

IN THE SUPREME COURT OF THE STATE OF NEVADA

GENE R. NAVE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40267

FILED

FEB 05 2003

ORDER OF AFFIRMANCE

CLERK OF SUPREME COURT
BY *J. R. [Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of robbery (count I) and attempted robbery (count II). The district court sentenced appellant Gene R. Nave to serve a prison term of 24 to 84 months for count I and a concurrent prison term of 16 to 72 months for count II.

Nave first contends that the district court erred in admitting his confession made to Las Vegas Metropolitan Corrections Officer Myron Hamm, who guarded Nave at the hospital. Specifically, Nave contends that the confession was involuntary because he made the statement while he was receiving medical treatment on his hand and while he was under the influence of two prescription medications, Trilaton and Elavil. We conclude that Nave's contention lacks merit.

"A confession is admissible only if it is made freely and voluntarily, without compulsion or inducement."¹ "The question of the admissibility of a confession is primarily a factual question addressed to the district court: where that determination is supported by substantial

¹Passama v. State, 103 Nev. 212, 213, 735 P.2d 321, 322 (1987).

evidence, it should not be disturbed on appeal."² In determining whether a confession is voluntary, the court looks at the totality of the circumstances.³

In the instant case, the district court found that the prescription drugs Nave was taking did not render his confession involuntary. We conclude that substantial evidence supports the district court's finding. In particular, Nave admitted that the medication he was taking was supposed to make him calm and coherent and also kept him from hallucinating and hearing voices. Additionally, Nave was examined by two different doctors, who found that Nave was competent to stand trial and concluded that the medication Nave was taking did not affect his competence. Moreover, Officer Hamm testified that, despite the fact that he expressly told Nave not to talk to him, Nave told Hamm that he would not be serving prison time on the robbery charges because he knew how to pick his victims, specifically, Nave chose victims who did not speak English. Finally, Nave testified at trial, denying that he made any statement whatsoever to Officer Hamm and explaining that the statement Hamm heard must have been made by another inmate, whom Nave was conversing with while in the hospital. Because the district court's finding that Nave's statement to Hamm was voluntary is supported by substantial evidence, we conclude that the district court did not err in admitting that statement.

In a related argument, Nave contends that the district court erred in denying his oral motion for a continuance made on the first day of

²Chambers v. State, 113 Nev. 974, 981, 944 P.2d 805, 809 (1997).

³Id.

trial. In particular, Nave contends that he was entitled to a continuance because the State failed to provide him with Officer Hamm's statement until the day of trial. Nave further alleges that he was prejudiced by the State's failure to turn over Hamm's statement earlier because his counsel did not get the opportunity to investigate whether Nave's statements made to Hamm were voluntary. We conclude that Nave's contention lacks merit.

It is well settled that the decision to grant or deny a request for a continuance is within the sound discretion of the district court.⁴ Only if the decision was arbitrary under the circumstances is it an abuse of discretion.⁵ Here, the district court denied the motion after inquiring about the discovery provided by the State and concluding that the State had timely provided Nave with all the evidence in the case against him, including the police reports referencing Hamm's statement, the preliminary hearing transcripts, and the State's notice of witnesses. Further, Nave failed to show he was prejudiced by the district court's denial of his motion for a continuance. As discussed above, the record supports the district court's finding that Nave's statement to Officer Hamm was voluntary. Additionally, there was overwhelming evidence of Nave's guilt presented at trial. In particular, Nave's two victims testified, identifying Nave as the robber, and two additional law enforcement officers testified that Nave admitted robbing the victims and directed the officers to the dumpster where he had disposed of a victim's wallet.

⁴McCabe v. State, 98 Nev. 604, 607, 655 P.2d 536, 537 (1982).

⁵Johnson v. State, 90 Nev. 352, 353, 526 P.2d 696, 697 (1974).

Accordingly, the district court did not abuse its discretion in denying the motion for a continuance.

Finally, Nave contends the district court abused its discretion at sentencing by relying on improper references contained in the presentence investigation report (PSI) that Nave brandished and used a weapon in the course of the robbery and attempted robbery. In particular, Nave notes that the jury in the instant case found that he did not use a deadly weapon and, therefore, the district court erred when it imposed sentence based upon Nave's use of a gun. We conclude that Nave's contentions lack merit.

Our review of the record reveals that Nave's counsel was provided with a copy of the PSI. The Offense Synopsis section of the PSI indicated, in part, that "[r]ecords of the Las Vegas Metropolitan Police Department and the Clark County District Attorney's Office reflect" that "[o]n April 19, 2002, two victims were approached by Gene Nave, who put a gun to their hand and demanded money." The PSI further indicated that two of the ten aggravating factors of Nave's offenses were "arrest included use of weapons" and "weapon brandished."⁶ At sentencing, Nave's counsel specifically objected to the references contained in the PSI to the use of a weapon and reminded the court that the "jury specifically found there was no weapon used in this offense." The district court informed Nave's counsel that the PSI was referring to the summary of the instant offense as contained in the police report and to Nave's extensive

⁶The other aggravating factors included: criminal history, history of violence, pending unrelated cases, offense deliberately committed, crime against a person, premeditated offense, deceptive during PSI interview, and denied culpability.

criminal history of violent offenses.⁷ After hearing arguments from counsel, the district court then pronounced its sentence.

"The sentencing judge has wide discretion in imposing a sentence, and that determination will not be overruled absent a showing of abuse of discretion. A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial."⁸ "[T]his court will reverse a sentence if it is supported solely by impalpable and highly suspect evidence."⁹

Even assuming that the assertions in the PSI related to Nave's use of a weapon were somehow improper, we conclude that the district court's sentence is not supported solely by reliance on those references. We note that, in addition to the instant offense, Nave's criminal history includes arrests for violent offenses involving the use of a weapon. Additionally, the sentences imposed were within the parameters provided by the relevant statutes.¹⁰ Moreover, there is no indication that the district court relied solely on references to Nave's use of a weapon

⁷We note that the district court did not err in refusing to strike the PSI because it accurately reflected the fact that Nave had been convicted of robbery and attempted robbery without deadly weapon enhancements. The district court also did not err in finding that references in the PSI to the use of a weapon were made as a summary of reports from law enforcement and Nave's prior criminal history.

⁸Todd v. State, 113 Nev. 18, 25, 931 P.2d 721, 725 (1997) (quoting Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996)).

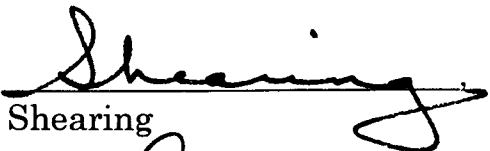
⁹Denson v. State, 112 Nev. 489, 492, 915 P.2d 284, 286 (1996) (citing Renard v. State, 94 Nev. 368, 369, 580 P.2d 470, 471 (1978); Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976)).

¹⁰See NRS 200.380; NRS 193.330(1)(a)(3).

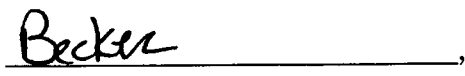
when it imposed sentence or that the court did not consider that the jury found that Nave did not use a deadly weapon in the course of the robbery and attempted robbery.¹¹

Having considered Nave's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

 J.
Shearing

 J.
Leavitt

 J.
Becker

cc: Hon. Lee A. Gates, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

¹¹Cf. Norwood, 112 Nev. at 439-40, 915 P.2d at 278 (district court abused discretion where court stated its belief, unsubstantiated by record, that appellant was gang member and leader and court imposed harsher sentence to send message to appellant and others like him); Goodson v. State, 98 Nev. 493, 495, 654 P.2d 1006, 1007 (1982) (district court abused discretion when it rejected defendant's denial of unsubstantiated allegations and imposed sentence based upon allegations).