IN THE SUPREME COURT OF THE STATE OF NEVADA

DIOSMANI LABORIGUILARTE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40416

FILED

MAR 20 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of attempted murder with the use of a deadly weapon (count I) and attempted robbery with the use of a deadly weapon (count II). The district court sentenced appellant to serve two consecutive prison terms of 72 to 240 months for count I and two consecutive prison terms of 48 to 120 months for count II, to run concurrently with count I.

First, appellant contends that the State adduced insufficient evidence to support his convictions for attempted murder and attempted robbery. Specifically, appellant contends that the evidence proved the victim was the primary aggressor and appellant shot the victim in self-defense.[1] Additionally, appellant contends that the victim's testimony that appellant demanded his wallet was self-serving, not credible and insufficient to sustain an attempted robbery conviction in light of the fact

[1]Although appellant did not testify at trial or present witness testimony, appellant presented his theory of self-defense through cross-examination of the State's witnesses and in opening and closing argument.

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that the victim also testified that he did not hear appellant's exact words. We conclude that appellant's contentions lack merit.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[2] In particular, we note that the victim testified at trial that he drove down the street to "get a good look" at appellant whom he believed to be a prowler in his neighborhood. Appellant saw the victim, stepped toward the victim's truck, pulled out a gun, and shot at him three times; one of those shots grazed the back of the victim's head. Thereafter, the victim testified that appellant demanded either money or his wallet, but that he was not sure which because his ears were ringing and his head hurt from the gunshot. The victim then fled, driving his truck into a pole.

Jorge Avila, an eyewitness to the shooting, also testified at appellant's trial. Avila observed the victim and a man with a dark complexion, whom he could not identify, "exchanging words." As the victim went to get out of the truck, the man pulled out a gun and shot him. The victim got back into the truck, and the man ran across the street while shooting at the truck again. As Avila drove away from the shooting, he described hearing a third shot and then observing the victim drive his truck head-on into a light pole.

Las Vegas Metropolitan Police Officer David Gilbert testified that, after hearing the details of the shooting on the police radio, he

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[2]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

observed appellant walking down the street in the vicinity of the shooting and asked him to stop. Appellant ran and Officer Gilbert pursued him. While searching for appellant, Gilbert was informed that another officer had apprehended him. That officer was Las Vegas Metropolitan Police Officer Jim Seebock. Seebock testified that he and his canine pursued the suspect from the scene of the shooting. Seebock discovered appellant crouching down in a bush; a gun was also found in the bush where appellant had been hiding. James Krylo, a firearms expert employed by the Las Vegas Metropolitan Police Department, testified that the gun found in the bush was the same gun used to shoot the victim. Krylo also testified that the trajectories of the bullets entering the victim's car came from the same general direction, namely, "left to right, [and] front to back."

Although appellant alleges that he shot the victim in self-defense and that he never demanded the victim's money or wallet, the jury could reasonably infer from the testimony presented that appellant shot the victim with the intent to kill him and demanded the victim's wallet or money in an attempt to rob him. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[3]

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[3]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Second, appellant contends that the district court erred in allowing State's witness Gilbert and expert witness Krylo to testify because the State provided insufficient notice of their testimony in violation of NRS 174.234. We conclude that appellant's contention lacks merit.

NRS 174.234(1)(a)(2) provides that written notice of the State's witnesses must be filed and served upon the defendant at least five days before trial. Additionally, NRS 174.234(2) provides that written notice of the State's expert witnesses must be filed and served upon the defendant at least twenty-one days before trial. Here, it is undisputed that the State did not comply with the notice requirements of NRS 174.234. The State notified appellant on August 7, 2002, that Gilbert would testify -- five days before the August 12 trial. Similarly, the State notified appellant on August 9, 2002, that Krylo, its firearms expert, would testify -- three days before the August 12 trial.

At a hearing outside the presence of the jury, the State explained the reason for its late disclosure of Gilbert:

> We were under the assumption at that point that the officers that generated the reports were the ones involved . . . in the pursuit, if you will. When we interviewed those officers we discovered that . . . . [t]hey were involved in the latter part of the pursuit. . . . We, upon being notified that Officer Gilbert was in fact, involved with the actual pursuit, the foot pursuit, we immediately notified [appellant].

Additionally, the State explained the reason for the late disclosure of Krylo, informing the court that they had timely provided notice of their

intent to call Krylo's supervisor, and then decided to have Krylo testify instead because he was the individual who actually performed the ballistics examination. The district court eventually ruled that Gilbert and Krylo could testify in the State's case-in-chief, but postponed their testimony to the next day, allowing appellant additional time to prepare his cross-examination.

NRS 174.295(2) sets forth the remedy for violation of a discovery order. Specifically, where a discovery order has been violated, the district court: "may order the party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."[4] "However, where the State's non-compliance with a discovery order is inadvertent and the court takes appropriate action to protect the defendant against prejudice, there is no error justifying dismissal of the case."[5]

Here, we conclude that the district court did not abuse its discretion in admitting the testimony of Gilbert and Krylo. It appears that the State's untimely disclosure of witnesses Gilbert and Krylo was unintentional in light of the State's reasonable explanations for its delay. We further conclude that the district court took adequate measures to

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[4]NRS 174.295(2).

[5]State v. Tapia, 108 Nev. 494, 497, 835 P.2d 22, 24 (1992) (construing NRS 174.295).

ensure that appellant was not prejudiced in allowing him additional time to prepare his cross-examination of the witnesses.[6] Accordingly, the district court did not abuse its discretion in allowing the testimony.

Third, appellant contends that the district court abused its discretion in certifying Krylo as an expert witness on bullet trajectory. Specifically, appellant contends that the district court violated his due process rights and NRS 50.275 by failing to determine if Krylo was a qualified expert in bullet trajectory paths and by vouching for Krylo's credibility as an expert. We conclude that Krylo's contention lacks merit.

At trial, appellant stipulated to the fact that Krylo was a firearms experts. Appellant, however, subsequently objected to Krylo's testimony about the trajectory of the bullets, arguing that tracing a bullet's trajectory was a "specific science" to which Krylo had not been certified. The district court overruled appellant's objection, noting that Krylo had testified at other trials regarding bullet trajectory paths and had previously been certified as an expert in that field.

NRS 50.275 provides that a qualified expert may testify to matters within his specialized scope of knowledge in order to aid the trier

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[6]Although appellant alleges that the district court did not allow the defense time to obtain its own expert to rebut Krylo's testimony, the record reveals that appellant did not request additional time beyond the one-day continuance to allow him time to put on his own expert on bullet trajectory.

of fact. The admissibility of expert testimony is within the sound discretion of the district court.[7]

In the instant case, we conclude the district court did not abuse its discretion in allowing Krylo to testify about the bullet trajectory paths. Appellant provides no authority for his claim that a firearms expert may not testify about bullet trajectory because it is a separate "specific science." Further, Krylo's resume, which was provided to appellant prior to Krylo's testimony, indicates that he had specialized knowledge in bullet trajectory paths, namely, he attended the FBI Bullet Trajectory and Shooting Reconstruction School. Finally, we note that, in admitting Krylo's testimony, the district court did not improperly vouch for Krylo's credibility. Rather, the district court merely noted that it was familiar with Krylo's credentials and was satisfied that he had expert knowledge in the area of bullet trajectory paths. Accordingly, the district court neither violated appellant's due process or statutory rights, nor abused its discretion in determining that Krylo was a qualified expert in bullet trajectory.

Finally, appellant contends that the sentences imposed constitute cruel and unusual punishment in violation of the United States and Nevada constitutions because the sentence is disproportionate to the crime. Appellant contends that the sentences are disproportionate and severe in light of his lack of a significant criminal history in conjunction with his belief that he was acting in self-defense. We disagree.

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[7]Smith v. State, 100 Nev. 570, 572, 688 P.2d 326, 327 (1984).

The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[8] Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'"[9]

This court has consistently afforded the district court wide discretion in its sentencing decision.[10] This court will refrain from interfering with the sentence imposed "[s]o 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."[11]

In the instant case, appellant does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. Further, we note that the sentences imposed are not unreasonably disproportionate to the offenses committed

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[8]Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion).

[9]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

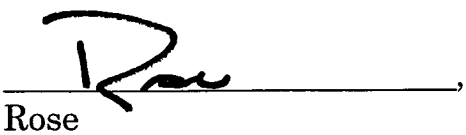
[10]See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987).

[11]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

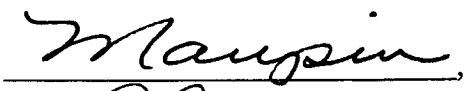
and are within the parameters provided by the relevant statutes.[12] Accordingly, we conclude that the sentences imposed do not constitute cruel and unusual punishment.

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

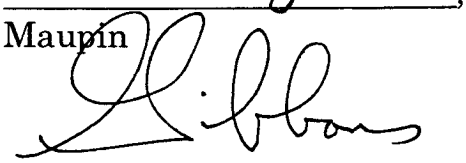
ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose



_____, J.
Maupin



_____, J.
Gibbons

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

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[12]See NRS 200.030(4); NRS 193.330(1)(a)(1); NRS 193.165(1); NRS 200.380(2); NRS 193.330(1)(a)(2).