IN THE SUPREME COURT OF THE STATE OF NEVADA

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

No. 44541

FILED

MAR 28 2007

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

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction, upon jury verdict, of grand larceny. Second Judicial District Court, Washoe County; James W. Hardesty, Judge. The district court adjudicated appellant Kenneth Wayne Dorsey a habitual criminal and sentenced him to a term of life imprisonment with the possibility of parole after ten years.

Dorsey entered a Reno beauty and grooming supply store owned by Bonnie and Joseph Wright. The Wrights were the only staff present, with Joseph manning the store's warehouse and Bonnie staffing the retail counter.

Dorsey proceeded to the store's nail-care section, which was a few feet away from the in-house office where an open safe was located. During Dorsey's eight-to-ten minute stay, Bonnie repeatedly inquired of Dorsey whether she could help him, but he responded that he was waiting for someone. Bonnie eventually saw with her peripheral vision Dorsey perform a scooping/swooping motion but did not see Dorsey physically enter the office. After this, Dorsey indicated that he would depart and said, "That's a beautiful flag," apparently in reference to a flag that was inside the office by the safe. Although he did not run, Dorsey hurriedly left.

Bonnie then yelled to her husband, who looked in the safe and declared that the deposit, allegedly consisting in part of $560 cash, was missing. Dorsey was later apprehended and charged with one count of burglary, one count of grand larceny, and one count of habitual criminality. At trial, Bonnie testified to the $560 value of the missing cash, based upon a calculator tape. In addition, Joseph testified to counting the money and generating a calculator tape on the morning of the incident. The calculator tape was not introduced. Dorsey did not testify at trial.

Over the objection of Dorsey's counsel, the trial court read a flight instruction to the jury. After commencing their deliberations, the jury initially deadlocked on the burglary and grand larceny counts, but eventually returned a guilty verdict on the grand larceny count after the court reporter read back Bonnie's trial testimony to them. In adjudicating Dorsey a habitual criminal, the district court took judicial notice of Dorsey's prior felony convictions. Dorsey now appeals.

Sufficient/competent evidence

Dorsey first argues that his grand larceny conviction cannot be sustained because there was insufficient and incompetent evidence that the money taken exceeded $250, the value threshold for grand larceny.[1] Dorsey offers three reasons why the evidence was insufficient or incompetent: (1) its admission violated the best evidence rule, (2) it

[1]See NRS 205.220(1)(a) (stating that a person commits grand larceny if the person intentionally steals, takes, and carries away personal goods or property, with a value of $250 or more, owned by another person).

constituted hearsay, and (3) the evidence's admission violated Crawford v. Washington.[2]

In a criminal case where a jury has arrived at a guilty verdict, the relevant inquiry is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution.[3]

Best evidence rule and hearsay

Dorsey argues that Bonnie's testimony about the $560 taken violated the best evidence rule and constitutes inadmissible hearsay because it was based on the calculator tape that Joseph generated, but which was not admitted at trial. We conclude that Dorsey waived appellate consideration of this issue because he failed to object to the relevant testimony during trial.[4]

Considering the issue under the plain error standard, we further conclude that there was no plain error because the alleged errors were not unmistakably apparent from a casual inspection of the record.[5] The best evidence rule does not prohibit Joseph's testimony that he personally counted the money and generated a calculator tape as a

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[2]541 U.S. 36 (2004).

[3]Milton v. State, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995); Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984).

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

[5]See Patterson v. State, 111 Nev. 1525, 1530, 907 P.2d 984, 987 (1995).

byproduct of that process.[6] Further, although Bonnie's testimony regarding Joseph's statements and his calculator entries may have constituted hearsay, the district court properly allowed his testimony because Joseph, the declarant, testified and was subject to cross-examination.[7]

In addition, we conclude that the alleged errors did not affect Dorsey's substantial rights because they were not prejudicial.[8] The Wrights were present at the trial and the defense had an opportunity to cross-examine them regarding their knowledge of the $560 figure.

Crawford v. Washington

Dorsey contends that a police report reciting the $560 amount constituted an "uncross-examined" testimonial out-of-court statement, which violated Crawford, as well as his Sixth and Fourteenth Amendment rights to confrontation and cross-examination. However, Dorsey's contention lacks merit because although the Wrights filed the police report, they also personally testified at trial and were subject to cross-examination on their statements to the police.[9]

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[6]See NRS 52.235 ("To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in this title.").

[7]See Crawford, 541 U.S. at 50-59; see also NRS 51.075(1) ("A statement is not excluded by the hearsay rule if its nature and the special circumstances under which it was made offer assurances of accuracy not likely to be enhanced by calling the declarant as a witness, even though he is available.").

[8]See Gallego v. State, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001).

[9]See City of Las Vegas v. Walsh, 121 Nev. ___, ___, 124 P.3d 203, 207 (2005) ("In Crawford, the [United States Supreme] Court held that the

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Because we are not persuaded by Dorsey's arguments on this matter, we conclude that the State met its burden to prove beyond a reasonable doubt that the money taken exceeded $250.

Flight instruction

Although we agree with Dorsey's next contention that the district court erred in giving a flight instruction unsupported by sufficient evidence, we conclude that the error was harmless because it did not prejudice the defendant's substantial rights. Evidence of flight is circumstantial evidence that a jury can consider to determine guilt,[10] and flight instructions are proper where such evidence has been presented.[11] However, we carefully scrutinized the record to determine if the evidence actually warranted a flight instruction because of the possibility of undue influence by such an instruction.[12] After our examination of the record, we conclude that there is not sufficient evidence indicating that Dorsey left the store in a deliberate attempt to avoid apprehension or arrest, or with a consciousness of guilt. Rather, the evidence indicates that he merely left the scene. However, in light of the testimony that no one else but Dorsey

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Confrontation Clause bars the use of a testimonial statement made by a witness who does not appear at trial, unless the witness is unavailable to testify at trial, and the defendant had a prior opportunity to cross-examine the witness regarding the statement.") (citing Crawford, 541 U.S. at 68-69).

[10]Maresca v. State, 103 Nev. 669, 674, 748 P.2d 3, 6-7 (1987).

[11]Potter v. State, 96 Nev. 875, 875-76, 619 P.2d 1222, 1222 (1980).

[12]See Miles v. State, 97 Nev. 82, 85, 624 P.2d 494, 496 (1981).

was near the safe during the timeframe in which the money was taken, we conclude that the erroneous flight instruction does not mandate reversal.[13]

Taking judicial notice of prior convictions

We agree with Dorsey's next argument that the district court erred in adjudicating him a habitual criminal after taking judicial notice of his prior convictions, which were established in a separate criminal proceeding over which the same district court had also presided.[14] "For the defendant to be sentenced as a habitual criminal, the State must prove the defendant's prior convictions beyond a reasonable doubt."[15] However, "[i]t is a general rule that courts should not take judicial notice of their records in another and different case, even though the cases are connected. . . ."[16] Although this rule is not absolute,[17] the circumstances in this particular case do not warrant an exceptional invocation of judicial

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[13]See Potter, 96 Nev. at 876, 619 P.2d at 1222-23.

[14]See Dorsey v. State, Docket No. 41900 (Order of Affirmance, March 3, 2005) (affirming judgment of conviction, pursuant to a jury verdict, of one count of burglary; adjudication as a habitual criminal; and sentence to a term of life imprisonment with the possibility of parole after ten years).

[15]Hymon v. State, 121 Nev. ___, ___, 111 P.3d 1092, 1103 (2005) (citing Hollander v. State, 82 Nev. 345, 349-50, 418 P.2d 802, 804 (1966)).

[16]Occhiuto v. Occhiuto, 97 Nev. 143, 145, 625 P.2d 568, 569 (1981) (determining that exception to general rule applied and the district court was justified in taking judicial notice of parties' prior divorce proceeding given the close relationship between the proceeding and the action at hand).

[17]See id.

notice.[18] Instead, certified copies or other evidence of Dorsey's previous convictions should have been received by the district court in making its adjudication.[19] Thus, we conclude that a new sentencing hearing is warranted.

Entitlement to jury trial as to habitual criminal adjudication

Finally, we conclude that Dorsey's argument that he is constitutionally entitled to a jury trial on the question of habitual criminal adjudication lacks merit. In Apprendi v. New Jersey,[20] the United States Supreme Court held that any fact that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to the jury and proved beyond a reasonable doubt. Because Apprendi specifically excludes the fact of prior conviction from its holding, Dorsey has failed to demonstrate that he is entitled to relief. We note that the Court reaffirmed the Apprendi holding in United States v. Booker.[21]

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[18]See State v. Davis, 69 S.E. 639, 643 (W. Va. 1910) (holding that a court could not take judicial notice of a former conviction for purposes of imposing an increased penalty for a second conviction, even though the former conviction took place in the same court and on a previous day of the same term as the present trial).

[19]See NRS 207.016(5) (stating that a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony for purposes of NRS 207.010).

[20]530 U.S. 466, 490 (2000).

[21]543 U.S. 220, 244 (2005) (holding that the Sixth Amendment is violated by the imposition of an enhanced sentence under the Federal Sentencing Guidelines based on the sentencing judge's determination of a fact, other than a prior conviction, that was not found by the jury or admitted by the defendant).

Dorsey further argues that NRS 207.010(1)(b) violates Apprendi because the sentencing court has discretion to either dismiss the habitual criminal count or adjudicate the defendant a habitual criminal and impose one of three sentences. He contends that the Sixth Amendment would not be violated if the statute mandated one specific sentence upon the finding of three prior felony convictions. We conclude that Dorsey's contention lacks merit for the reasons stated in O'Neill v. State.[22]

For the foregoing reasons, we affirm Dorsey's conviction,[23] but we reverse his sentence and remand this case to the district court for a new sentencing hearing. Accordingly, we

ORDER the judgment of the district court AFFIRMED IN

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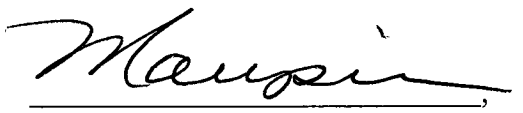
[22]123 Nev. ___, ___, ___ P.3d ___ (2007).

[23]We have also considered Dorsey's argument that the evidence was insufficient to establish the asportation element of grand larceny, but conclude that it lacks merit.

PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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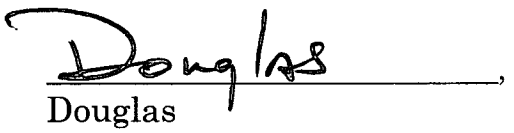

J.
Douglas

J.
Parraguirre

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