IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL ANTHONY KING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 56691

FILED

MAY 10 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of one count each of burglary, attempted burglary, and possession of burglary tools. Eighth Judicial District Court, Clark County; David Wall, Judge.

Amended information

Appellant Michael Anthony King contends that he was forced to choose between asserting his right to a speedy trial and presenting an effective defense when the district court allowed the State to amend the criminal information on the eve of trial. An information may be amended at any time before the verdict is rendered so long as the amendment does not allege additional or different offenses and the defendant's substantial rights are not prejudiced. NRS 173.095(1). Here, the State sought to amend the information by adding aiding and abetting theories to each of the charges. It argued that evidence of an unidentified accomplice adduced during the preliminary hearing raised "the concept of criminal liability of the defendant as an aider and abettor;" Barren v. State, 99 Nev. 661, 668, 669 P.2d 725, 729 (1983), requires the State to specifically allege in the information that the defendant aided and abetted; and the State had provided King with a draft of the amended information two days

earlier. King objected to the amendment, but acknowledged that further investigation would not be helpful. We note that there is no indication that the State engaged in "unfair concealment or vacillation" regarding its aiding and abetting theory of the case, see Randolph v. State, 117 Nev. 970, 978, 36 P.3d 424, 429 (2001), and we conclude that the district court did not abuse its discretion by allowing the information to be amended, see Viray v. State, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005).

Sufficiency of evidence

King contends that insufficient evidence supports his conviction for attempted burglary because the State failed to present any evidence that he intended to enter the garage and commit a crime therein. We review the evidence in the light most favorable to the prosecution and determine whether any rational juror could have found the essential elements of the crime beyond a reasonable doubt. McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992). Here, the jury heard testimony that, at 2:30 in the morning, King entered the victim's vehicle and used the victim's garage door opener to open the victim's garage. The victim observed King standing on the neighbor's porch across the street. When the police arrived, they found King, dressed in black, hiding in some shrubbery. The police searched King and the area where he was hiding and recovered the victim's garage door opener, several other garage door openers, tools for opening locks, and a few flashlights. King admitted to the police that he opened the garage door and stated that he was looking for money. We conclude that a rational juror could reasonably infer from this testimony that King opened the victim's garage door with the intent to enter the garage and commit larceny. See NRS 193.200 (intent); NRS 193.330(1) (attempts); NRS 205.060(1) (burglary); Sharma v. State, 118

Nev. 648, 659, 56 P.3d 868, 874 (2002) (observing that "intent . . . is inferred by the jury from the individualized, external circumstances of the crime"). 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. Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

Habitual criminal adjudication

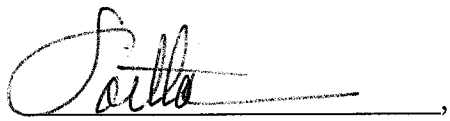
King contends that the district court abused its discretion by adjudicating him a habitual criminal because his prior crimes were nonviolent and some were remote in time. However, "NRS 207.010 makes no special allowance for non-violent crimes or for the remoteness of [prior] convictions; instead, these are considerations within the discretion of the district court." Arajakis v. State, 108 Nev. 976, 983, 843 P.2d 800, 805 (1992). Accordingly, we conclude that the district court did not abuse its discretion in this regard. See NRS 207.010(2); O'Neill v. State, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007).

King further contends that his 5- to 12-year prison sentence "for a small-time theft that caused no physical harm shocks the conscience." We review a district court's sentencing determination for abuse of discretion. Randell v. State, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). Because King does not argue that the habitual criminal punishment statute is unconstitutional, his sentence is within the parameters of that statute, and we are not convinced that the sentence is so grossly disproportionate to the gravity of the offense and King's history of recidivism as to shock the conscience, we conclude that the sentence does not violate the constitutional proscriptions against cruel and unusual punishment. See NRS 207.010(1)(a); Ewing v. California, 538 U.S. 11, 29

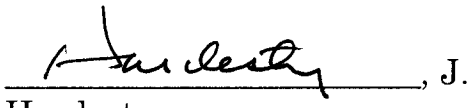
(2003) (plurality opinion); Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion); Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996); Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

Having considered King's contentions and concluded that he is not entitled to relief, we

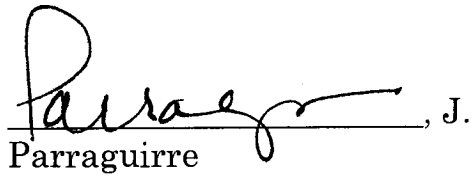
ORDER the judgment of conviction AFFIRMED.



_____, J.
Saitta



_____, J.
Hardesty



_____, J.
Parraguirre

cc: Chief Judge, Eighth Judicial District Court
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk