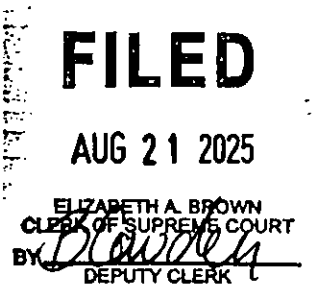
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MATTHEW CLAYTON BARCUS,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89272-COA



ORDER AFFIRMING IN PART, VACATING IN PART AND REMANDING

Matthew Clayton Barcus appeals from a judgment of conviction, entered pursuant to a jury verdict, of possessing, receiving, or transferring a stolen vehicle; possessing a schedule I or II controlled substance, less than 14 grams, third or subsequent offense; and possessing burglary tools. Second Judicial District Court, Washoe County; Tammy Riggs, Judge.

In July 2023, Saloman Lopez discovered that his white Toyota Tercel was missing. He called the police and reported that his car had been stolen. A few days later, Lopez saw his vehicle at a nearby park and observed the silhouette of a person inside. Lopez called the police, and Reno Police Department officers responded and contacted the person inside the vehicle, Barcus.

Officer Victor Vega located a backpack in the driver's seat containing various tools as well as some screwdrivers and a headlamp in the passenger's seat. In the trunk of the vehicle, the officers located a suitcase Barcus admitted was his, containing artwork. On Barcus's person, the officers recovered a key ring with six shaved-down keys as well as a

25-36844

small bag containing methamphetamine. Officers arrested Barcus and subsequently the State charged Barcus, by way of information, with possessing, receiving, or transferring a stolen vehicle; possessing a schedule I or II controlled substance, less than 14 grams, third or subsequent offense; and possessing burglary tools. The information also charged Barcus as a small habitual criminal.

This matter proceeded to a two-day jury trial. Lopez testified that when he discovered his stolen car, there was a man in the passenger's seat who did not have permission to be in his car. Lopez further testified that he possessed the car's only key and that the bags located in the car did not belong to him.

During Officer Vega's testimony, the State asked "[as to] things that we see that are common in the commission of burglaries or other property crimes, are you familiar with tools that are used?" Barcus objected and argued that the State was "attempting to solicit testimony from Officer Vega that is dependent on specialized knowledge, training and experience, and [that] he's not been noticed as an expert witness." The State responded that Officer Vega was testifying to his experience as an officer and that this was not expert testimony. The State clarified that Officer Vega would not be offering an opinion as to whether the tools collected were indeed burglary tools; instead, he would only be expressing that these were items he commonly saw during the commission of crimes.

The district court overruled Barcus's objection, concluding that Officer Vega "may express a lay opinion about what these tools were and what they were intended to be used for." The State resumed questioning Officer Vega and asked, "[w]hat are . . . common tools used during the commission of burglaries or other crimes?" Officer Vega answered that burglary tools were often found in backpacks or pockets and "have been

mended or bent or, like, the tip sharpened, like, to screwdrivers and things like that." Officer Vega explained that they were usually tools that have been "amended in a way where it could be used to defeat a lock, like sharpened, bent."

Officer Vega then described how he responded to the call at the park and contacted Barcus. While searching Barcus, Officer Vega discovered the set of six shaved-down keys as well as a bag of methamphetamine. Barcus told Officer Vega that none of the keys would start the vehicle; however, when Officer Vega attempted to use all the keys on the Tercel's ignition, he discovered that three of the six keys started the car. Officer Vega testified that he had previously seen shaved-down keys and had experience with people using such keys on vehicles to see if one would work. Officer Vega testified that he also discovered screwdrivers and a headlamp in the front passenger's seat and other tools in a backpack.

The district court admitted photographs of the keys as well as the other tools discovered. The district court thereafter admitted Officer Vega's bodycam footage into evidence which showed him successfully starting the ignition with three of the shaved-down keys. When testifying about the pictures of the tools, Officer Vega testified that one tool stood out to him as a "pry bar" with an amended or sharpened tip that could be used as a wedge on latches. He indicated that he had seen similar tools on people who were apprehended for the commission of crimes.

Officer Vega also recounted that during their interaction, Barcus commented that "he couldn't be charged with being in possession of a stolen motor vehicle because he wasn't driving the vehicle." Officer Vega further explained that he confirmed Lopez was the registered owner of the vehicle and that the vehicle was reported stolen.

During closing arguments, the State argued that "shaved filed keys are burglary tools" and urged the jury to consider the circumstances in which the seemingly innocuous tools were found: "[i]n a vehicle, a stolen vehicle, in a backpack, with a defendant who has keys to a vehicle, keys that don't belong to the vehicle but start the vehicle." The State further argued that "Officer Vega told you these are tools commonly used to defeat locking devices, and they're found during the commission of a crime."

Following deliberations, the jury returned a guilty verdict on all three substantive counts.[1] At sentencing, the district court admitted certified copies of seven of Barcus's prior convictions, including a 2005 conviction where Barcus was adjudicated a habitual criminal and served 13 years in prison. Although Barcus argued against habitual criminal adjudication in this case, the district court disagreed and adjudicated Barcus as a habitual criminal. In doing so, the court remarked that the multiple shaved-down car keys indicated "that this is just how you're going to, you know, survive. This is how you're going to live. This is your intended future conduct in this case." The court further said, "You just have no intent to change, no effort to address your controlled substances issue, and I think that therefore, you do deserve . . . another habitual offender designator." The district court thereafter sentenced Barcus to 5 to 12.5 years in prison; however, the court only sentenced Barcus pursuant to the small habitual criminal enhancement "charge" and did not independently sentence Barcus for the three substantive crimes.

This appeal followed. On appeal, Barcus argues that the district court abused its discretion by permitting Officer Vega to offer

---

[1]During his closing argument, Barcus conceded that he was guilty of possessing a schedule I or II controlled substance, less than 14 grams, third or subsequent offense.

unnoticed expert testimony on the identification of burglary tools. Barcus also argues that the district court abused its discretion by adjudicating him under the small habitual criminal statute. Upon review, we conclude that Barcus is not entitled to relief and thus affirm his judgment of conviction. Nevertheless, because we agree with the State that the judgment of conviction imposes an illegal sentence, we vacate the sentence and remand this matter for resentencing.

The district court did not abuse its discretion by allowing Officer Vega's testimony about the burglary tools, and any potential error in admitting the testimony was harmless

Barcus argues that Officer Vega's testimony regarding the tools recovered in the vehicle constituted unnoticed expert testimony. Specifically, Barcus contends that Officer Vega offered a "clear conclusion as to the purpose of these tools, that was beyond the scope of information available to the average lay person." However, Barcus does not argue that the error resulted in prejudice. In response, the State contends that Barcus failed to show that Officer Vega's testimony went beyond permissible lay witness testimony and that any error was harmless. Upon review, we conclude that Barcus is not entitled to relief.

This court reviews a district court's decision to admit opinion testimony for an abuse of discretion. *Brown v. State*, 138 Nev. 464, 469, 512 P.3d 269, 275 (2022); *see also Watson v. State*, 94 Nev. 261, 264, 578 P.2d 753, 756 (1978) ("The admissibility and competency of opinion testimony, either expert or non-expert, is largely discretionary with the trial court, as is the determination of what evidentiary areas mandate the use of experts." (internal citation omitted)). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

We look at a testimony's substance when determining if it constitutes expert testimony: "[D]oes the testimony concern information within the common knowledge of or capable of perception by the average layperson or does it require some specialized knowledge or skill beyond the realm of everyday experience?" *Burnside v. State*, 131 Nev. 371, 382-83, 352 P.3d 627, 636 (2015). A lay witness may offer an opinion or inference that is "[r]ationally based on the perception of the witness; and . . . [h]elpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." NRS 50.265. Conversely, "[i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify to matters within the scope of such knowledge." NRS 50.275.

In Nevada, the statute criminalizing possession of burglary tools provides, in pertinent part, as follows:

> Every person who makes or mends or causes to be made or mended, or has in his or her possession . . . any engine, machine, tool, false key, picklock, bit, nippers or implement adapted, designed or commonly used for the commission of burglary . . . under circumstances evincing an intent to use or employ . . . in the commission of a crime . . . shall be guilty of a gross misdemeanor.

NRS 205.080(1). There is no requirement under the text of the statute that the classification of a burglary tool requires expert testimony. Additionally, the supreme court has never held that expert testimony is required to identify burglary tools for the State to obtain a conviction for possessing the same.

Relying on the Nevada Supreme Court's decision in *Watson*, Barcus contends that Officer Vega gave unnoticed expert testimony in this case. In *Watson,* a police officer testified that "channellocks are often used by burglars to break the internal mechanism of door locks and that socks

are often used in lieu of gloves to cover the hands thereby preventing fingerprint impressions." 94 Nev. at 264, 578 P.2d at 756. The appellant in *Watson* did not challenge this testimony as undisclosed expert testimony but instead argued "it was never determined whether the officer testified as an expert and that absent such determination the jury may have been overly influenced by such nonexpert testimony given under the guise of expertise." *Id.* at 264, 578 P.2d at 755. The supreme court observed that this testimony *appeared* to be proffered as expert testimony based on unspecified "foundational questions" and "a jury instruction pertaining to expert testimony." *Id.* at 264, 578 P.2d at 755-56. Notwithstanding the court's characterization of the police officer's testimony in *Watson*, we do not read that case as holding that an expert is always required to identify tools as burglary tools.[2]

In this case, after reviewing the substance of Officer Vega's testimony, we conclude that the district court did not abuse its discretion. Officer Vega testified about how the tools recovered were modified, including how several keys were shaved so that they could start the vehicle and how the other tools might have been used in the commission of burglaries based on his training and experience. The court reasonably concluded that the testimony was within the common knowledge of or

---

[2]It appears that other jurisdictions have differing views on this issue. *See, e.g., Sutton v. State*, 791 S.E.2d 618, 624 (Ga. Ct. App. 2016) (stating that, "[i]n the vast majority of cases . . . , whether a tool is commonly used in the commission of [a crime] is within the ken of the average juror, and therefore, jurors may make such a determination based on their own personal knowledge and experience" (internal quotation marks omitted)); *but see People v. Jenkins*, 532 P.2d 857, 858, 860-61 (Cal. 1975) (concluding that an officer's testimony that "a wrecking bar, crow bar, tin snips, lineman's plies, and bolt cutters" were "commonly used to commit burglaries" was expert testimony).

capable of perception by the average layperson. Moreover, the court could reasonably conclude that Officer Vega's testimony that he had seen similar tools used in the commission of crimes was rationally based on his perception and did not require specialized knowledge or skill. Thus, the district court's decision to allow this testimony was not arbitrary or capricious or outside the bounds of law or reason.

In any event, we conclude that any potential error in admitting Officer Vega's testimony was harmless. NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); *see also Burnside*, 131 Nev. at 384, 352 P.3d at 637 (recognizing that the erroneous admission of expert testimony will not result in reversal unless "the evidence substantially affected the jury's verdict").

Here, Officer Vega's challenged testimony did not substantially affect the jury's verdict on the possession of burglary tools charge. The jury was instructed on the definition of "burglary tools" set forth in the statute. That definition includes any "false key . . . or implement adapted, designed, or commonly used for the commission of burglary." NRS 205.080(1). Even excluding Officer Vega's challenged testimony, the jury received evidence that Barcus possessed a ring of six shaved-down keys that did not belong to the stolen vehicle and watched a video where three of those keys started that vehicle. This constitutes independent overwhelming evidence of guilt as to the possession of burglary tools charge. *See Richmond v. State*, 118 Nev. 924, 934, 59 P.3d 1249, 1255 (2002) (stating that a "[f]ailure to exclude evidence . . . is harmless error where overwhelming evidence supports the conviction").

Likewise, Officer Vega's challenged testimony did not substantially affect the jury's verdict on Barcus's other convictions. Barcus

admitted guilt to the narcotics-possession charge in his closing argument, and he does not challenge that conviction on appeal. As to Barcus's conviction for possessing, receiving, or transferring a stolen vehicle, Officer Vega's challenged testimony about the burglary tools was not directly related to that crime, and there was overwhelming evidence of Barcus's guilt. *See* NRS 205.273(1)(b) ("A person commits an offense involving a stolen vehicle if the person: . . . [h]as in his or her possession a motor vehicle which the person knows or has reason to believe has been stolen.").

Lopez testified that his Toyota Tercel was stolen from his apartment and that he later discovered an unknown man inside. Officer Vega testified that Barcus was the man inside the stolen Tercel, that Barcus possessed on his person various keys that started the car, that the vehicle was stolen, and that Barcus admitted to telling the officers that his suitcase containing artwork was in the vehicle's trunk. Accordingly, Officer Vega's testimony identifying the burglary tools did not substantially affect the jury's verdict as to any of the charges. Thus, any potential error in admitting this testimony was harmless and does not warrant reversal.

The district court did not abuse its discretion by adjudicating Barcus as a small habitual criminal; however, we vacate Barcus's sentence and remand for resentencing because the sentence imposed is illegal

Barcus argues the district court abused its discretion by adjudicating him as a habitual criminal because it considered facts beyond those before the court. Specifically, Barcus contends that the district court's comments to him that the keys indicated his "intended future conduct" showed the district court's intention to punish him for "potential future

crimes that had not yet occurred."[3] In response, the State argues that the district court's comments sought to further the legitimate penal goal of incapacitation and that Barcus fails to demonstrate that the court relied solely on impalpable or suspect information at sentencing. We agree with the State.

District courts have wide discretion in imposing a sentence. *Brake v. State*, 113 Nev. 579, 584, 939 P.2d 1029, 1033 (1997). "So 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, this court will refrain from interfering with the sentence imposed." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

NRS 207.010(1)(a) states that a person who has been convicted of at least five prior felonies "is a habitual criminal and shall be punished for a category B felony by imprisonment in the state prison for a minimum term of not less than 5 years and a maximum term of not more than 20 years." The "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).

---

[3]Seemingly in conjunction with this argument, Barcus notes that the sentencing court acknowledged that the majority of Barcus's prior convictions were for non-violent drug or property crimes and that his most recent conviction was from 2005. However, to the extent this constitutes additional argument, we reject any such argument because the habitual criminal statute "makes no special allowance for non-violent crimes or for the remoteness of convictions; instead, these are considerations within the discretion of the district court." *Arajakis v. State*, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

"Adjudication of a defendant as a habitual criminal is 'subject *to the broadest kind of judicial discretion.*'" *LaChance v. State*, 130 Nev. 263, 276-77, 321 P.3d 919, 929 (2014) (quoting *Tanksley v. State*, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997)). To determine if a district court's habitual criminal adjudication is proper, "this court looks to the record as a whole to determine whether the sentencing court actually exercised its discretion." *Id.* at 277, 321 P.3d at 929 (internal quotation marks omitted); *Hughes v. State*, 116 Nev. 327, 333, 996 P.2d 890, 893-94 (2000) (stating the sentencing court acts properly as long as it does not operate "under a misconception of the law regarding the discretionary nature of a habitual criminal adjudication"). When considering a habitual criminal enhancement, the district court "may consider facts such as a defendant's criminal history, mitigation evidence, victim impact statements and the like." *LaChance*, 130 Nev. at 277, 321 P.3d at 929 (internal quotation marks omitted).

The district court was within its discretion to adjudicate Barcus a habitual criminal under NRS 207.010(1)(a). There is no indication in the record that the district court had a misconception that the enhancement was required. Rather, the record shows that the district court considered Barcus's criminal history, controlled substance struggles, that he "had opportunities . . . to try to get assistance," the specific charges and number of charges since the 1990s, as well as the facts of the instant case.

Additionally, the record does not indicate the district court sought to punish Barcus for future crimes; rather, the record indicates the district court considered that Barcus may pose a risk to others in the future, a consideration well within the district court's discretion. *See Haberstroh v. State*, 105 Nev. 739, 741, 782 P.2d 1343, 1344 (1989) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is an

inevitable and not undesirable element of criminal sentencing." (internal quotation marks omitted)). Moreover, the district court's comments regarding Barcus's "intended future conduct" go directly to incapacitation, which is a legitimate goal of sentencing. *See Ewing v. California*, 538 U.S. 11, 29 (2003) (plurality opinion) (explaining "the State's interest is not merely punishing the offense of conviction, or the triggering offense," as there is an additional interest "in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law" (internal quotation marks omitted)). Because the district court considered appropriate information to serve a legitimate sentencing purpose, the district court was within its discretion to adjudicate Barcus a habitual criminal.

Nevertheless, the State points out, and Barcus does not dispute, that the judgment of conviction erroneously imposes a sentence for the small habitual criminal enhancement without imposing any sentence on the three substantive charges. We agree that this is an error. *See Burns v. State*, 88 Nev. 215, 220, 495 P.2d 602, 605 (1972) (stating that when adjudicating a defendant a habitual criminal, "[t]he trial court must sentence on the substantive crime charged . . . , and then invoke the recidivist statute to determine the penalty" (internal quotation marks omitted)); *see also Cohen v. State*, 97 Nev. 166, 169, 625 P.2d 1170, 1172 (1981) ("[T]he purpose of the habitual criminal statute is not to charge a separate substantive crime, but to allege a fact which may enhance the punishment."). Here, the judgment of conviction does not sentence Barcus on any of the three substantive crimes and is thus facially illegal. Additionally, the judgment of conviction does not specify to which of Barcus's felony convictions the sentence of 5 to 12.5 years in prison applies,

see Odoms v. State, 102 Nev. 27, 33, 714 P.2d 568, 572 (1986) (recognizing a district court may enhance each of the qualifying primary offenses), and Barcus's conviction for possession of burglary tools, a gross misdemeanor, could not be enhanced because the habitual criminal statute only applies to felonies, *see* NRS 207.010(1). Thus, while we affirm Barcus's convictions, we vacate Barcus's sentence and remand this matter for resentencing consistent with this order.[4] Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND VACATED IN PART AND REMAND this matter to the district court for resentencing.

_____, C.J.
Bulla

_____, J.
Gibbons

_____, J.
Westbrook

cc: Hon. Tammy Riggs, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

[4]Insofar as Barcus has raised other arguments not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.