IN THE SUPREME COURT OF THE STATE OF NEVADA

SEAN EDWARD COOTS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 59670
SEAN EDWARD COOTS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 60117

FILED

DEC 13 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

These are consolidated appeals from a judgment of conviction, pursuant to a jury verdict, of two counts of felon in possession of a firearm and a judgment of conviction, pursuant to a no contest plea, of trafficking in a controlled substance. Third Judicial District Court, Lyon County; David A. Huff, Judge.

Docket Number 59670

Sufficiency of the evidence

Appellant Sean Edward Coots contends that insufficient evidence was adduced at trial to support his convictions for felon in possession of a firearm. He specifically asserts that the evidence was insufficient because the State failed to show that he constructively possessed the firearms. We disagree.

Coots stipulated that he was a felon. Trial testimony established that Coots was under police surveillance. Over a six-week period, police observed Coots at his mother's Dayton residence on several

occasions. Police officers obtained a search warrant and went to the home. At Coots' home, they spoke with his mother. She directed them to Coots' room. On a desk in the room, police officers discovered a piece of mail addressed to Coots. Under the bed, police officers discovered several casino player's cards with Coots' name on them. In the closet, police officers found two shotguns in plain sight.

We conclude that the evidence supporting this conviction, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. NRS 202.360(1)(a); Jackson v. Virginia, 443 U.S. 307, 319 (1979); McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

Hearsay

Coots argues that the admission of testimony from Detectives Hales and Miller that Coots' mother directed them to the location of Coots' bedroom was inadmissible hearsay. Even if the detectives' responses were deemed error, they are nevertheless harmless. Here, substantial evidence connected Coots to the room; namely, the police surveillance, the mail, and the player's cards. Therefore, reversal is not warranted. See Abram v. State, 95 Nev. 352, 356, 594 P.2d 1143, 1145 (1979) (concluding that errors in admitting evidence are harmless if there is overwhelming evidence of guilt).

Prosecutorial misconduct

Coots contends that the prosecutor committed two instances of misconduct. We analyze claims of prosecutorial misconduct in two steps: first, we determine whether the prosecutor's conduct was improper, and second, if the conduct was improper, we determine whether it warrants reversal. Valdez v. State, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008).

When the misconduct has been preserved for appeal, we use a harmless-error standard to determine whether it warrants reversal. Id. at 1190, 196 P.3d at 477.

Coots argues that the prosecutor committed misconduct during opening statements. Coots points to three statements made by the prosecutor. During opening statements, the prosecutor said: "And it's important that these weren't small guns. It's not like he can say he didn't know they were there." And later, "I'm not sure how he can say with a straight face that those guns weren't his." Coots argues that he never spoke with the State and that the prosecutor "was testifying to the jury about statements that were never made." Coots also argues that the prosecutor's statement that at the end of the trial, the jury should "hold him accountable" improperly invited the jury to "send [Coots] a message." After the prosecution had concluded their opening statement, Coots objected but did not request a curative instruction. Even assuming that the prosecutor's comments were improper, we conclude that they were harmless and no relief is warranted on this basis alone. See Browning v. State, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) ("[P]rejudice from prosecutorial misconduct results when a prosecutor's statements so infect the proceedings with unfairness as to make the results a denial of due process." (alteration omitted) (internal quotation marks omitted)); Knight v. State, 116 Nev. 140, 144-45, 993 P.2d 67, 71 (2000) ("A prosecutor's comments should be viewed in context, and 'a criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" (quoting United States v. Young, 470 U.S. 1, 11 (1985))).

Next, Coots argues that the prosecutor committed misconduct by implying that he had a burden to elicit evidence. During closing

arguments, the prosecutor asked the jury a rhetorical question: "[I]f they weren't his [guns] whose were they?" Coots did not object to the prosecutor's statement. Coots argues that this question improperly shifted the burden of proof and implied that Coots "must prove they were someone else's weapons." Generally, it is "improper for a prosecutor to comment on the defense's failure to produce evidence" because such comments shift the burden of proof to the defense. Whitney v. State, 112 Nev. 499, 502, 915 P.2d 881, 883 (1996). However, so long as the prosecutor does not comment on the defendant's decision not to testify, it is permissible for the prosecutor to comment on the fact that the defendant failed to substantiate the defense theory of the case with supporting evidence, Evans v. State, 117 Nev. 609, 631, 28 P.3d 498, 513 (2001); see also Leonard v. State, 117 Nev. 53, 81, 17 P.3d 397, 415 (2001). We conclude that the prosecutor's statement attempted to show that Coots did not substantiate his allegations that he did not own the guns, and therefore did not constitute misconduct.

Coots also argues that the cumulative effect of the prosecutor's misconduct requires reversal. But we have found only one error, which was harmless. "One error is not cumulative error." U.S. v. Sager, 227 F.3d 1138, 1149 (9th Cir. 2000); see also Hoxsie v. Kerby, 108 F.3d 1239, 1245 (10th Cir. 1997) ("Cumulative-error analysis applies where there are two or more actual errors."); State v. Perry, 245 P.3d 961, 982 (Idaho 2010) ("[A] necessary predicate to the application of the doctrine [of cumulative error] is a finding of more than one error.").

Jury instructions

Coots argues that the district court made two jury-instruction errors. We disagree. This court reviews the district court's decision as to

jury instructions for an abuse of discretion or judicial error. Grey v. State, 124 Nev. 110, 122, 178 P.3d 154, 163 (2008

First, Coots argues that the district court erred by giving instruction number 9, which defined actual and constructive possession, because only constructive possession was applicable. Coots also argues that the definition of constructive possession improperly included language about joint possession. We conclude that any error in giving this instruction was harmless. The jury instruction was a correct statement of the law. See Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996) (defining actual and constructive possession); see also Batin v. State, 118 Nev. 61, 65-66, 38 P.3d 880, 883 (2002) (recognizing definition of "constructive possession"). The State and Coots conceded that this case did not involve actual possession during their closing arguments. And the portion of the instruction regarding joint possession required the State to prove that Coots possessed the weapon while allowing that others might have shared that possession.

Second, Coots contends that the district court erred by refusing to give a negatively phrased instruction relating to actual or constructive possession. As a general rule, a defendant is entitled to jury instructions on his or her theory of the case so long as some evidence exists to support it, and if the proposed instruction contains the correct law. Crawford v. State, 121 Nev. 744, 751, 121 P.3d 582, 586 (2005). However, the district court may refuse jury instructions on the defendant's theory of the case which are substantially covered by other instructions. Earl v. State, 111 Nev. 1304, 1308, 904 P.2d 1029, 1031 (1995). Coots' proposed instruction is not a negatively phrased position or theory instruction. Instead, the instruction merely indicated that this was not an

actual possession case and repeated the State's burden of proof. We conclude that the district court did not err by refusing to give this instruction.

Sentencing hearing

Coots argues that the district court abused its discretion during sentencing. Coots specifically takes issue with accusations made by the prosecutor that Coots is a "Tier III sex offender" and that the district court considered several uncharged, but related, drug-trafficking offenses that were contained in the presentence investigation report and were used to support the prosecutor's sentencing argument. We have consistently afforded the district court wide discretion in its sentencing decisions. See Houk v. State, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987). "'A sentencing court is privileged to consider facts and circumstances which would clearly not be admissible at trial.'" Todd v. State, 113 Nev. 18, 25, 931 P.2d 721, 725 (1997) (quoting Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996)). However, "the district court must refrain from punishing a defendant for prior uncharged crimes. Consideration of those crimes is solely for the purpose of gaining a fuller assessment of the defendant's life, health, habits, conduct, and mental and moral propensities." Denson v. State, 112 Nev. 489, 494, 915 P.2d 284, 287 (1996) (quotation marks omitted). Here, Coots fails to demonstrate that the district court relied solely on "impalpable and highly suspect evidence." Id. at 492, 915 P.2d at 286. Moreover, Coots' prison term of life with the possibility of parole falls within the parameters provided by the relevant statute. See NRS 207.010(1)(b)(2). We conclude that the district court did not abuse its discretion at sentencing.

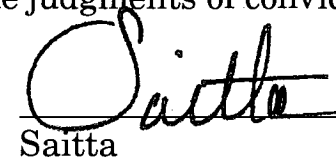
Coots also contends that the district court erred by relying on three constitutionally infirm prior convictions to adjudicate him a habitual criminal. Specifically, he argues that the State failed to prove that he was afforded his constitutional rights in his prior convictions. We review the district court's habitual-criminal adjudication for an abuse of discretion. See NRS 207.010(2); O'Neill v. State, 123 Nev. 9, 12, 153 P.3d 38, 40 (2007). The record reveals that the district court relied upon certified court documents that proved the existence of three prior felony convictions, Coots failed to prove that they were not felonies, and he failed to overcome the presumption of regularity afforded criminal convictions. See NRS 207.010(1)(b); NRS 207.016(5); Dressler v. State, 107 Nev. 686, 697-98, 819 P.2d 1288, 1295-96 (1991). Accordingly, we conclude that Coots has failed to demonstrate that the district court abused its discretion in this regard.

Docket Number 60117

Coots argues that the no contest plea he entered in docket number 60117 is invalid because of the alleged errors that occurred during the trial in docket number 59670. Because the record does not indicate that Coots challenged the validity of his guilty plea in the district court, his claim is not appropriate for review on direct appeal from the judgment of conviction and, therefore, we need not address it. See Bryant v. State, 102 Nev. 268, 272, 721 P.2d 364, 368 (1986), superseded by 1991 Nev. Stat., Ch. 44, §§ 31-33, at 92 as stated in Hart v. State, 116 Nev. 558, 562 n.3, 1 P.3d 969, 971 n.3 (2000); see also O'Guinn v. State, 118 Nev. 849, 851-52, 59 P.3 488, 489-90 (2002).

Having considered Coots' contentions and concluded that no relief is warranted, we

ORDER the judgments of conviction AFFIRMED.



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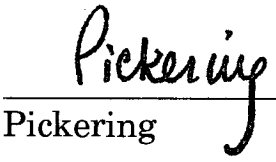

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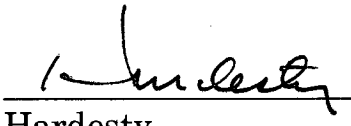

_____, J.
Hardesty

cc: Third Judicial District Court
Steve E. Evenson
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Lyon County District Attorney
District Court Clerk