

Second, Wilson argues this court should reverse his conviction and order a new trial based upon a conflict of evidence. Wilson did not seek a new trial in the district court and therefore, the trial judge did not

have an opportunity to rule on whether any conflicting testimony should have been resolved differently than it was resolved by the jury. *See* NRS 176.515(4); *State v. Purcell*, 110 Nev. 1389, 1394, 887 P.2d 276, 278-79 (1994). And Wilson does not demonstrate the jury improperly resolved any conflicting testimony. Therefore, Wilson is not entitled to relief for this claim.

Third, Wilson argues the district court erred by failing to grant a mistrial when a State's witness mentioned she found a toy gun in Wilson's vehicle. Wilson also argues the district court's admonition to the jury to disregard the statement was insufficient because it directed the jury to disregard mention of a gun, rather than the toy gun the witness had mentioned.

We review a district court's ruling on a motion for mistrial for an abuse of discretion. *Ledbetter v. State*, 122 Nev. 252, 264, 129 P.3d 671, 680 (2006). To demonstrate the district court abused its discretion in denying a motion for mistrial, an appellant must show "the inadvertent statement was so prejudicial as to be unsusceptible to neutralizing by an admonition to the jury." *Parker v. State*, 109 Nev. 383, 388, 849 P.2d 1062, 1065 (1993) (internal quotation marks omitted).

The record demonstrates the parties had agreed not to discuss a toy gun discovered in Wilson's vehicle, but a crime scene analyst mentioned it during her testimony. Wilson immediately objected and moved for a mistrial, asserting the jury may believe Wilson used the toy gun during the commission of the crimes. The district court concluded the statement was inadvertent and so brief that a mistrial was not warranted. Given the district court's denial of the motion for mistrial, the defense

requested a curative instruction and the district court instructed the jury to disregard the witness' statement regarding the gun.

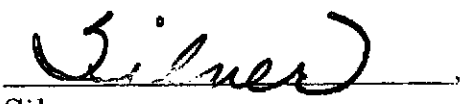
Given the nature of the challenged statement and the district court's admonition directing the jury to disregard the challenged statement, we conclude Wilson fails to demonstrate the district court abused its discretion in denying the motion for mistrial. *See Lisle v. State*, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997) (stating jurors are presumed to follow the district court's instructions). We further conclude Wilson fails to demonstrate the district court's admonition was inappropriate considering the circumstances in this matter.

Fourth, Wilson argues his sentence under the small habitual criminal enhancement amounts to cruel and unusual punishment. Wilson asserts his sentence is grossly disproportionate to his crimes and his criminal history includes mostly non-violent offenses, demonstrating a sentence under the habitual criminal enhancement was not appropriate.

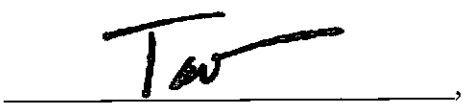
"A sentence within the statutory limits is not cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience." *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotation marks omitted). Wilson's prison terms totaling 8 to 20 years fall within the parameters of the relevant statute, *see* NRS 207.010(1)(a), and Wilson fails to meet his burden to demonstrate this statute is unconstitutional. *See State v. Castaneda*, 126 Nev. 478, 481, 245 P.2d 550, 552 (2010). Wilson's lengthy history of recidivism was properly considered when imposing sentence and, under these circumstances, his sentence is not disproportionate to his crimes and does not constitute cruel and unusual punishment. *See Ewing*

v. California, 538 U.S. 11, 29 (2003) (plurality opinion); *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion). Therefore, Wilson is not entitled to relief for this claim.

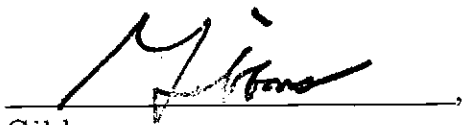
Having concluded Wilson is not entitled to relief, we ORDER the judgment of conviction AFFIRMED.



_____, C.J.
Silver



_____, J.
Tao



_____, J.
Gibbons

cc: Hon. Michael Villani, District Judge
Oronoz, Ericsson & Gaffney, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk