

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KEVIN LEE KENNEDY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 76679-COA

FILED

FEB 11 2020

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

ORDER OF AFFIRMANCE

Kevin Lee Kennedy appeals from a judgment of conviction entered pursuant to a jury verdict of battery causing substantial bodily harm, battery, eluding a police officer, escape, battery by a prisoner, and possession of a firearm by a prohibited person. Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

First, Kennedy argues there was insufficient evidence produced at trial to support the jury's finding of guilt of battery causing substantial bodily harm and battery by a prisoner. Kennedy contends the State failed to meet its burden to demonstrate he did not act in self-defense. 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).

The record reveals witnesses testified Kennedy approached two persons, Sam and Daniel Peebles, at a casino and asked if they knew him from school. Kennedy and Sam shoved each other and Kennedy punched Sam. Kennedy next attacked Daniel and did so before Daniel stood from his seat. Daniel was unable to defend himself and sustained serious injuries, including a broken jaw. Kennedy attempted to leave the area in a

vehicle, but police officers arrested him and took him to jail. The police obtained a warrant for a blood draw. As a nurse attempted to perform the blood draw, Kennedy grabbed her thumb and held on until a jailer pulled Kennedy's hand away. Given the evidence and testimony concerning Kennedy's attack on Daniel, Daniel's injuries, and Kennedy's actions toward the nurse, the jury could reasonably find Kennedy committed battery causing substantial bodily harm and battery by a prisoner. *See* NRS 200.481(2)(b), (f). While Kennedy contends the State did not demonstrate he was not acting in self-defense, 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).

Second, Kennedy argues there was insufficient evidence produced at trial to support the jury's finding of guilt of possession of a firearm by a prohibited person. The record reveals Kennedy was driving a truck when he was stopped and eventually arrested by the police. The police searched the vehicle and discovered a handgun in the truck bed directly behind the driver's seat. The handgun was not in a case and snowflakes were on it even though it was not snowing that night. The snowflakes on the handgun caused the police officer to believe it had recently been handled and dropped into snow on the ground. In addition, Kennedy had previously been convicted of a felony. Given the testimony produced at trial, the jury could reasonably find Kennedy had constructive possession of the firearm and committed possession of a firearm by a prohibited person. *See* NRS 202.360(1)(b); *see also Palmer v. State*, 112 Nev. 763, 769, 920 P.2d 112, 115 (1996) (stating "possession may be imputed when the contraband is found in a location which is immediately and exclusively accessible to the accused and subject to [his] dominion and control"). 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*, 97 Nev. at 73, 624 P.2d at 20.

Third, Kennedy argues the district court abused its discretion by adjudicating him a habitual criminal and sentencing him according to the small habitual criminal statute. Kennedy argues the district court erred by considering one of the judgments of conviction because it did not contain his actual middle name and listed an incorrect social security number. Kennedy also asserts the district court abused its discretion by adjudicating him a habitual criminal because his prior convictions were stale.

We review a district court's sentencing decision for abuse of discretion. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009). The district court has 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). We will not interfere with the sentence imposed by the district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

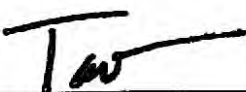
At the sentencing hearing, Kennedy contended a judgment of conviction from Nye County should not be considered for purposes of adjudicating him a habitual criminal because it did not contain his correct middle name and social security number. However, a detention sergeant employed by White Pine County Sheriff's Office testified concerning that judgment of conviction and explained that it was accompanied by a captain's card. The sergeant explained a captain's card contains identifying information concerning the defendant and the captain's card that accompanied the Nye County judgment of conviction contained Kennedy's

photograph. The Nye County judgment of conviction also accurately listed Kennedy's date of birth. In addition, the State submitted a judgment of conviction from White Pine County as proof of a second felony conviction. As a result, the district court concluded the State had met its burden to prove Kennedy had two prior felony convictions. *See Hyman v. State*, 121 Nev. 200, 215, 111 P.3d 1092, 1103 (2005).

The record reveals the district court understood its sentencing authority and properly exercised its discretion to adjudicate Kennedy a habitual criminal. *See Hughes v. State*, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000); *see also Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992) ("NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions."). Kennedy's sentence under the habitual criminal enhancement falls within the parameters of the relevant statute, *see* NRS 207.010(1)(a), and he does not argue his sentence was based upon impalpable or highly suspect evidence. We conclude the district court did not abuse its discretion and Kennedy's argument lacks merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.¹


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

¹We deny Kennedy's February 7, 2020, motion to remove counsel.

cc: Hon. Gary Fairman, District Judge
Kirsty E. Pickering Attorney at Law
Attorney General/Carson City
White Pine County District Attorney
White Pine County Clerk