IN THE COURT OF APPEALS OF THE STATE OF NEVADA

KENDRICK TYRONE BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 79131-COA

ORDER OF AFFIRMANCE

Kendrick Tyrone Brown appeals from a judgment of conviction, pursuant to a jury verdict, of four counts of ownership or possession of a firearm by a prohibited person. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Las Vegas Metropolitan Police Department (LVMPD) Detective Christopher Cannon and a criminal informant drove to the Sunset Motel as part of an undercover operation and sought to purchase firearms from Brown.[1] Brown, a convicted felon, had been residing at the motel. Minutes after arriving, Detective Cannon purchased a rifle from Brown for $250, using specifically marked bills which would be easily identifiable later. Before leaving, Detective Cannon asked Brown if he had access to more guns. Brown answered affirmatively and then went back to his room for a short time before leaving the motel.

Based upon this, LVMPD detectives obtained a telephonic search warrant for Brown's motel room. During the search, detectives discovered, among other things, three additional guns in a closet and a rent receipt made out to Brown. Brown was arrested the same day while sitting

[1]We do not recount the facts except as necessary to our disposition.

at a slot machine in a convenience store. However, the buy money was not found on Brown's person or in the motel room.

Brown was indicted on three counts of ownership or possession of a firearm by a prohibited person and one count of possession of a controlled substance (the first indictment). Shortly after being indicted, on March 30, 2017, Brown invoked his right to a speedy trial. Though Brown's trial was originally scheduled for June 2017, the trial was subsequently delayed to August 2017 due to Brown's pre-trial motion practice.

On July 26, 2017, a week before calendar call, the State filed an amended indictment against Brown, eliminating the possession of a controlled substance charge and adding an additional count of ownership or possession of a firearm by a prohibited person (the second indictment) that specifically related to the undercover gun buy. At calendar call, Brown argued that a continuance was necessary so that he could properly prepare for the new charge. Alternatively, Brown requested that the new count be severed from the original counts into separate trials. The district court denied Brown's request for severance, set a new trial date, and dismissed the first indictment, arraigning Brown on the amended one.

Prior to trial, Brown filed three additional motions. First, Brown moved for dismissal, arguing that his right to a speedy trial was violated by the State's delay in bringing the second indictment. Second, Brown argued that the amended indictment should be dismissed because the district court and the State failed to comply with NRS 174.085(7) and provide good cause for dismissal of the original indictment. Lastly, Brown filed a motion to dismiss for failure to preserve evidence. The district court denied each motion.

Brown proceeded to a three-day trial where the jury found him guilty on all charges. On appeal, Brown challenges his convictions, arguing (1) the district court erred by failing to sever count I from counts II-IV; (2) the State's delay in filing the second indictment violated his Sixth Amendment speedy trial right; (3) the district court erroneously denied Brown's motion to dismiss by misinterpreting NRS 174.085; (4) the State's failure to preserve evidence warranted dismissal of the second indictment or a *Sanborn* instruction;[2] (5) the State violated his right to a fair trial by committing prosecutorial misconduct; (6) his sentence term of 10-25 years under Nevada's habitual offender statute violates the Eighth Amendment and constitutes cruel and unusual punishment; and (7) cumulative error warrants reversal. We disagree.

The district court did not abuse its discretion by finding that joinder was proper

First, Brown argues the district court erred by denying his request to sever the original three counts of possession of a firearm by a prohibited person from the fourth count. Brown contends that unfair prejudice resulted because the offenses were unconnected and thus could not be assessed separately, resulting in a "spillover effect" by the jury.

We review a district court's order denying a defendant's motion to bifurcate offenses for an abuse of discretion. *Tabish v. State*, 119 Nev. 293, 302, 72 P.3d 584, 589-90 (2003). Under NRS 173.115, separate offenses may be joined as long as they are "(a) Based on the same act or transaction; or (b) Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Determining whether

---

[2]*Sanborn v. State*, 107 Nev. 399, 407-08, 812 P.2d 1279, 1285-86 (1991).

separate offenses comprise a common scheme or plan involves a fact-specific analysis. *Farmer v. State*, 133 Nev. 693, 699-700, 405 P.3d 114, 120-21 (2017). Additionally, even if joinder is proper under NRS 173.115, if joinder would result in unfair prejudice, the offenses should be severed. *Honeycutt v. State*, 118 Nev. 660, 667-68, 56 P.3d 362, 367 (2002), *overruled on other grounds by Carter v. State*, 121 Nev. 759, 121 P.3d 592 (2005). Moreover, joinder is also inappropriate if the prosecution's evidence for one offense is significantly stronger than the others and leads the jury to infer criminal propensity or the "spillover" effect. *Tabish*, 119 Nev. at 305, 72 P.3d at 592.

We conclude that the district court did not abuse its discretion because counts I-IV were connected and part of a common scheme or plan. The record shows that count I, which stemmed from Brown's sale of a firearm to an undercover detective, was connected to counts II-IV because it was the basis upon which the police obtained a search warrant for Brown's motel room and discovered the additional firearms. Substantial evidence further shows that the offenses were part of a common scheme or plan because all four offenses were similar (possession of a firearm by a prohibited person) and occurred within the same temporal and physical proximity (the Sunset Motel). Moreover, joinder did not result in a "spillover effect" or unfair prejudice when evidence of count I likely would have been admissible at a separate trial because it was the basis for the search warrant and evidence for count I was not "significantly stronger" than that of counts II-IV. *See Mitchell v. State*, 105 Nev. 735, 737-38, 782 P.2d 1340, 1342 (1989) (holding that if "evidence of one charge would be cross-admissible in evidence at a separate trial on another charge, then both charges may be tried together and need not be severed").

Brown's Sixth Amendment Right to a Speedy Trial was not violated

We now turn to the question of whether Brown's Sixth Amendment speedy trial right was violated. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy . . . trial." U.S. Const. amend. VI. To determine if a defendant's speedy trial right has been violated, this court conducts a four-part balancing test, established in *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972), and clarified in *Doggett v. United States*, 505 U.S. 647, 651-54 (1992). The *Barker-Doggett* test requires this court to weigh four factors: "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *State v. Inzunza*, 135 Nev. 513, 516, 454 P.3d 727, 730 (2019) (quoting *Barker*, 407 U.S. at 530).

While "[n]o one factor is determinative" and the factors "must be considered together with such other circumstances as may be relevant," the *Barker-Doggett* analysis is not triggered unless the length of the delay is presumptively prejudicial. *Inzunza*, 135 Nev. at 516, 454 P.3d at 730-31 (quoting *United States v. Ferreira*, 665 F.3d 701, 705 (6th Cir. 2011)).

Here, the delay was not presumptively prejudicial, as it was considerably less than a year. Although Brown asserted his speedy trial right soon after indictment and throughout the case, much of the ensuing delay was attributable to Brown's motions to continue the trial in order for him to file his various pretrial motions, which then consumed more time.

The district court did not err in applying NRS 174.085(7)

Next, Brown argues that NRS 174.085(7) precluded the State from proceeding on the amended indictment because the State failed to show good cause before dismissing the first indictment. This is a purely legal question that we review de novo. *Camacho v. State*, 119 Nev. 395, 399, 75 P.3d 370, 373 (2003).

NRS 174.085(7) provides in pertinent part that "[a]fter the arrest or incarceration of the defendant, the prosecuting attorney may voluntarily dismiss an indictment or information without prejudice to the right to bring another indictment or information only upon good cause shown to the court and upon written findings and a court order to that effect." However, when there are two proceedings pending simultaneously against a defendant, dismissal of one does not trigger NRS 174.085's requirements. *Thompson v. State*, 125 Nev. 807, 812-13, 221 P.3d 708, 712 (2009). Because the State brought the second indictment prior to dismissing the first, NRS 174.085(7) is inapplicable.

The district court did not abuse its discretion by denying Brown's motion to dismiss for failure to preserve evidence

Brown next argues that the State, in bad faith, failed to preserve fingerprint and DNA evidence located on the undercover buy gun, which was material to his defense. Brown contends that the district court abused its discretion by denying his motion requesting dismissal or, in the alternative, a *Sanborn* instruction to remedy the State's failure. *Sanborn v. State*, 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991).

On appeal, we note that Brown failed to include the district court order denying his motion and instead only submitted the motion hearing transcript memorializing the court's denial. *See Johnson v. State*, 113 Nev. 772, 776, 942 P.2d 167, 170 (1997) (concluding that on appeal, the appellant is tasked with the responsibility of making an adequate appellate record). However, despite this failure, we conclude that Brown's claim can still be reached on the merits and thus choose to analyze the denial of Brown's motion.

We review a district court's decision denying a motion to dismiss an indictment for an abuse of discretion. *Hill v. State*, 124 Nev.

546, 550, 188 P.3d 51, 54 (2008). The State is required to preserve material evidence under Due Process.[3] *Steese v. State*, 114 Nev. 479, 491, 960 P.2d 321, 329 (1998). Loss or destruction of evidence warrants reversal or a conclusive presumption instruction only if "(1) the defendant is prejudiced by the loss or (2) the evidence was 'lost' in bad faith by the government." *Sparks v. State*, 104 Nev. 316, 319, 759 P.2d 180, 182 (1988); *Sanborn v. State,* 107 Nev. 399, 408, 812 P.2d 1279, 1286 (1991). "It is not sufficient that the showing disclose merely a hoped-for conclusion from examination of the destroyed evidence" or "that examination of the evidence would be helpful in preparing [a] defense." *Boggs v. State*, 95 Nev. 911, 913, 604 P.2d 107, 108 (1979).

Here, the district court found that Brown had failed to prove bad faith because the testing lab refused to test the gun due to its use in an undercover operation, not improper storage. Brown even stipulated to this fact at trial. Further, the gun's alleged improper storage was also not the product of bad faith. Both the detective who stored the gun and the prosecutor testified that the storage and lack of testing was a mistake and Brown was not originally charged for the undercover gun buy, so its material value was minimal at the beginning of the case. Moreover, Brown fails to demonstrate the underlying predicate that the evidence that he identifies—fingerprints and DNA—ever actually existed in a form that was subject to being tested. He speculates that had the State done additional testing of the firearms, such evidence might have been uncovered, but that

---

[3]The State's failure to collect evidence is also considered a due process violation. *See Daniels v. State*, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998). However, a separate test is utilized when the State fails to collect evidence. *Id.*

is nothing more than speculation insufficient to justify a finding of "bad faith" by the State, much less dismissal of the charges.

Prosecutorial Misconduct

Next, Brown alleges that the State engaged in various acts of prosecutorial misconduct by intentionally eliciting testimony which referenced a prior bad act, calling upon the jury to find Brown guilty based solely on his felon status, and stating facts not in evidence. However, our review of the record reveals that none of the alleged instances of misconduct amounted to improper conduct.

We recognize that "[a] prosecutor's comments should be considered in context, and a criminal conviction is not to be overturned on the basis of a prosecutor's comments standing alone." *Leonard v. State*, 117 Nev. 53, 81, 17 P.3d 397, 414 (2001) (internal quotation marks omitted). When viewing the prosecutor's first two statements in context, it is clear that the State did not intend to elicit bad act testimony and did not label Brown guilty based on his felon status. Rather, in the first instance, the prosecutor sought to rebut Brown's own contention that because the police never recovered the buy money he was therefore innocent. Similarly, the second statement was also proper because the prosecutor was merely reciting the elements of the crime charged. We also conclude that it was permissible for the prosecutor to imply that the closet door was open, despite the existence of some contrary testimony, because a photo admitted into evidence supported that inference. *See Jeffries v. State*, 133 Nev. 331, 334, 397 P.3d 21, 26 (2017) (recognizing that a prosecutor may not argue facts not in evidence but "may argue inferences from the evidence and offer conclusions on contested issues" (quoting *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005)). Moreover, any potential prosecutorial errors were

harmless in view of the overwhelming evidence against Brown. *See Valdez v. State*, 124 Nev. 1172, 1188-89, 196 P.3d 465, 476 (2008).

Brown's Eighth Amendment right against cruel and unusual punishment was not violated

Next, Brown contends that his sentence of 10-25 years in prison, under the habitual offender statute, constitutes cruel and unusual punishment, in violation of the Eighth Amendment. Relying upon *Solem v. Helm*, 463 U.S. 277 (1983), Brown argues that his sentence is grossly disproportionate and shocks the conscience when considering his nonviolent criminal history and mitigating factors.

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, 1001 (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). We afford district courts wide discretion in making sentencing decisions. *Martinez v. State*, 114 Nev. 735, 737-38, 961 P.2d 143, 145 (1998).

In *Sims v. State*, our supreme court analyzed a *Solem* claim and noted that "the *Solem* majority observed that '[i]n view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.'" 107

Nev. 438, 438, 814 P.2d 63, 63-64 (1991) (quoting *Solem*, 463 U.S. at 290 n. 16).

Here, Brown does not allege that the habitual offender statute is unconstitutional. *See* NRS 207.010(1)(b)(3). The district court sentenced him within the guidelines of the statute to concurrent sentences, and we conclude that the aggregate sentence imposed is not so grossly disproportionate so as to shock the conscience and constitute cruel and unusual punishment.

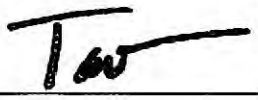
Cumulative error does not warrant reversal

Finally, Brown argues that cumulative error warrants reversal. However, because we discern no error, there is nothing to cumulate. *Burnside v. State*, 131 Nev. 371, 408, 352 P.3d 627, 652 (2015).

Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_____, C.J.
Gibbons



_____, J.
Tao

_____, J.
Bulla

cc: Hon. Adriana Escobar, District Judge
Gregory & Waldo, LLC
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk