IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT N. WORDLAW,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 40988

FILED

JAN 27 2004

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 of battery with the use of a deadly weapon. The district court adjudicated appellant Robert N. Wordlaw as a habitual criminal and sentenced him to serve a prison term of 10-25 years.

First, Wordlaw contends that the district court abused its discretion because sentencing him as a habitual criminal constitutes cruel and unusual punishment in violation of both the United States and Nevada Constitutions.[1] Wordlaw argues that his sentence is disproportionate to the crime and that he should have been sentenced solely pursuant to NRS 200.481(2)(e)(1) (calling for a sentence of 2-10 years and/or a fine of no more than $10,000.00 for battery with use of a deadly weapon conviction). In support of his argument, Wordlaw points out that three of the prior convictions considered by the district court were non-violent in nature (drug-related offenses), and that although the fourth conviction involved violence (robbery), it was remote in time, occurring in 1978. According to Wordlaw, unlike the earlier offenses, "this case is a spur of the moment, heat of passion crime against a girlfriend where she suffers a bump on the head." We disagree with Wordlaw's contention.

[1]See U.S. Const. amend. VIII; Nev. Const. art. 1, § 6.

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.[2] Further, this court has consistently afforded the district court wide discretion in its sentencing decision,[3] 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."[4] 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.[5]

The district court has broad discretion to dismiss a habitual criminal allegation.[6] Accordingly, the decision to adjudicate an individual as a habitual criminal is not an automatic one.[7] The district court "may dismiss a habitual criminal allegation when the prior convictions are stale

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

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

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

[5]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).

[6]See NRS 207.010(2).

[7]Clark v. State, 109 Nev. 426, 428, 851 P.2d 426, 427 (1993).

or trivial or in other circumstances where a habitual criminal adjudication would not serve the purpose of the statute or the interests of justice."[8] The habitual criminal statute, however, "makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions; instead, these are considerations within the discretion of the district court."[9]

This court explained that "Nevada law requires a sentencing court to exercise its discretion and weigh the appropriate factors for and against the habitual criminal statute before adjudicating a person as a habitual criminal."[10] Although it is easier for this court to determine whether the sentencing court exercised its discretion when the sentencing court makes particularized findings and specifically addresses the nature and gravity of the prior convictions, this court has never required such explicit findings.[11] Instead, we will look to the record as a whole to determine whether the district court exercised its discretion or was operating under a misconception that habitual criminal adjudication is automatic upon proof of the prior convictions.[12]

In the instant case, Wordlaw cannot demonstrate that the district court relied on impalpable or highly suspect evidence or that the relevant statutes are unconstitutional. We note that the sentence imposed

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[8]Hughes v. State, 116 Nev. 327, 331, 996 P.2d 890, 892 (2000) (emphasis added).

[9]Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992).

[10]Hughes, 116 Nev. at 333, 996 P.2d at 893.

[11]Id.

[12]Id. at 333, 996 P.2d at 893-94.

was within the parameters provided by the relevant statute.[13] At the sentencing hearing, evidence was presented by the State informing the district court about Wordlaw's extensive criminal history. The presentence investigation report prepared by the Division of Parole and Probation (P & P) listed 41 prior offenses from 1975-2002, numerous arrests and offenses committed in three different states without prosecutions, 11 different aliases, two social security numbers and three different dates of birth. Many of the offenses committed by Wordlaw did, in fact, involve the use of violence. The district court was so moved to ask Wordlaw, "If there ever was an habitual criminal, how can you say you aren't one?" The district court noted that the State, at the very least, provided sufficient evidence of four prior felony convictions and adjudicated Wordlaw as a habitual criminal. The district court followed the recommendation of P & P and sentenced Wordlaw to a prison term of 10-25 years. Based on all of the above and the record as a whole, we conclude that the district court understood its sentencing authority and exercised its discretion in deciding to adjudicate Wordlaw as a habitual criminal. Accordingly, we conclude that the district court did not abuse its discretion at sentencing, and the sentence imposed is not disproportionate to the crime and does not constitute cruel and unusual punishment under either the federal or state constitution.[14]

Second, Wordlaw contends that the district court erred in denying his motion for a new trial. More than three weeks after the trial ended, the victim, who did not testify at either the preliminary hearing or

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[13]See NRS 207.010(1)(b)(3).

[14]See Schmidt v. State, 94 Nev. 665, 668, 584 P.2d 695, 697 (1978).

the trial because she could not be located, came forward with an affidavit recanting her prior statements to the police. The victim stated that Wordlaw did not, in fact, beat her with a beer bottle. Wordlaw argues that the victim's recantation amounts to newly discovered evidence, which, if admitted in a new trial, would increase the probability that he would not be convicted of using a deadly weapon. We disagree.

NRS 176.515(1) states that "[t]he court may grant a new trial to a defendant if required as a matter of law or on the ground of newly discovered evidence." In order to grant a motion based on newly discovered evidence, the district court must find that the evidence was, in fact, "newly discovered; material to the defense; such that even with the exercise of reasonable diligence it could not have been discovered and produced for trial; non-cumulative; [and] such as to render a different result probable upon retrial."[15] The district court has the discretion to grant or deny a timely motion for a new trial, and the district court's determination will not be reversed on appeal absent a clear abuse of its discretion.[16]

The district court conducted a hearing on Wordlaw's motion prior to sentencing. Evidence was presented indicating that the victim, escorted by Wordlaw's sister, appeared in the public defender's office 23 days after the end of the trial and delivered a notarized statement in which she recanted the statement she made to police officers immediately after the battery. In her notarized statement, the victim now claimed that

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[15]Funches v. State, 113 Nev. 916, 923-24, 944 P.2d 775, 779-80 (1997).

[16]See Servin v. State, 117 Nev. 775, 792, 32 P.3d 1277, 1289 (2001).

Wordlaw never beat her with a beer bottle. Counsel for Wordlaw conceded that there was no effort made to contact the victim after her whereabouts were made known.

The district court questioned the credibility of the victim and veraciousness of her statement, noting that in domestic relationships where there is a battery, "[i]t wouldn't be the first time . . . that a wife or significant other has been entreated by a family member or Defendant to recant testimony or not be available or testify in their behalf." The district court also noted that the new evidence would have been countered by the three police officers who testified at trial that the victim informed them that Wordlaw did indeed strike her over the head with a bottle. Additionally, when the officers knocked down the apartment door after hearing sounds of an attack, they testified that they saw Wordlaw holding the neck of a beer bottle in his hand. Therefore, the district court concluded that the evidence presented in the notarized statement would not render a different result probable upon retrial. We agree and conclude that the district court did not err or abuse its discretion in denying Wordlaw's motion because the evidence in question, based on all of the above, does not establish grounds for a new trial.

Finally, Wordlaw contends that the district court erred at trial in allowing the State to present the statement of the unavailable victim pursuant to the excited utterance exception to the hearsay rule. Wordlaw claims that the State could not demonstrate that the victim's statements were "spontaneous enough to negate possible fabrication," or that she "was still under the stress of the event, in part because she had already had a conversation with emergency medical providers prior to the time she was interviewed by responding police officers." Wordlaw argues that the

admission of the victim's statement violated his Sixth Amendment right to confront the witnesses against him. We disagree with Wordlaw's contention.

In order to admit the out-of-court statement of an unavailable witness, "[f]irst, the Confrontation Clause usually requires the prosecution to demonstrate that the declarant is unavailable. Second, upon a showing of unavailability, the hearsay statement may be admitted if: (1) the statement satisfies the indicia of a 'firmly rooted' hearsay exception; or (2) the statement reflects 'particularized guarantees of trustworthiness.'"[17] The excited utterance exception to the hearsay rule provides that a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition is not inadmissible under the hearsay rule."[18] Timing is an essential factor in determining the applicability of the excited utterance exception.[19] Rulings on the admissibility of evidence are left to the sound discretion of the district court, and will not be disturbed on appeal absent a showing of manifest error.[20]

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[17]Bockting v. State, 109 Nev. 103, 108, 847 P.2d 1364, 1367 (1993) (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)); see also Rowland v. State, 118 Nev. 31, 42, 39 P.3d 114, 121 (2002).

[18]NRS 51.095.

[19]See Browne v. State, 113 Nev. 305, 313, 933 P.2d 187, 192 (1997); see also Hogan v. State, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987) (upholding the admission of a statement made one hour after a threat based on the excited utterance exception to the hearsay rule).

[20]See Keeney v. State, 109 Nev. 220, 228, 850 P.2d 311, 316 (1993), overruled on other grounds by Koerschner v. State, 116 Nev. 1111, 13 P.3d 451 (2000); Kazalyn v. State, 108 Nev. 67, 71-72, 825 P. 2d 578, 581

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We conclude that the district court did not err in allowing the admission of statements made to the police by the unavailable victim. Officer Coday of the Las Vegas Metropolitan Police Department testified that he was present with two other officers outside the victim's apartment, and that they heard "a lot of screaming and yelling and smacking noises." After the officers forcibly entered the apartment, they observed Wordlaw with a beer bottle in one of his hands, and holding the victim with his other hand; the victim was bleeding from her head and face. Wordlaw was taken into custody, and Officer Coday approached the victim. Officer Coday testified that the victim told him that Wordlaw came home "and was upset for some unknown reason, and immediately began calling her a bitch and started slapping her and hitting her. And at one point he picked up a beer bottle which also struck her on her face and on her back with." Officer Coday also testified that the victim "was visibly shaken, very nervous. She was crying: 'I'm scared.'" Two other officers testified that they had an opportunity to speak with the victim soon after she received medical attention, and that she was still crying, upset, and shaking when she told them both that Wordlaw had struck her with a beer bottle.

The victim could not be located and did not testify at either the preliminary hearing or at trial, and there was an outstanding bench warrant for her arrest. The victim's statements were the subject of a motion in limine and pretrial hearing in which the district court determined that the excited utterance exception to the hearsay rule applied. The district court concluded that the victim's statements to the

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. . . *continued*
(1992), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000).

police officers had a sufficient indicia of reliability because they were made under the stress of excitement caused by the battery. Moreover, we also conclude that the victim's statements did not violate Wordlaw's right to confront the witnesses against him because the statements contained particularized guarantees of trustworthiness in that they were made immediately after the battery occurred.[21] Therefore, based on all of the above, we conclude that the district court did not commit manifest error in allowing the admission of the victim's statements.

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

ORDER the judgment of the district court AFFIRMED.[22]

Becker, J.
Becker

Agosti, J.
Agosti

Gibbons, J.
Gibbons

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[21]See Franco v. State, 109 Nev. 1229, 1236-37, 866 P.2d 247, 252 (1993) (holding that a statement of a non-testifying hearsay declarant is admissible under the Confrontation Clause if it is deemed reliable).

[22]We have considered all proper person documents filed or received in this matter, and we conclude that the relief requested is not warranted.

cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk