IN THE SUPREME COURT OF THE STATE OF NEVADA

KENNETH WAYNE DORSEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41900

FILED

MAR 0 3 2005

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 burglary. Second Judicial District Court, Washoe County; James W. Hardesty, Judge. The district court adjudicated Dorsey a habitual criminal and sentenced him to serve a term of life in the Nevada State Prison with the possibility of parole after ten years.

Dorsey first contends that the evidence presented at trial was insufficient to support his burglary conviction. Specifically, Dorsey argues that the State introduced insufficient evidence to establish that he entered CLK Designs with the intent to commit larceny.[1]

Evidence is sufficient to uphold a conviction when a reasonable jury could have been convinced of the defendant's guilt beyond

[1]See NRS 205.060(1).

05-04173

a reasonable doubt.[2] "'[T]he test . . . is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to accept.'"[3] Circumstantial evidence is enough to support a conviction,[4] and the evidence will be considered in the light most favorable to the prosecution.[5]

We conclude that sufficient evidence was presented at Dorsey's trial from which a rational jury could find him guilty of burglary beyond a reasonable doubt. Employee Rae Swainston testified that CLK Designs was an interior design studio. Although CLK Designs sold a small number of items, such as pillows and lamps, it served primarily as a space where the owner would meet with clients to discuss interior design services. Swainston testified that she was outside the front entrance of the store putting up Christmas decorations when she heard a noise. Swainston looked into the store and observed Dorsey behind a desk, holding a cash box. The cash box had been located in the second drawer of

---

[2]Nika v. State, 113 Nev. 1424, 1434, 951 P.2d 1047, 1054 (1997), overruled on other grounds by Leslie v. Warden, 118 Nev. 773, 59 P.3d 440 (2002).

[3]Lisle v. State, 113 Nev. 679, 691, 941 P.2d 459, 467 (1997) (quoting Edwards v. State, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974)).

[4]Id. at 691-92, 941 P.2d at 467.

[5]Furbay v. State, 116 Nev. 481, 486, 998 P.2d 553, 556 (2000).

the desk. Swainston asked Dorsey what he was doing, and he replied that he did not take anything. Dorsey eventually put the cash box down and left. Swainston testified that Dorsey had entered CLK Designs through a side entrance. The jury could reasonably infer from Swainston's testimony that Dorsey entered CLK Designs with the intent to commit larceny. The jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports it.[6]

Second, Dorsey claims that the district court erred in admitting evidence of a prior burglary. In evaluating the admissibility of a prior bad act, the district court must determine whether "(1) the incident is relevant to the crime charged; (2) the act is proven by clear and convincing evidence; and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice."[7] The district court's decision concerning whether to admit or exclude evidence of a prior bad act will not be disturbed on appeal absent manifest error.[8]

We conclude that the district court did not err in determining that Dorsey's 1997 burglary conviction was sufficiently similar to the charged offense and therefore relevant as proof of Dorsey's intent to feloniously enter CLK Designs and commit larceny, as well as proof of

---

[6]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[7]Tinch v. State, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997).

[8]Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

preparation, plan, and absence of mistake.[9] Further, the district court did not commit manifest error in finding that the 1997 burglary was proven by clear and convincing evidence, and that its probative value was not substantially outweighed by the danger of unfair prejudice. We note that the district court diminished any potential prejudice by instructing the jury that it could consider Dorsey's prior conviction only for certain limited purposes consistent with NRS 48.045(2), and not as evidence of bad character or a disposition to commit crimes.

Third, Dorsey argues that the district court erred in ruling that the State would be allowed to cross-examine his proposed expert witness, Dr. Howle, concerning Dorsey's numerous prior convictions. As a result of the district court's decision, Dorsey did not call Dr. Howle as a witness.

A review of the record reveals that outside the presence of the jury, Dorsey made an offer of proof concerning the expected testimony of Dr. Howle. Dr. Howle was prepared to testify that Dorsey exhibited conduct consistent with an impulse control disorder, and that he showed signs of kleptomania. In response, the State argued that Dr. Howle's testimony would open the door for the State to cross-examine him concerning Dorsey's multiple prior convictions. Specifically, the State contended that because kleptomania is characterized by a sudden impulse

---

[9]See NRS 48.045(2); Tillema v. State, 112 Nev. 266, 269, 914 P.2d 605, 607 (1996).

to steal that is unrelated to financial need, Dorsey's previous convictions were relevant to rebut Dr. Howle's opinion. The district court ruled that the State would be allowed to question Dr. Howle about several of Dorsey's previous convictions that were otherwise inadmissible. Dorsey argues that the district court erred in failing to conduct a Petrocelli hearing[10] prior to making such a ruling.

The failure to conduct a Petrocelli hearing is not grounds for reversal if the record is sufficient for this court to determine that the prior bad act evidence was admissible.[11] Dorsey's prior convictions were relevant to Dr. Howle's expected opinion that Dorsey exhibited signs of kleptomania.[12] Further, the record is sufficient to determine that the remaining Tinch factors have been met. We therefore conclude that Dorsey is not entitled to relief on this claim.

Fourth, Dorsey contends that the district court erred in refusing his proffered jury instruction on the lesser-included offense of trespass. However, this court recently held that trespass is not a lesser-

---

[10]See Petrocelli, 101 Nev. 46, 692 P.2d 503.

[11]See Qualls v. State, 114 Nev. 900, 903, 961 P.2d 765, 767 (1998); Tinch, 113 Nev. at 1176, 946 P.2d at 1064-65.

[12]See NRS 50.305 (providing that an expert may be required to disclose underlying facts or data on which his opinion is based on cross-examination).

included offense of burglary.[13] Therefore, the district court did not err in refusing Dorsey's requested instruction.

Fifth, Dorsey claims that his adjudication as a habitual criminal amounted to cruel and unusual punishment in violation of both the United States and Nevada Constitutions.[14] In support of this contention, Dorsey argues that his prior convictions were non-violent property crimes, and some were remote in time.

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.[15] This court has consistently afforded the district court wide discretion in its sentencing decision,[16] 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."[17] Despite its severity, a sentence within the statutory limits is not cruel and unusual punishment where the statute itself is

---

[13]See Smith v. State, 120 Nev. ___, 102 P.3d 569 (2004).

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

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

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

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

constitutional, and the sentence is not so unreasonably disproportionate as to shock the conscience.[18]

The district court has broad discretion to dismiss a habitual criminal allegation,[19] and the decision to adjudicate an individual as a habitual criminal is therefore not an automatic one.[20] The district court "may dismiss a habitual criminal allegation when the prior convictions are stale or trivial or in other circumstances where a habitual criminal adjudication would not serve the purpose of the statute or the interests of justice."[21] 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."[22] This court 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 prior convictions.[23]

---

[18]Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996).

[19]See NRS 207.010(2).

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

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

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

[23]Hughes, 116 Nev. at 333, 996 P.2d at 893-94.

In the instant case, Dorsey's sentence was within the parameters provided by the relevant statute,[24] and was not so unreasonably disproportionate as to shock the conscience.[25] Further, Dorsey cannot demonstrate that the district court relied on impalpable or highly suspect evidence, or that the relevant statutes are unconstitutional. At his sentencing hearing, the State presented evidence of Dorsey's extensive criminal record, noting that Dorsey had thirty-three prior arrests, which resulted in six felony convictions, eight misdemeanor convictions, and four prison terms. At the conclusion of the sentencing hearing, the district court noted, "the State has a substantial interest in maintaining a long period of supervision over Mr. Dorsey should he ever be paroled" and found that habitual criminal adjudication was appropriate. Based on the record as a whole, we conclude that the district court understood its sentencing authority and exercised its discretion in adjudicating Dorsey a habitual criminal. We further conclude that Dorsey's sentence does not constitute cruel and unusual punishment under the federal or state constitutions.

Lastly, Dorsey argues that his adjudication as a habitual criminal violated the Sixth and Fourteenth Amendments of the United States Constitution because his prior convictions were never submitted to

---

[24]See NRS 207.010(1)(b)(2).

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

the jury and proved beyond a reasonable doubt. Dorsey cites to Apprendi v. New Jersey[26] in support of this proposition.

Dorsey failed to raise this objection below, and we conclude that no constitutional error occurred.[27] In Apprendi, the United States Supreme Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[28] Because Apprendi specifically excluded the fact of a prior conviction from its holding, Dorsey did not demonstrate that his constitutional rights were violated by the failure to present evidence of his prior convictions to a jury. Although Dorsey contends that subsequent United States Supreme Court decisions in Ring v. Arizona[29] and Blakely v. Washington[30] alter the analysis, we conclude that this argument is unpersuasive.

---

[26]530 U.S. 466 (2000).

[27]See Dzul v. State, 118 Nev. 681, 688, 56 P.3d 875, 880 (2002).

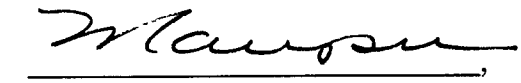
[28]530 U.S. at 490.

[29]536 U.S. 584 (2002) (holding that a capital sentencing scheme requiring a judge to determine aggravating circumstances violates the Sixth Amendment right to a jury trial).

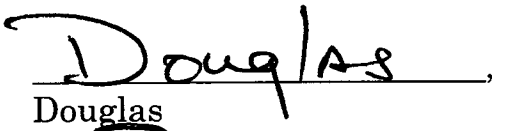
[30]542 U.S. ___ (2004) (holding that a sentencing scheme allowing a judge to increase the defendant's sentence beyond the standard range upon finding of "substantial and compelling reasons" violates the Sixth Amendment right to a jury trial).

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

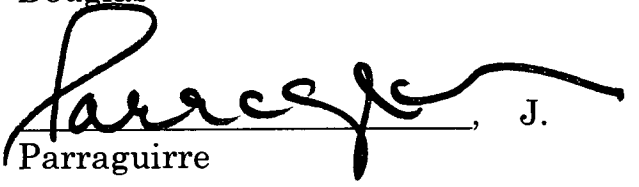
ORDER the judgment of the district court AFFIRMED.



_____, J.
Maupin



_____, J.
Douglas



_____, J.
Parraguirre

cc: Second Judicial District Court Dept. 9, District Judge
Richard F. Cornell
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk