

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DARIAN CHRISTOPHER OWENS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 69519

**FILED**

FEB 22 2017

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

Appellant Darian Owens appeals from a judgment of conviction entered pursuant to a jury verdict of 9 counts of conspiracy to commit robbery; 11 counts of burglary while in possession of a firearm; 6 counts of robbery with the use of a deadly weapon; 4 counts of robbery with the use of a deadly weapon, victim age 60 years or older; 1 count of attempted robbery with the use of a deadly weapon; and 1 count of possession of a firearm by an ex-felon. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

First, Owens claims his sentence of 32 consecutive terms of life without the possibility of parole, imposed pursuant to the large habitual criminal statute, constituted cruel and unusual punishment and shocks the conscience. Owens claims the sentence is grossly disproportionate to the crimes, he was only 26 when he was convicted, the crimes that made him eligible for the large habitual criminal enhancement occurred when he was 18, and the sentence was harsher than requested by the State.

Regardless of its severity, "[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) (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 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 sentence imposed is within the parameters provided by the relevant statute, see NRS 207.010(1)(b), and Owens does not allege that the statute is unconstitutional. Owens had three previous convictions for robbery with the use of a deadly weapon and, shortly after being released from prison for those prior crimes, he committed this series of robberies with the use of a deadly weapon. We conclude the sentence imposed is not grossly disproportionate to the crimes committed and Owens’ history of recidivism and does not constitute cruel and unusual punishment. See *Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion).

Second, Owens claims the State committed prosecutorial misconduct during trial by eliciting a reference to an uncharged bad act, a home invasion that occurred just prior to Owen’s arrest, without first requesting a Petrocelli<sup>1</sup> hearing. We review claims of prosecutorial misconduct for improper conduct and then determine whether reversal is warranted. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). We review improper conduct claims for harmless error. *Id.*

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<sup>1</sup>*Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985).

We conclude the State did not commit misconduct in this regard.<sup>2</sup> The record demonstrates the State did not elicit the reference to the uncharged bad act. The witness made reference to the uncharged bad act in a nonresponsive answer to a question asked by the State. However, even assuming there was error, we conclude the error was harmless because the reference to the uncharged act was fleeting, *Collman v. State*, 116 Nev. 687, 705-06, 7 P.3d 426, 437-38 (2000) (noting when the reference to a defendant's past criminal activity was fleeting any error was harmless), the district court gave a limiting instruction at the close of evidence regarding uncharged conduct, and the evidence presented at trial established overwhelming evidence of Owens' guilt. Owens, after being arrested, told police officers he was the person who committed the crimes. He also told the officers where to find the gun used in the robberies. He later identified himself on most of the video surveillance tapes as being the person with the firearm during the robberies.

Third, Owens claims the district court abused its discretion by denying his request for mistrial based on the above alleged misconduct. "A defendant's request for mistrial may be granted for any number of reasons where some prejudice occurs that prevents the defendant from

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<sup>2</sup>Contrary to the State's claim, this home invasion testimony was not properly admitted as *res gestae* because there was no need to elicit the home invasion testimony in order to describe the crime charged. See NRS 48.035(3); *Bellon v. State*, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) ("[T]he complete story of the crime doctrine must be construed narrowly. Accordingly, we have stated that the crime must be so interconnected to the act in question that a witness cannot describe the act in controversy without referring to the other crime." (internal quotation marks omitted)). The alleged home invasion occurred after the crimes in question were committed and was not necessary to describe the crime charged.

receiving a fair trial.” *Rudin v. State*, 120 Nev. 121, 144, 86 P.3d 572, 587 (2004). “The trial court has discretion to determine whether a mistrial is warranted, and its judgment will not be overturned absent an abuse of discretion.” *Id.* at 142, 86 P.3d at 596.

Even assuming the State erred by eliciting the uncharged act, Owens failed to demonstrate prejudice prevented him from receiving a fair trial. As stated above, the reference to the uncharged conduct was fleeting and the district court gave a limiting instruction regarding uncharged conduct. Therefore, we conclude the district court did not abuse its discretion by denying the request for mistrial.

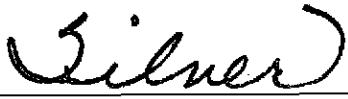
Fourth, Owens claims the State committed prosecutorial misconduct during closing arguments by twice referring to detectives as “ROP” detectives which informed the jury Owens was a repeat offender. We conclude the State did not commit prosecutorial misconduct by referring to the detectives as “ROP” detectives. The jury was never informed “ROP” means repeat offender program and, therefore, the State’s reference to “ROP” did not convey to the jury Owens was a repeat offender.


Fifth, Owens claims the district court abused its discretion by denying his request for mistrial based on the above alleged misconduct. As noted above, the State did not commit misconduct by referring to the detectives as ROP detectives. Therefore, we conclude the district court did not abuse its discretion by denying the request for mistrial.

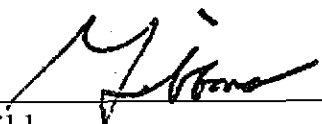
Finally, Owens argues the cumulative errors of prosecutorial misconduct warrant reversal. However, we reject this claim because even assuming there was one error, the error was harmless. *See United States v. Sager*, 227 F.3d 1138, 1149 (9th Cir. 2000) (“One error is not cumulative

error.”); *Pascua v. State*, 122 Nev. 1001, 1008 n.16, 145 P.3d 1031, 1035, n.16 (2006).

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

  
\_\_\_\_\_, C.J.  
Silver

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Douglas Smith, District Judge  
Law Office of Benjamin Nadig, Chtd.  
Nguyen & Lay  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk