IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHNNY RODRIGUEZ ARTEAGA
A/K/A JOHN RODERICK ARTEAGA
A/K/A JOHNNY RODRICK ARTEAGA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 39416

FILED

JUN 18 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE WITH LIMITED REMAND FOR CORRECTION OF JUDGMENT OF CONVICTION

This is an appeal from a judgment of conviction pursuant to a jury verdict of guilty of one count of assault with a deadly weapon.

FACTS

Appellant Johnny R. Arteaga threatened his wife with a knife at their home. Mrs. Arteaga summoned police to the home and Mrs. Arteaga and her children were extricated through a window. Police arrested Arteaga, who was intoxicated and belligerent, and charged him with assault with a deadly weapon.

While in custody, Arteaga and his wife had several conversations over a jail telephone. Each conversation commenced with a warning that all conversations may be monitored or recorded. Topics of conversation included her upcoming testimony at his trial, the future of their marriage, and his need to seek counseling for a dependency problem. The district court allowed redacted portions of the audiotapes to be played at Arteaga's trial, despite Arteaga's objections that the conversations were privileged.

A jury found Arteaga guilty. Because of Arteaga's five prior felony convictions, the district court sentenced him to between eight and twenty years as a habitual offender.

DISCUSSION

First, Arteaga contends the audiotapes of his conversation with his wife while in custody are protected under NRS 49.295. In addition, Arteaga contends the marital testimonial privilege should have precluded the admissibility of the audiotapes. We disagree.

NRS 49.295 "'protect[s] confidential communications between spouses.'"[1] Here, the audiotapes were made while Arteaga was in custody at the Washoe County Detention Facility. The conversations were not confidential because a warning was given to the parties that telephone conversations might be monitored or recorded. Arteaga and his wife were aware their conversations might be recorded; thus, there was no expectation of confidentiality.[2] Moreover, "[t]he introduction of a spouse's hearsay statements is not 'testimony'" protected under NRS 49.295.[3] NRS 49.295 applies only to examination of a spouse at trial.[4]

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[1]Constancio v. State, 98 Nev. 22, 25, 639 P.2d 547, 549 (1982) (quoting Deutscher v. State, 95 Nev. 669, 683, 601 P.2d 407, 416 (1979)).

[2]See U.S. v. Madoch, 149 F.3d 596, 602 (7th Cir. 1998) (explaining privilege does not apply where conversations between spouses in jail are recorded); United States v. Harrelson, 754 F.2d 1153, 1169-70 (5th Cir. 1985) (concluding no spousal communication privilege existed where eavesdropping could reasonably be expected to occur).

[3]See Franco v. State, 109 Nev. 1229, 1244, 866 P.2d 247, 257 (1993).

[4]Id.

"Constitutional rights are personal and may not be asserted vicariously."[5] We conclude Arteaga lacks standing to assert a challenge on his wife's behalf. Furthermore, any right Arteaga had was waived when his wife testified without objection.

Second, Arteaga asserts the audiotaped conversations were inadmissible because the conversations failed to show a consciousness of guilt or any other factor stated in NRS 48.045. Further, Arteaga contends the district judge failed to apply the correct standard for admitting prior bad acts. We disagree.

An incident relevant to the crime charged is admissible if proved by clear and convincing evidence, and the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.[6] Further, evidence showing consciousness of guilt is admissible even if the conduct is criminal.[7]

The district court found the probative value of the audiotaped conversations outweighed any prejudice. Further, the district court found the evidence had been proven by the clear and convincing standard. The evidence was deemed admissible to show consciousness of guilt. We conclude the district court did not manifestly err.

In addition, we conclude Arteaga's statements were admissible even in the absence of a Petrocelli hearing. The incriminating statements

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[5]Greene v. State, 113 Nev. 157, 176, 931 P.2d 54, 66 (1997) (citing Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973)).

[6]Petrocelli v. State, 101 Nev. 46, 51-52, 692 P.2d 503, 507-08 (1985); see also Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997); Walker v. State, 112 Nev. 819, 824, 921 P.2d 923, 926 (1996).

[7]Reese v. State, 95 Nev. 419, 423, 596 P.2d 212, 215 (1979).

were not hearsay under NRS 51.035 because they were his own statements offered against him.[8] Even if the statements somehow constituted hearsay, they would be admissible as an exception under NRS 51.105(1), which states that a "statement of the declarant's then existing state of mind, emotion, sensation or physical condition, such as intent, plan, motive, design, mental feeling, pain and bodily health, is not inadmissible under the hearsay rule."[9]

Third, Arteaga argues his sentence as a habitual offender is grossly disproportionate to the crime. We disagree. A district court's determination that a defendant is a habitual criminal is "'subject to the broadest kind of judicial discretion.'"[10] There is "no express limitation on the judge's discretion."[11] Even when this court disagrees with a determination by the district court, "'it [is] presumptively improper for this court to superimpose its own views on sentences of incarceration lawfully pronounced by our sentencing judges.'"[12]

We conclude, however, the district court erred in the wording of the judgment of conviction. "[T]he purpose of the habitual criminal

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[8]NRS 51.035(3); see Elvik v. State, 114 Nev. 883, 896, 965 P.2d 281, 289-90 (1998).

[9]See Elvik, 114 Nev. at 896, 965 P.2d at 289-90.

[10]Tanksley v. State, 113 Nev. 997, 1004, 946 P.2d 148, 152 (1997) (quoting Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993) (emphasis omitted)).

[11]Id. (citing French v. State, 98 Nev. 235, 237, 645 P.2d 440, 441 (1982)).

[12]Arajakis v. State, 108 Nev. 976, 984, 843 P.2d 800, 805 (1992) (quoting Sims v. State, 107 Nev. 438, 440, 814 P.2d 63, 64 (1991)).

statute is not to charge a separate substantive crime, but to allege a fact which may enhance the punishment."[13] "'Failure to properly sentence does not render the entire trial and proceeding a nullity[;] . . . [the] Court[] [has the] authority to modify the trial court's erroneous sentence.'"[14]

The district court's judgment of conviction found Arteaga guilty of the crime of being a habitual criminal. This implies Arteaga has been charged with "a separate substantive crime."[15] The district court correctly enhanced the punishment because of the previous felony convictions; the judgment of conviction merely needs to be revised. As such, we remand with instructions to correct the conviction consistent with Hollander v. State.[16]

Accordingly, we

ORDER this matter AFFIRMED WITH LIMITED REMAND to the district court to correct the judgment of conviction consistent with Hollander.[17]

_____, J.
Rose

_____, J.
Maupin

_____, J.
Gibbons

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[13]Cohen v. State, 97 Nev. 166, 169, 625 P.2d 1170, 1172 (1981).

[14]Hollander v. State, 82 Nev. 345, 354, 418 P.2d 802, 807 (1966) (quoting Lisby v. State, 82 Nev. 183, 190, 414 P.2d 592, 596 (1966)).

[15]Cohen, 97 Nev. at 169, 625 P.2d at 1172.

[16]82 Nev. at 354, 418 P.2d at 807.

[17]Id.

cc: Hon. Janet J. Berry, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
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Washoe District Court Clerk