

IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL STEWART SPENCER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42141

FILED

APR 05 2004

WETTE M BLOOM
CLERK OF SUPREME COURT
BY *J. Rihard*
DEPUTY CLERK

ORDER AFFIRMING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of burglary and two counts of obtaining property by false pretenses. The district court adjudicated Spencer a habitual criminal and sentenced him to serve a prison term of 6 to 20 years.

Spencer first contends that his conviction should be reversed because the district court failed to conduct a sufficient canvass to determine whether he knowingly and intelligently waived his right to testify. We conclude that Spencer's contention lacks merit.

This court has stated that "while it is good practice" for a trial court to advise a defendant about his constitutional right to testify, we have also held that such an advisement is not mandatory for purposes of a valid conviction.¹ In this case, the record reveals that the district court informed Spencer about his right to testify and Spencer acknowledged that he discussed whether he should testify with defense counsel. Our

¹Phillips v. State, 105 Nev. 631, 633, 782 P.2d 381, 382 (1989).

decision in Phillips v. State does not require anything more. Moreover, like the defendant in Phillips, there is no indication in the record that Spencer was coerced or misled into waiving his right to testify, nor is there any indication from Spencer that he wanted to testify.² Accordingly, we conclude that the district court did not err by failing to properly advise Spencer.

Spencer next contends that there was insufficient evidence presented to support his conviction for obtaining property by false pretenses. In particular, Spencer contends that there was no evidence that he obtained the tile saw from Earthstone Gallery on February 26, 2003, under false pretenses because, at the time of the purchase, he explained to the retailer that there were insufficient funds in his bank account to cover the check. Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.³

In particular, we note that Kelly Asher, the Earthstone Gallery bookkeeper, testified that on February 26, 2003, Spencer told her that the tile saw he had purchased from Earthstone one week before, on February 20, 2003, had been stolen and requested that Asher loan him a new tile saw until he received an insurance settlement on the stolen saw. Asher refused to loan Spencer a saw, but agreed to hold Spencer's personal

²See id.

³See 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).

check until Friday when the insurance check was purportedly due to arrive. After holding the check for the requisite period, Asher deposited it. The personal check Spencer wrote on February 26, as well as the check he wrote on February 20, were returned for insufficient funds. Asher contacted Spencer about the checks and he agreed to bring in the money to pay for the saws, but never did. Additionally, the State presented testimony from two pawnshop employees that Spencer had pawned the two tile saws on the same days that he purchased them. Finally, according to a bank employee, Spencer's checking account had been closed by the bank on February 24, 2003, and Spencer had been personally notified by telephone and also by mail that his account was closed. Additionally, the bank employee testified that the highest balance in Spencer's account at any given time was \$280.00.

Although Spencer alleges that he intended to deposit funds in the account to pay for the saw he received from Earthstone on February 26, the jury could reasonably infer from the evidence presented that Spencer used false pretenses to obtain it. 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.⁴ We therefore conclude that Spencer's contention lacks merit.

⁴See 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).

Nonetheless, we conclude that remand of this case is required because the district court erred at sentencing. Specifically, the sentence set forth in the judgment of conviction provides for only one definite term of 6 to 20 years in prison. Spencer, however, was convicted of four offenses. Therefore, Spencer was not sentenced to definite terms on each conviction.⁵ This appears to have been the result of some confusion regarding the application of the habitual criminal statute.

When the district court adjudicates a defendant as a habitual criminal, the habitual criminal statute allows for enhancement of the sentence for the substantive crimes charged.⁶ Thus, in such cases, the district court uses the habitual criminal statute to determine the penalty to be imposed for the substantive crimes charged.⁷ Moreover, our decision in Lisby v. State⁸ does not stand for the proposition that when a defendant is adjudicated as a habitual criminal he may receive only one sentence regardless of the number of substantive crimes charged. Rather, Lisby simply stands for the proposition that a defendant may not receive a sentence for the substantive crime charged and a separate sentence for

⁵See NRS 176.033(1)(b); NRS 176.035; Powell v. State, 113 Nev. 258, 264 n.9, 934 P.2d 224, 228 n.9 (1997).

⁶See NRS 207.010(1); Hollander v. State, 82 Nev. 345, 353-54, 418 P.2d 802, 806-07 (1966).

⁷Hollander, 82 Nev. at 353-54, 418 P.2d at 806-07.

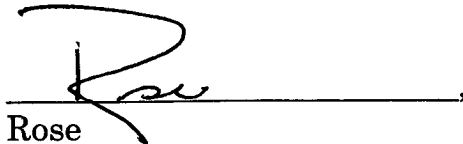
⁸82 Nev. 183, 414 P.2d 592 (1966).


being a habitual criminal.⁹ The district court's failure to specify a sentence for each of Spencer's convictions must therefore be corrected.

For the reasons stated above, we

ORDER the judgment of conviction AFFIRMED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.¹⁰


Shearing C.J.


Rose J.


Maupin J.

cc: Hon. James W. Hardesty, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk
Michael Stewart Spencer

⁹Id. at 189, 414 P.2d at 595-96; see also Staude v. State, 112 Nev. 1, 7, 908 P.2d 1373, 1377 (1996), modified on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002).

¹⁰Because appellant is represented by counsel in this matter, we decline to grant appellant permission to file documents in proper person in this court. See NRAP 46(b). Accordingly, the clerk of this court shall return to appellant unfiled all proper person documents appellant has submitted to this court in this matter.