IN THE SUPREME COURT OF THE STATE OF NEVADA

CLYDE BIBBY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40777

FILED

NOV 21 2003

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit robbery (count I), burglary while in the possession of a firearm (count II), robbery with the use of a deadly weapon (count III), stop required on signal of a police officer (count IV), and possession of a controlled substance (count V). The district court sentenced appellant Clyde Bibby to serve a prison term of 12-36 months for count I, a concurrent prison term of 36-72 months for count II, two consecutive prison terms of 36-120 months for count III, a consecutive prison term of 12-48 months for count IV, and a concurrent prison term of 12-34 months for count V.

First, Bibby contends that the district court erred in denying his motion to dismiss the charges based on the State's failure to gather and preserve allegedly exculpatory evidence. Bibby was convicted for his participation in the robbery of a gas station convenience store. The incident, however, was recorded by the store's video surveillance system. The store manager believed that he had downloaded the recorded incident onto a computer disk, which he then turned over to the police officers arriving at the scene. The police officers did not review the disk. Shortly before the trial was set to begin, it was discovered that the store manager inadvertently failed to download the recording of the incident, and because

the surveillance system only stores approximately five weeks of information, a recording of the incident was no longer available. Bibby argues that the lost surveillance system recording of the robbery would have corroborated his claim that he was not a willing participant, and instead, was coerced into robbing the convenience store by a third party. We disagree with Bibby's contention.

When the State fails to gather evidence, the defendant must demonstrate that the evidence was material, i.e. "that there is a reasonable probability that, had the evidence been available to the defense, the result of the proceedings would have been different."[1] Only when the State has acted in bad faith is dismissal of the charges an available sanction.[2] When the State gathers evidence, its failure to preserve potentially exculpatory evidence "may result in dismissal of the charges if the defendant can show 'bad faith or connivance on the part of the government' or 'that he was prejudiced by the loss of the evidence.'"[3] In proving prejudice to the defendant, "[i]t is not sufficient to show 'merely a hoped-for conclusion' or 'that examination of the evidence would be helpful in preparing [a] defense.'"[4] This court has stated that in

---

[1]Daniels v. State, 114 Nev. 261, 267, 956 P.2d 111, 115 (1998).

[2]Id.

[3]Id. at 266-67, 956 P.2d at 115 (quoting Howard v. State, 95 Nev. 580, 582, 600 P.2d 214, 215-16 (1979)).

[4]Leonard v. State, 117 Nev. 53, 68, 17 P.3d 397, 407 (2001) (citations omitted).

determining whether evidence that was lost is material, the evidence "'must be evaluated in the context of the entire record.'"[5]

In the instant case, the district court heard arguments from counsel pertaining to Bibby's motion to dismiss the charges. In denying the motion, the district court stated:

> [T]here is a statement by the State that they didn't lose it [the recording of the incident], it was never recorded. Now if that's true, and I have to presume it's true because the burden is on you [Bibby] to show, you have to make some showing that it could reasonably be anticipated that the evidence sought would be exculpatory. Well, I don't see that that showing is made.

Later, at trial, the store manager testified that he was not properly instructed on how to download information from the surveillance system onto a disk, and as a result, the disk did not contain a recording of the robbery. Bibby chose not to cross-examine the store manager.

We conclude that the district court did not err in denying Bibby's motion to dismiss the charges. Bibby has failed to demonstrate that the Las Vegas Metropolitan Police Department (LVMPD) acted in bad faith with regard to the lost surveillance recording. Bibby has also failed to demonstrate that the lost recording was material to his defense. Bibby alleges prejudice based on his lost opportunity to corroborate his claim that he was not a willing participant in the robbery; however, eyewitness/victim testimony regarding Bibby's conduct contradicts his story. The store clerk testified that Bibby was an active participant in the robbery, Bibby demanded and gathered the money from the two registers,

---

[5]Klein v. Warden, 118 Nev. 305, 314, 43 P.3d 1029, 1035 (2002) (quoting United States v. Agurs, 427 U.S. 97, 112-13 (1976)).

and never once sought help or indicated that he was under duress. Presumably, the surveillance recording would have depicted the same events testified to by the store clerk. Therefore, we conclude that Bibby was not entitled to a dismissal of the charges based on the State's failure to either gather or preserve this evidence.

Second, Bibby contends that insufficient evidence was adduced at trial to support his conviction on all of the counts except for count V, possession of a controlled substance, which he does not challenge. Bibby's argument, however, contains a fatal flaw. His defense at trial was that he was coerced by a third party into committing the crime, therefore, Bibby concedes a robbery and burglary took place, and that he fled from the scene with his alleged captor, who was armed with a rifle. As this court has stated many times, it is for the jury to determine the weight and credibility to give any allegedly conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.[6] The fact that the offense occurred is uncontroverted. The jury reasonably inferred from the evidence presented that the State's theory was more credible, and, despite Bibby's claim, concluded that he was a willing and active participant.[7] Therefore, we conclude that Bibby's contention is without merit.

Finally, Bibby contends that the district court abused its discretion at sentencing because the sentence is disproportionate to his conduct and constitutes cruel and unusual punishment. Bibby argues that

---

[6]Hutchins v. State, 110 Nev. 103, 107, 867 P.2d 1136, 1139 (1994).

[7]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. ___, ___, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

his criminal history was nonviolent in nature, and "[t]aking into consideration that [he] was coerced into participating in this offense consecutive sentences on nonmandatory counts is so disproportionate . . . that it shocks the conscience of fundamental fairness." We disagree.

The Eighth Amendment of the United States Constitution does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime.[8] Further, this court has consistently afforded the district court wide discretion in its sentencing decision,[9] and 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."[10] Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience.[11]

In the instant case, Bibby does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. We also note that the sentence imposed was

---

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

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

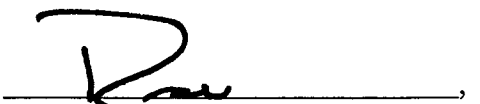
[10]Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

[11]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).

within the parameters provided by the relevant statutes.[12] Additionally, it is within the district court's discretion to impose consecutive sentences.[13] Accordingly, we conclude that the sentence imposed is not too harsh, is not disproportionate to the crime, does not constitute cruel and unusual punishment, and that the district court did not abuse its discretion at sentencing.

Having considered Bibby's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Rose

_____, J.
Leavitt

_____, J.
Maupin

cc: Hon. Jessie Elizabeth Walsh, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

---

[12]See NRS 199.480(1)(a) (count I); NRS 205.060(4) (count II); NRS 200.380(2), NRS 193.165(1) (count III); NRS 484.348(3)(b) (count IV); NRS 453.336 (count V).

[13]See NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 429 P.2d 549 (1967).