IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES ARCILLE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42794

FILED

AUG 24 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant James Arcille to serve two consecutive prison terms of 60-156 months and ordered him to pay $1,007.00 in restitution.

First, Arcille contends that the district court erred in excluding a prospective juror during voir dire. Arcille also claims that the district court utilized a double standard during voir dire that benefited the State. We disagree.

Initially, we note that Arcille failed to preserve this issue for review on appeal. Specifically, he failed to object during voir dire. Failure to raise an objection with the district court generally precludes appellate consideration of an issue.[1] This court may nevertheless address alleged error if it was plain and affected the appellant's substantial rights.[2] We

[1]See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997).

[2]See NRS 178.602.

conclude that no plain error occurred in this case, and that Arcille's contention is without merit.

Second, Arcille contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of robbery with the use of a deadly weapon. Arcille claims that the property was not taken in the presence of the victim and that the State failed to prove that a deadly weapon was used. We disagree.

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.[3] 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, sufficient evidence supports the verdict.[4] We also note that circumstantial evidence alone may sustain a conviction.[5] Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.[6]

Third, Arcille contends that the district court improperly instructed the jury regarding the definitions of "deadly weapon" and "use" of a deadly weapon. We disagree and conclude that the "use" instruction was clear and unambiguous and required the jury to find that a deadly weapon was used, not necessarily by means resulting in actual injury, but

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[3]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also NRS 200.380(1); NRS 193.165(1).

[4]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).

[5]See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

[6]See Martinez v. State, 114 Nev. 746, 748, 961 P.2d 752, 754 (1998); see also Guy v. State, 108 Nev. 770, 775, 839 P.2d 578, 581 (1992).

to produce a fear of harm. Further, we conclude that Arcille cannot demonstrate that he was prejudiced by the "deadly weapon," and the error in providing an incomplete instruction, if any, was harmless.[7]

Fourth, Arcille contends that he was denied the right to a fair trial due to the cumulative effect of several discovery violations.[8] Arcille argues that the State failed to provide him, prior to trial, with the shirt worn by the victim at the time of the robbery, a video taken of the incident, and the victim's medical records. Arcille claims: "[i]n one sense, some of these items could be considered Brady material."[9] We conclude that Arcille's contention is without merit.

Even assuming that the victim's shirt was either intentionally or inadvertently withheld, we cannot conclude that there was a Brady violation. Arcille fails to demonstrate that the evidence at issue was favorable to his defense, or that he was prejudiced.[10] Further, Arcille was aware of the existence of the shirt due to the crime scene photographs, yet he never requested to see or examine the shirt.[11] And finally, even if evidence of the shirt had been disclosed to the defense, we conclude that there was not a "reasonable probability" that the outcome of the trial would have been different.[12]

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[7]See NRS 178.598.

[8]See DeChant v. State, 116 Nev. 918, 927, 10 P.3d 108, 113 (2000).

[9]Brady v. Maryland, 373 U.S. 83, 87 (1963).

[10]See Strickler v. Greene, 527 U.S. 263, 281-82 (1999).

[11]See Steese v. State, 114 Nev. 479, 495, 960 P.2d 321, 331 (1998).

[12]Mazzan v. Warden, 116 Nev. 48, 66, 993 P.2d 25, 36 (2000); Jimenez v. State, 112 Nev. 610, 619, 918 P.2d 687, 692 (1996).

Next, Arcille contends that the State committed a discovery/Brady violation by not providing him with the videotape of the robbery in a timely fashion. We disagree.

This court has stated that the "resolution of discovery issues is normally within the district court's discretion."[13] And "[i]t is within the district court's sound discretion to admit or exclude evidence, and 'this court will not overturn [the district court's] decision absent manifest error.'"[14]

We conclude that the district court did not abuse its discretion in resolving this discovery issue. Arcille has failed to demonstrate that he was prejudiced in any way by the district court's ruling, or that the State committed a discovery violation. We further conclude that the State did not impermissibly withhold the videotape of the robbery, and thus, did not violate the mandate of Brady.

Next, Arcille contends that the State committed another discovery/Brady violation when, "on the last day of trial, medical records were introduced into evidence that had not been turned over to the defense prior to the beginning of the trial." We disagree and conclude that the district court did not abuse its discretion in admitting a portion of the victim's medical records. To the extent that the physician's notes contained information from the victim about his present symptoms and the cause of his injury, and were pertinent to both diagnosis and treatment, the information was admissible under the medical records and

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[13]Floyd v. State, 118 Nev. 156, 167, 42 P.3d 249, 257 (2002), cert. denied 537 U.S. 1196 (2003).

[14]Means v. State, 120 Nev. ___, ___, 103 P.3d 25, 29 (2004) (quoting Collman v. State, 116 Nev. 687, 702, 7 P.3d 426, 436 (2000)) (footnote omitted).

diagnosis exception to the hearsay rule.[15] Finally, because we conclude that there are no discovery and/or Brady violations, Arcille's contention that the cumulative effect of the alleged errors denied him a fair trial is without merit.

Fifth, Arcille contends that the State, during its opening argument, violated a pretrial order of the district court regarding spontaneous statements he made at the time of his arrest. Arcille has not provided this court with any relevant authority and/or cogent argument in support of his assignment of error.[16] Further, Arcille has not demonstrated that the prosecutor did, in fact, commit any misconduct.[17]

Sixth, Arcille contends that his due process rights were violated at sentencing. At the first date set for the sentencing hearing, the district court granted the State's motion for a continuance. Arcille now claims that the two-week delay was "unreasonable." We disagree and conclude that Arcille's right to due process at sentencing was not violated by the two-week continuance. Arcille has not offered any argument or provided this court with any relevant authority in support of his contention that he was somehow prejudiced by the delay.[18] Therefore, we conclude that the district court did not err.

Finally, Arcille contends that the district court abused its discretion at sentencing. Arcille argues that the sentence, "which on the

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[15]See NRS 51.115; see also Koerschner v. State, 116 Nev. 1111, 1118, 13 P.3d 451, 456 (2000), holding modified on other grounds by State v. Dist. Ct. (Romano), 120 Nev. ___, 97 P.3d 594 (2004).

[16]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

[17]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

[18]See Prince, 118 Nev. at 641, 55 P.3d at 951 (citing Barker, 407 U.S. at 532); see also Maresca, 103 Nev. at 673, 748 P.2d at 6.

low end is equal to having received two small habitual criminal sentences," is too harsh. 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.[19] This court has consistently afforded the district court wide discretion in its sentencing decision.[20] The district court's discretion, however, is not limitless.[21] Nevertheless, we 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."[22] 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 to the crime as to shock the conscience.[23]

In the instant case, Arcille does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant sentencing statutes are unconstitutional. In fact, the sentence imposed by the district court was within the parameters provided by the relevant statutes.[24] At the sentencing hearing, the State discussed Arcille's

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

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

[21]Parrish v. State, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000).

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

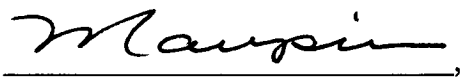
[23]Allred v. State, 120 Nev. 410, 420, 92 P.3d 1246, 1253 (2004).

[24]See NRS 200.380(2); NRS 193.165(1).

extensive criminal history and described him as a "career criminal." Therefore, based on all of the above, we conclude that the district court did not abuse its discretion by imposing a sentence that was too harsh.

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

ORDER the judgment of conviction AFFIRMED.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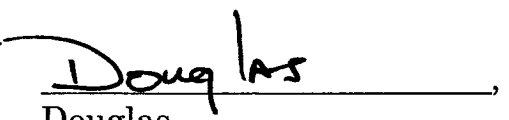
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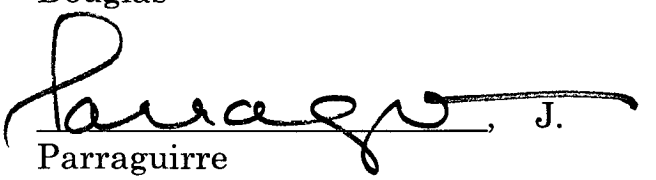
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cc: Hon. Donald M. Mosley, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk