IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LEON ALLEN VANTILBURG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 87439-COA

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

Leon Allen Vantilburg appeals from a judgment of conviction, entered pursuant to a jury verdict, of grand larceny of a motor vehicle. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Vantilburg argues the district court erred by admitting evidence in violation of *Bruton v. United States*, 391 U.S. 123 (1968). In particular, Vantilburg contends body camera video was played for the jury, in which a deputy for the Washoe County Sheriff's Office stated during an interview with Vantilburg that Vantilburg's "story and [his] co-defendant's story are totally different." Vantilburg contends that it can be inferred the codefendant's statement was inculpatory because Vantilburg had maintained his innocence.[1]

[1]The State contends that this court should review this issue for plain error because Vantilburg did not properly preserve this issue for appeal. We conclude Vantilburg adequately preserved this issue for this court's review. After the video was played, defense counsel requested a bench conference and indicated that they had previously asked the State to redact the challenged portion of the video. Although not initially proposed as such, defense counsel subsequently confirmed that they were raising a *Bruton* objection.

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"*Bruton* provides that the admission of a nontestifying codefendant's inculpatory statement that *expressly implicates* the defendant violates the Confrontation Clause." *Turner v. State*, 136 Nev. 545, 549, 473 P.3d 438, 444 (2020) (emphasis added). Here, it is not clear Vantilburg's codefendant actually told law enforcement a "totally different" story such that there was a statement to which *Bruton* applied; rather, the district court determined that the deputy's statement was merely a law enforcement tactic. But even assuming Vantilburg's codefendant did provide such a story, the deputy's statement did not implicate *Bruton* because it did not relay or recite any factual statement made by Vantilburg's codefendant, let alone a statement that expressly implicated Vantilburg.[2] Therefore, Vantilburg fails to demonstrate that the video violated his confrontation rights, and we conclude the district court did not err by admitting the video.

Vantilburg also argues the district court erred by adjudicating him a habitual criminal for several reasons. First, Vantilburg contends that the State failed to prove (1) his identity with respect to the 1986 conviction for unlawful taking of a vehicle, (2) the 1986 conviction was a felony conviction, and (3) his identity with respect to the 1988 conviction for burglary. "Under NRS 207.010, the state must prove beyond a reasonable doubt: (1) the identity of the person; and (2) the conviction of prior felonies." *Carr v. State*, 96 Nev. 936, 939, 620 P.2d 869, 871 (1980). "Ordinarily, positive identity is accomplished by the presentation of photographs, fingerprints, and any other available identity data." *Hollander v. State*, 82

[2]Vantilburg does not allege that further details regarding the codefendant's allegedly contradictory story were contained elsewhere in the video.

Nev. 345, 348, 418 P.2d 802, 804 (1966). The district court may also consider uncommon surnames and the identity of first names and surnames in determining whether the State has proven a defendant's identity. *Id.* at 348-49, 418 P.2d at 804.

Here, the State presented evidence that Vantilburg had been convicted of, among other things, two prior felonies in California: a 1986 conviction for unlawful taking of a vehicle, Cal. Veh. Code § 10851; and a 1988 conviction for burglary, Cal. Penal Code § 459. In support of these convictions, the State presented certified copies of the abstracts of judgment, the complaints, and other documents.[3]

The documents related to the 1986 conviction listed "Michael Anthony Marino" as the offender. To prove Vantilburg was "Michael Anthony Marino," the State presented a prison packet from the California Department of Corrections for "Michael Anthony Marino," which contained a booking photo, fingerprints, and identifying information. Vantilburg does not argue that the person shown in the booking photo is not him, that the fingerprints for "Michael Anthony Marino" do not match his own, or that any of the identifying information for "Michael Anthony Marino" does not match his information. Indeed, several identifiers in the prison packet match Vantilburg's current information as reflected in the presentence investigation report, such as his date of birth, height, race, eye color, and

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[3]Although a California abstract of judgment is not itself a judgment of conviction, it is "a contemporaneous, statutorily sanctioned, officially prepared clerical *record* of the conviction and sentence" that California courts "cloak[ ] with a presumption of regularity and reliability" akin to a judgment of conviction. *People v. Delgado*, 183 P.3d 1226, 1234 (Cal. 2008); *see also Dressler v. State*, 107 Nev. 686, 693, 819 P.2d 1288, 1292 (1991) (stating "a judgment of conviction is entitled to a presumption of regularity").

the fact that he has a chest tattoo.[4] Additionally, the State presented Nevada court documents listing "Michael A. Marino" as an alias for "Leon Allen Vantilburg." We conclude the State presented sufficient evidence to establish Vantilburg's identity with respect to the 1986 conviction.

As to Vantilburg's claim that the State failed to prove the 1986 conviction was a felony conviction, the abstract of judgment states that Vantilburg was convicted of "the following felony" before listing the offense of unlawful taking of a vehicle. The complaint indicates that the violation of Cal. Veh. Code § 10851 was charged as a felony, and a document titled "certificate and commitment" indicates that Vantilburg pleaded guilty to a felony offense under Cal. Veh. Code § 10851. Therefore, we conclude the State presented sufficient evidence to establish Vantilburg's 1986 conviction was a felony.

Regarding Vantilburg's challenge to the 1988 conviction, the documents related to that conviction list "Lon Allen Vantilburg" as the offender. Although these documents omit the letter "e" from Vantilburg's first name, they correctly relay Vantilburg's middle name and unique surname. Moreover, the fingerprint card contained in the California prison packet had the name "Vantilburg, Lon Allen" printed on it before it was crossed out and "Marino, Michael A." was handwritten above it, which, as discussed above, was proven to be an alias of Vantilburg. Therefore, we conclude the State presented sufficient evidence to establish Vantilburg's identity with respect to the 1988 conviction. Accordingly, we conclude the district court properly relied on the 1986 and 1988 convictions in determining Vantilburg was eligible for habitual criminal adjudication.

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[4]Vantilburg did not identify any information in the presentence investigation report that needed to be corrected at sentencing.

Second, Vantilburg contends that all of the alleged prior convictions were trivial and remote. In particular, he contends that (1) his only conviction for a violent offense occurred over ten years ago; (2) he has only had one felony conviction within the last 19 years; (3) three of the prior convictions were for property crimes that he allegedly committed between 19 and 37 years ago; and (4) his first alleged conviction would have been when he was only 17 years old.[5]

"Our habitual criminality statute exists to enable the criminal justice system to deal determinedly with career criminals who pose a serious threat to public safety." *Sessions v. State*, 106 Nev. 186, 191, 789 P.2d 1242, 1245 (1990). Although "NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of convictions," *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992), a district court may nonetheless decline to adjudicate a defendant a habitual criminal "when the prior convictions are stale or trivial or in other circumstances where a habitual criminal adjudication would not serve the purpose of the statute or the interests of justice," *Hughes v. State*, 116 Nev. 327, 331, 996 P.2d 890, 892 (2000); *see also* NRS 207.010(3). "Adjudication of a defendant as a habitual criminal is subject *to the broadest kind of judicial discretion.*" *LaChance v. State*, 130 Nev. 263, 276, 321 P.3d 919, 929 (2014) (internal quotation marks omitted).

At sentencing, the district court recalled the purposes to be served by the habitual criminal statute and determined that habitual criminal adjudication was proper "upon review of the complete record," including Vantilburg's criminal history. The presentence investigation

[5]Vantilburg was 54 years old at the time of sentencing.

report indicates that Vantilburg had previously been convicted of 8 felonies, 4 gross misdemeanors, and 17 misdemeanors. In addition to several offenses that, like the instant offense, relate to motor vehicles, including: (1) the 1986 felony conviction for unlawful taking of a vehicle; (2) a 1991 gross misdemeanor conviction for unlawful taking of a vehicle; (3) a 1993 felony conviction for attempted possession of a stolen vehicle; and (4) a 2019 misdemeanor conviction for breaking, injuring, or tampering with a vehicle, Vantilburg's history also includes several serious offenses unrelated to motor vehicles, such as: (1) 1988 and 1998 felony convictions for burglary, (2) a 2010 gross misdemeanor conviction for willfully endangering a child, and (3) a 2014 felony conviction for battery with the use of a deadly weapon.

Although several of Vantilburg's convictions are remote in time and/or trivial, given his extensive criminal history, we cannot conclude the district court abused its broad discretion in determining that the purposes of the habitual criminal statute would be effectuated by adjudication in this matter. *See Tanksley v. State*, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997) (holding a district court did not abuse its discretion in determining that habitual criminal adjudication would serve the purposes of the statute even though the prior felonies were challenged as "old and stale"). Therefore, Vantilburg is not entitled to relief on this claim.

Third, Vantilburg contends that the State failed to prove his 1993 convictions for attempted possession of a stolen vehicle and receiving property or services obtained through the unlawful use of a credit card did not arise from the same transaction or occurrence such that they could be considered two separate felony convictions for the purposes of habitual criminal adjudication. The State concedes that it failed to prove as much and that these convictions should have been treated as a single felony

conviction. *See LaChance,* 130 Nev. at 278, 321 P.3d at 930 ("[W]here two or more convictions grow out of the same act, transaction or occurrence, and are prosecuted in the same indictment or information, those several convictions may be utilized only as a single 'prior conviction' for purposes of applying the habitual criminal statute." (quotation marks omitted)).

Vantilburg was sentenced pursuant to the large habitual criminal statute, which requires that a defendant have previously been convicted of seven felonies. *See* NRS 207.010(1)(b). In seeking habitual criminal adjudication, the State alleged that Vantilburg had exactly seven qualifying felony convictions. As the State now concedes that it only offered sufficient proof of six of those convictions and that remand is warranted so that Vantilburg may be resentenced pursuant to the small habitual criminal statute, we reverse Vantilburg's sentence and remand this matter to the district court for that purpose. *See* NRS 207.010(1)(a).

Finally, Vantilburg argues the district court erred by penalizing him for maintaining his innocence. A district court may not impose a harsher sentence on a defendant simply because the defendant maintains their innocence in the face of overwhelming evidence of their guilt. *See Bushnell v. State*, 97 Nev. 591, 593 & n.1, 637 P.2d 529, 531 & n.1 (1981).

At sentencing, the district court asked Vantilburg about a video that showed him walking onto a property and taking a truck. Vantilburg maintained that he was not on the property and that the person in the video was not him. After the district court adjudicated Vantilburg a habitual criminal, but before it announced the sentence, it stated "I gave you a chance to tell me the truth at the end, Mr. Vantilburg. I saw the trial. The

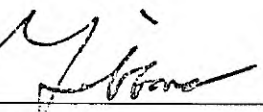
evidence was overwhelming. It was you." The court then sentenced Vantilburg to 10 years to life in prison.[6]

In light of the court's statements and the sentence imposed, it appears Vantilburg's refusal to admit guilt may have influenced the court's sentencing decision. Having already concluded that Vantilburg is entitled to resentencing based on the number of prior convictions the State proved, we further conclude that Vantilburg is entitled to resentencing before a different district court judge. *See Brake v. State*, 113 Nev. 579, 584, 939 P.2d 1029, 1033 (1997) ("[I]f the judge relies upon prejudicial matters, such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge.").

In light of the foregoing, we

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

_____, C.J.
Bulla



_____, J.
Gibbons

_____, J.
Westbrook

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[6]NRS 207.010(1)(b) permits a district court to sentence a defendant to life in prison without the possibility of parole, 10 years to life in prison, or 10 to 25 years in prison.

cc: Chief Judge, Second Judicial District Court
Hon. Scott N. Freeman, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk