IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT JAMES DAY,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 38028

ORDER AFFIRMING IN PART AND REMANDING IN PART

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon and one count of burglary while in possession of a deadly weapon. The district court adjudicated appellant as a habitual offender and sentenced him to serve 10 to 25 years in prison.

Appellant first argues that the district court erred in denying his motion to dismiss based on the State's failure to preserve the identity of a material witness. We disagree.

Because the State never obtained the witness's name, appellant's allegation is properly analyzed as a claim that the State failed to gather evidence. In Daniels v. State,[1] we held that dismissal of criminal charges may be an available remedy for the State's failure to gather evidence where the evidence was material and the failure to gather the evidence was the result of a bad faith attempt to prejudice the defendant's case. Even assuming that the witness's testimony would have been material, we conclude that appellant failed to demonstrate that the failure to gather the witness's name was the result of a bad faith attempt to prejudice appellant's case. Accordingly, dismissal of the charges was not warranted. Moreover, we note that at the worst, the alleged failure to gather evidence appears to have been the result of mere negligence. In Daniels, we explained that such failures to gather evidence warrant no sanctions, "but the defendant can still examine the prosecution's witnesses

[1]114 Nev. 261, 267-68, 956 P.2d 111, 115 (1998).

about the investigative deficiencies."[2] Appellant's counsel conducted such a cross-examination in this case. Under the circumstances, we conclude that the district court did not err in denying appellant's motion to dismiss.[3]

Appellant next contends that the district court abused its discretion by admitting testimony regarding an out-of-court statement by an unavailable witness. Based on our review of the record, we conclude that the district court did not abuse its discretion in finding that the statement was not inadmissible hearsay because it was not offered for the truth of the matter asserted.[4] Moreover, even assuming that the statement was inadmissible hearsay, we conclude that any error in admitting it was harmless given the overwhelming evidence of appellant's guilt.[5]

Appellant finally contends that the victim's identification of him at trial was unreliable because it was tainted by a one-on-one confrontation shortly after the robbery and because police gave the victim a picture of appellant after she identified him. We disagree.

As a preliminary matter, we note that appellant failed to challenge the identification at trial. As a result, we need not consider this issue.[6] Assuming that this issue was properly before us, we conclude that it lacks merit. After a careful review of the record, we conclude that, even assuming that the pretrial identification procedure was unnecessarily suggestive, the eyewitness' identification of appellant was reliable and

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[2]Id. at 267, 956 P.2d at 115.

[3]To the extent that appellant alleges a violation of Brady v. Maryland, 373 U.S. 83 (1963), based on the State's failure to obtain the witness's name or to disclose his statement to Sergeant Flaherty, we conclude that there was no such violation.

[4]See NRS 51.035 (defining "hearsay").

[5]See Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993) (stating that erroneous admission of hearsay is subject to harmless error analysis).

[6]See Gaitor v. State, 106 Nev. 785, 788-89, 801 P.2d 1372, 1375 (1990), overruled on other grounds by Barone v. State, 109 Nev. 1168, 866 P.2d 291 (1993).

there was no denial of due process.[7] Moreover, it appears that the victim received the photograph of appellant after the pretrial identification and that the photograph did not affect the reliability of the eyewitness identification. Accordingly, we conclude that appellant's contention lacks merit.

Having considered appellant's contentions and concluded that they lack merit, we affirm the judgment of conviction. However, our review of the judgment of conviction revealed several defects that require a remand.

First, the judgment of conviction states that appellant pleaded guilty when, in fact, he was convicted pursuant to a jury verdict. This error must be corrected.

Second, the district court adjudicated appellant as a habitual criminal but failed to refer to the statute under which that adjudication was made. NRS 176.015(1)(c) provides that a judgment of conviction must include "a reference to the statute under which the defendant is sentenced." This error must also be corrected.

Lastly, the sentence set forth in the judgment of conviction provides for only one definite term: 10 to 25 years in prison. Appellant, however, was convicted of two offenses. Therefore, it appears that appellant was not sentenced to definite terms on each conviction.[8] This appears to have been the result of some confusion regarding the application of the habitual criminal statute. When the district court adjudicates a defendant as a habitual criminal, the habitual criminal statute allows for enhancement of the sentence for the substantive crimes charged.[9] Thus, in such cases, the district court uses the habitual criminal statute to determine the penalty to be imposed for the substantive crimes charged (here, robbery and burglary).[10] Moreover, our decision in Lisby v.

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[7]Cf. Wright v. State, 106 Nev. 647, 799 P.2d 548 (1990); Gehrke v. State, 96 Nev. 581, 613 P.2d 1028 (1980).

[8]See NRS 176.033(1)(b); NRS 176.035; Powell v. State, 113 Nev. 258, 264 n.9, 934 P.2d 224, 228 n.9 (1997).

[9]See NRS 207.010(1); Hollander v. State, 82 Nev. 345, 353, 418 P.2d 802, 806-07 (1966).

[10]Hollander, 82 Nev. at 353, 418 P.2d at 806-07.

State[11] does not stand for the proposition that when a defendant is adjudicated as a habitual criminal he may receive only one sentence regardless of the number of substantive crimes charged. Rather, Lisby simply stands for the proposition that a defendant may not receive a sentence for the substantive crime charged and a separate sentence for being a habitual criminal.[12] The district court's failure to specify a sentence for each of appellant's convictions must also be corrected.[13]

For the reasons stated above, we

ORDER the judgment of conviction AFFIRMED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.[14]

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Kathy A. Hardcastle, District Judge
Attorney General
Clark County District Attorney
Clark County Public Defender
Clark County Clerk

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[11]82 Nev. 183, 414 P.2d 592 (1966).

[12]Id. at 189, 414 P.2d at 595-96; see also Staude v. State, 112 Nev. 1, 7, 908 P.2d 1373, 1377 (1996).

[13]We note that the district court can enhance the sentence for the robbery pursuant to the deadly weapon enhancement statute or the habitual criminal statute, but not under both statutes. See Odoms v. State, 102 Nev. 27, 714 P.2d 568 (1986).

[14]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.