

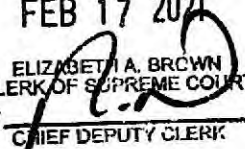
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JACOB ANGELO MASSEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 81269-COA

FILED

FEB 17 2021

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

Jacob Angelo Massey appeals from a judgment of conviction, pursuant to a jury verdict, for domestic battery, third offense. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Massey and the victim have a child together but do not live together.¹ One evening, the victim left the minor child home alone while she went to work. Washoe County Human Services (Human Services) learned of this and removed the child from the home. Later that evening, Human Services sent Massey an email notifying him of the situation. Massey contacted the victim several times, but the victim refused to have a conversation with him. The next morning Massey spoke with a caseworker from Human Services, who assured Massey they were handling the situation and told him he should not contact the victim.

Despite that, Massey went to the victim's home that morning, forced his way inside, grabbed her by her throat, and held her to the ground for nearly ten minutes. Massey held her down with one hand and held her hair with his other hand. Massey let the victim up only after she agreed to talk with him. Before the victim left the bathroom to talk with Massey in the kitchen, she fixed her hair and had to pull out a clump of it. They went

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

to the kitchen, where Massey told the victim he should kill her for what she did to the child. Terrified, she grabbed two knives from her knife block and told Massey to leave. Massey refused and lunged at her, grabbing her hair. She swung the knives at Massey, resulting in several stab wounds to his abdomen. Once they noticed his injuries, the victim helped stop the bleeding and called 9-1-1. Police officers and emergency personnel located Massey sitting on the side of her home. Massey underwent emergency surgery.

A responding police officer noted and photographed the victim's injuries, including redness to her neck and a bump on her head. At trial, the police officer stated he found a clump of hair in the bathroom and that he did not check for petechiae (demonstrating signs of strangulation in the eyes).

The State charged Massey with battery constituting domestic violence and burglary. The jury returned a verdict of guilty for battery and not guilty for burglary. At sentencing, the State admitted Massey's 50 prior misdemeanor convictions, several of which involved domestic violence. When sentencing Massey, the district court stated:

The jury spoke wisely in this case. The evidence against Mr. Massey was overwhelming.

Among the seminal facts in his case was the fact that Mr. Massey spoke heatedly with the social worker who had removed his [child] from the home, and that social worker was so concerned during that conversation by Mr. Massey's demeanor and his behavior that she warned him not to go to [the victim's] residence. She is not a law enforcement officer, but certainly a representative of, very broadly, the State and the powers of the State. And she specifically told him not to go to [the victim's] residence.

Instead, he went to [the victim's] residence, looking for a fight. Mr. Massey consistently looks for fights. Over the course of his entire adult behavior, he has again and again and again chosen violence to solve problems.

As opposed to retreating, leaving the circumstances, he would be quick to point out, "Well, [the victim] battered me, or battered others," without any, apparently, acknowledgment or recognition on his part it is his actions that are the focus of the circumstances in this case, and not the actions of [the victim] or anyone else.

What is at the heart of the case is Mr. Massey's pathological choice to use violence again and again and again and again. He was, in fact, on probation at the time he committed this offense for a violent battery. He was required to undertake counseling and intervention. Nothing has remitted—that has changed or quieted or in any way affected—his choice to use violence on all of the people in his life. From his own blood relatives to his chosen relatives, meaning his girlfriends or significant others, to his child, no one is safe from Mr. Massey's choices to use violence. That is very, very dangerous.

The district court sentenced Massey to 24 to 72 months in prison for battery.

On appeal, Massey argues that there was insufficient evidence to support his conviction for domestic battery and that the district court relied on impalpable and highly suspect evidence at sentencing. As we discern no error, we affirm the judgment of conviction.

Massey argues the evidence was insufficient to convict him of domestic battery. He claims the victim had a motive to lie because she could have been subject to criminal liability if she were the initial aggressor. He also contends the physical evidence demonstrates insufficient evidence of battery because there was a lack of any signs of struggle in the bathroom or

evidence of petechiae, and that the victim's injuries were consistent with his version of events.

When reviewing a challenge to the sufficiency of the evidence, this court reviews the evidence in the light most favorable to the prosecution and determines whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (emphasis in original) (quoting *Koza v. State*, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984)). This court will not disturb the jury's verdict on appeal when it is supported by substantial evidence. *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Substantial evidence supports the jury's finding of domestic battery. The jury heard eyewitness testimony from Massey and the victim and determined the victim's testimony was more credible, evidenced by the fact that it convicted Massey of domestic battery. She also testified that Massey forced his way into her residence, put his hands around her throat, held her to the floor for about 10 minutes, and only let her up when she agreed to talk to him. The victim also testified that when she had the knives in her hand and told Massey to leave her residence, he lunged at her and grabbed her hair.

Additionally, the responding police officer testified that the victim had redness around her neck and a lump on her head, and that he found a clump of hair in the bathroom, all of which are consistent with the victim's testimony. The State also admitted photos that showed the victim's injuries and the hair in the bathroom. Accordingly, substantial evidence supports the jury's verdict.

Next, Massey argues the district court abused its discretion in sentencing him to the statutory maximum sentence for two reasons. First, he argues the district court penalized him for maintaining his innocence, in violation of the Fifth Amendment of the United States Constitution. Relying on *Brake v. State*, 113 Nev. 579, 939 P.2d 1029 (1997), Massey argues this statement from the district court during sentencing violated his constitutional right to maintain his innocence:

As opposed to retreating, leaving the circumstances, [Massey] would be quick to point out, "Well, [the victim] battered me, or battered others," without any, apparently, acknowledgement or recognition on his part it is his actions that are the focus of the circumstances in this case, and not the actions of [the victim] or anyone else.

Second, he contends the sentence incorrectly penalizes him for his actions during the alleged burglary, of which the jury acquitted him, when the district court said he "went to [the victim's] residence, looking for a fight. Mr. Massey consistently looks for fights."

The district court has wide discretion in its sentencing decision. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). This court 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).

While a district court has wide discretion to consider prior uncharged crimes during sentencing, the district court must refrain from punishing a defendant for prior uncharged crimes. *See Sheriff v. Morfin*, 107 Nev. 557, 561, 816 P.2d 453, 455 (1991); *see also Riker v. State*, 111 Nev.

1316, 1326-27, 905 P.2d 706, 712-13 (1995). "Consideration of those crimes is solely for the purpose of gaining a fuller assessment of the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Denson v. State*, 112 Nev. 489, 494, 915 P.2d 284, 287 (1996) (quoting *Williams v. New York*, 337 U.S. 241, 245 (1949)).

In *Brake v. State*, the Nevada Supreme Court held the district court violated the defendant's constitutional right against self-incrimination when it considered the defendant's lack of remorse for his crime at sentencing. In *Brake*, the district court said at sentencing:

[Y]our lack of remorse, your lack of insight into what you have actually done, . . . there is no lack of insight into how it is going to affect you, Mr. Brake, but there is a lack of insight as to how this affected others and how it has affected your victim. For that, your lack of remorse, this Court reaches the conclusion that the recommendation of the State is appropriate.

Brake, 113 Nev. at 584, 939 P.2d at 1033. The court held that the district court's statement violated the defendant's constitutional right and that the error was not harmless because he "had no prior criminal record, suffered a considerable amount of mental and physical abuse as a child, and appeared to have been manipulated by his mother to commit the crime. Therefore, it appears that the district court's consideration of [Brake]'s lack of remorse likely resulted in the harshest possible sentence being assessed." *Id.* at 585, 939 P.2d at 1033. The court concluded that the district court's consideration of the defendant's lack of remorse constituted an abuse of discretion and vacated the sentence and remanded for a different judge to sentence the defendant. *Id.*

This case is different from *Brake* for two reasons. In *Brake*, the district court relied primarily on the defendant's lack of remorse at

sentencing; while here, the district court specifically noted four independent reasons for its sentence of Massey. First, the district court concluded there was “overwhelming” evidence against Massey. Second, Massey was on probation at the time of the crime. Third, Massey had prior court-ordered counseling and interventions, which did not stop or change his violent actions. Finally, the district court explicitly stated that “[w]hat is at the heart of the case is Mr. Massey’s pathological choice to use violence again and again and again and again,” showing that it was Massey’s propensity for violent conduct that earned him his sentence.

The district court did not abuse its discretion when it sentenced Massey to the statutory maximum because it did not rely on impalpable or highly suspect evidence, and because the district court considered other factors in assessing Massey’s sentence. Further, the district court did not employ language at Massey’s sentencing directly or implicitly commenting on Massey’s Fifth Amendment right not to testify at trial in this case, but rather addressed his long-standing pattern of behavior which the judge could appropriately consider in imposing Massey’s sentence. *Cf. Brake*, 113 Nev. at 584-85, 939 P.2d at 1033.

Additionally, the district court was aware of Massey’s criminal history because it reviewed the presentence investigation report, another distinction from *Brake*. In *Brake*, the defendant had no prior criminal history, which constituted a mitigating circumstance. Here, Massey had 50 misdemeanor convictions—several of which involved domestic violence. Further, the district court correctly relied on evidence of Massey’s criminal history, as well as Massey’s life, habits, conduct, and moral propensities. One moral propensity that the district court relied upon was Massey’s


repeated violence towards his family, the mother of his child, and even his child.

The district court's comment that Massey did not acknowledge or recognize his actions in this case should be reviewed in context. The district court indicated that Massey's actions alone gave rise to the "circumstances [of] this case." The district court noted that despite the fact that an official of the State warned Massey not to go to the victim's house, Massey defied the warning, went to the victim's house uninvited, and battered her there. The district court did not touch on whether Massey felt remorse or not; it simply recounted the reasons for which it based its sentence. Further, the district court did not state it punished Massey for the alleged burglary of the victim's home. As such, the district court did not rely upon impalpable or highly suspect evidence in sentencing Massey.

Accordingly, we

ORDER the judgment of conviction AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Egan K. Walker, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk