IN THE SUPREME COURT OF THE STATE OF NEVADA

MONICA SHAWN BROWN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 89654

FILED
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ELIZABETH A. BROWN
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BY
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ORDER AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

This is an appeal from a judgment of conviction for exploitation of an older or vulnerable person and theft. Eighth Judicial District Court, Clark County; Erika L. Mendoza, Judge.

Melvina Watts-Young was a 63-year-old California resident and a recently widowed cancer survivor suffering from neuropathy. Watts-Young first met Monica Brown, a realtor, when Watts-Young sought to sell her California home and relocate to Nevada. Brown showed Watts-Young a few homes in Henderson and offered to help Watts-Young sell her California home. Brown sent Watts-Young an electronic document which Watts-Young understood would permit Brown to negotiate the sale of the California home on Watts-Young's behalf. Watts-Young testified that the document was scrambled and confusing, but signed the document on Brown's insistence. Watts-Young later realized that the document gave Brown power of attorney. Watts-Young testified that she never would have signed the document had she known what it was.

After the California home was sold, the sale proceeds were deposited in Watts-Young's bank account. Brown then contacted Watts-Young's bank requesting a transfer of funds. When the bank denied the

request, Brown contacted Watts-Young to approve the transfer for "the house and everything." Believing funds were needed to purchase a home in Henderson that Brown had shown her, Watts-Young authorized a transfer of $63,000. However, Brown deposited the money into an account owned by Brown and her husband, Lawrence Brown, and later transferred most of the money to an account owned solely by Lawrence.

Using Watts-Young's money, Brown purported to buy Watts-Young (1) a home, (2) a new car, and (3) a new living room set. In reality, Brown used the funds to rent Watts-Young a home in North Las Vegas on a 12-month lease at $1,300 per month, financed a $20,000 Jeep in Lawrence's name, and purchased a living room set. Dissatisfied with the situation on her arrival to Las Vegas, Watts-Young spent one night in the home before returning to California the next day to spend the summer with her family. That day, Brown informed Watts-Young by text that the lease was a twenty-four month lease at $1,300 per month, for a total of $31,200. However, at trial, the landlord contradicted Brown by testifying that the lease was actually only for twelve months.

Brown tried contacting Watts-Young several times throughout the summer, but Watts-Young testified that she communicated to Brown that she was not happy with Brown's conduct and did not want to talk to Brown until she returned to Las Vegas. Brown testified at trial that after making dozens of unsuccessful attempts to contact Watts-Young, her family, and friends, she surmised that Watts-Young had died.

In July, Brown ceased making rental payments on the Las Vegas home and sought to recover the Jeep so that she could surrender it to the financing company. After a tow truck driver came to take the Jeep, Watts-Young protested, as she believed she owned the vehicle outright. Similarly, when Watts-Young returned to the Las Vegas home in August,

she discovered that the landlord had initiated eviction proceedings which surprised her as she had not fully realized until that time the home was a rental. At trial, the landlord testified to only receiving the initial deposit/startup fees, and rent from May through July, totaling approximately $4,150. Brown never returned the unspent portion of the $63,000 to Watts-Young.

In 2019, the State filed an information charging Brown with one count of exploitation of an older or vulnerable individual and one count of theft. The complaint alleged that Brown accomplished the first count by "entering into a course with Lawrence Brown of conduct whereby [Brown] and Lawrence Brown transferred money out of [Watts-Young's] bank account" for specified items that were never provided to Watts-Young nor used for her benefit." At the preliminary hearing, the prosecutor noted that while Lawrence had not been charged, the State considered him a co-conspirator in the commission of the charged offenses and continually referred to Lawrence as being involved in the conduct resulting in the charges.

Due to multiple continuances, resulting in part from the COVID-19 pandemic, Brown's trial did not begin until Monday, May 20, 2024, five years after the preliminary hearing. The Saturday before Brown's trial, the State moved to amend its information to add three theories of prosecution: that Brown committed the crime (1) directly; (2) by aiding or abetting another; and/or (3) by way of conspiracy with another. The State claimed that these amendments were meant to clarify the manner by which Brown committed the charged offenses and to realign the information with the evidence and testimony presented at the preliminary hearing. Brown opposed. The district court initially denied the motion to amend, but later ultimately granted it.

Following trial, the jury found Brown guilty of exploitation of an older or vulnerable person, $5,000 or more, and theft, $3,500 or more. At the sentencing hearing Brown requested probation and the State pushed for jail time. After hearing from both parties, the district court observed that the sentencing decision was "a very difficult call," acknowledging that Watts-Young had been "irreparably affected" by Brown's conduct, but noting that Brown "presents like a productive member of the community, who has seemingly a good heart" and no prior criminal background. The district court also observed that "at the end of the day ultimately what I need to see to be confident to give Ms. Brown a shot would be some kind of remorse that I've never seen" and that Brown "still can't bring herself to say that she actually did anything wrong." The district court added that Brown doubled down on her conduct, was insincere, and failed to take accountability for her actions. Following this explanation, the district court sentenced Brown to 24-60 months of incarceration and ordered restitution be made to Watts-Young.

Brown appeals her conviction and sentence. On appeal, we consider whether (1) the district court abused its discretion at Brown's sentencing, (2) the district court abused its discretion in permitting the State to amend its information at trial, and (3) the evidence was sufficient to support Brown's conviction.

The district court abused its discretion at Brown's sentencing

We conclude that the district court abused its discretion when it considered Brown's lack of remorse or accountability in its sentencing decision. "A sentencing judge is allowed wide discretion in imposing a sentence; absent an abuse of discretion, the district court's determination will not be disturbed on appeal." *Randell v. State*, 109 Nev. 5, 8, 846 P.2d 278, 280 (1993). An abuse of discretion occurs when a court's decision is

arbitrary or capricious, or if it exceeds the bounds of law or reason. *In re Eric A.L.*, 123 Nev. 26, 33, 153 P.3d 32, 36-37 (2007). "If [a] judge relies upon prejudicial matters, such reliance constitutes an abuse of discretion that necessitates a resentencing hearing before a different judge." *Brake v. State*, 113 Nev. 579, 584, 939 P.2d 1029, 1033 (1997) (citation modified).

A defendant retains her Fifth Amendment rights after a jury verdict because the appellate process is still available. *Bushnell v. State*, 97 Nev. 591, 593, 637 P.2d 529, 531 (1981). We have held that a defendant's Fifth Amendment rights are violated, and an abuse of discretion occurs, when a district court considers a defendant's lack of remorse at sentencing. *Brown v. State*, 113 Nev. 275, 291, 934 P.2d 235, 245-46 (1997) ("The district court violated [defendant's] Fifth Amendment rights by considering his lack of remorse when he still had a constitutional right to maintain his innocence . . .") (citation modified); *Brake*, 113 Nev. at 585, 939 P.3d at 1033 ("[T]he district court's consideration of [defendant's] 'lack of remorse' after he had maintained his innocence violated [defendant's] Fifth Amendment rights and constituted an abuse of discretion.").

The record shows that the district court's sentencing analysis carefully weighed the facts before ultimately considering, as the dispositive issue, Brown's lack of remorse and accountability. Doing so constituted an abuse of discretion and violated Brown's Fifth Amendment rights. Accordingly, because the district court abused its discretion at sentencing, Brown must receive a new sentencing hearing before a different judge. *See Brake*, 113 Nev. at 585, 939 P.2d at 1033 (holding that a new sentencing hearing before a different judge was required after the original sentencing judge improperly considered the defendant's lack of remorse).

The district court did not abuse its discretion in permitting the State to amend its information before trial

The district court's decision to allow the State's amendment did not prejudice Brown's substantial rights. The decision to permit an amendment of a charging document is within a district court's discretion. *Viray v. State*, 121 Nev. 159, 162, 111 P.3d 1079, 1081 (2005) NRS 173.095(1) states that "[t]he court may permit an indictment or information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." This court has read NRS 173.095(1) in conjunction with the requirement that the "State . . . give adequate notice to the accused of the various theories of prosecution." *State v. Eighth Jud. Dist. Ct.*, 116 Nev. 374, 377, 997 P.2d 126, 129 (2000). The purpose of the notice requirement is to provide a criminal defendant with information on the charges against him so that he can prepare an adequate defense. *See Viray*, 121 Nev. at 162, 111 P.3d at 1081-82.

As a threshold matter, we decline Brown's request for this court to hold that an "unnecessary five-year delay" in adding theories of prosecution creates a rebuttable presumption of prejudice. Brown points to no caselaw requiring such a holding in this context, nor does she offer any compelling reason why this circumstance requires such a presumption. Further, recognizing the kind of presumption that Brown suggests would erode the discretion this court has provided district courts in ruling on the propriety of charging document amendments. *Id.* at 162, 111 P.3d at 1081.

This court has permitted amendment of charging documents throughout trial. *Id.* at 162, 111 P.3d at 1081 (allowing amendment made on the first day of trial); *Hollander v. State*, 82 Nev. 345, 353, 418 P.2d 802, 806 (1966) (allowing amendment made after completion of trial on the

substantive offense where the amendment was not prejudicial). The State may amend an information when doing so clarifies how the alleged crime was committed. *See Shannon v. State*, 105 Nev. 782, 785, 783 P.2d 942, 944 (1989) (allowing the State to amend to clarify how the defendant sexually assaulted a victim); *DePasquale v. State*, 106 Nev. 843, 848, 803 P.2d 218, 221 (1991) (permitting State to amend information to clarify how the defendant beat the victim to death). The State may also amend an information when the amendment is consistent with evidence presented at a preliminary hearing, and where doing so does not affect an appellant's ability to prepare for trial. *Nall v. State*, 85 Nev. 1, 3, 448 P.2d 826, 827 (1969).

The State's initial information alleged that Brown exploited an older or vulnerable person by:

> entering into a course with Lawrence Brown of conduct whereby [Brown] and Lawrence Brown transferred money out of the [victim's] bank account for the purpose of buying or renting a home and buying a vehicle, and failed to provide those items, using [victim's] funds not for her benefit, in the total approximate amount of $57,411.21.

The State moved to amend the information the Saturday before trial to add the following text:

> The Defendant being criminally liable under one or more of the following principles of criminal liability, to wit: (l) by directly committing this crime; and/or (2) by aiding or abetting in the commission of this crime, with the intent that this crime be committed, by counseling, encouraging, hiring, commanding, inducing and/or otherwise procuring the other to commit the crime; and/or (3) pursuant to a conspiracy to commit this crime, with the intent that this crime be committed, Defendant aiding or abetting and/or conspiring by Defendant acting in concert throughout.

Brown's argument that she received insufficient notice of the added prosecutorial theories is unpersuasive. As discussed, the State may amend an information to clarify the manner by which an alleged crime was committed, including where doing so is consistent with testimony provided at a preliminary hearing. *Shannon*, 105 Nev. at 785, 783 P.2d at 944; *DePasquale*, 106 Nev. at 848, 803 P.2d at 221. The State's amendment did just that. There was ample evidence presented at the preliminary hearing implicating Lawrence's involvement in the same course of conduct as Brown that formed the basis for the charged offenses. And the original, unamended information specifically identifies Lawrence as one whom Brown "entered into a course with" in the commission of the criminal conduct. From this evidence, Brown was adequately apprised that the State intended to prove her guilt through her actions in relation to Lawrence such that she could prepare to defend against it at trial.

Brown's argument that the delayed nature of the State's amendment constituted unfair surprise or trial by ambush is rebutted by the plain terms of NRS 173.095(1), which permits amendment of an information up to the end of trial so long as a defendant's substantial rights are not prejudiced. Brown cites no case law suggesting that such a delay violates a defendant's substantial rights, nor does she explain how she was ambushed or surprised at trial because of the State's amendment. Brown also fails to show how this alleged error compromised her ability to defend herself at trial. Even if Brown is correct that *Viray* requires that a defendant receive sufficient notice to "prepare" a defense, rather than "present" a defense, Brown does not explain how her trial preparation or strategy would have been different had she received adequate notice of the prosecutorial theories, or how the allegedly insufficient notice actually prejudiced Brown's ability to defend herself. *See Viray*, 121 Nev. at 162,

111 P.3d at 1081. Accordingly, we conclude that the district court did not abuse its discretion in permitting the State to amend its information at trial.

The evidence was sufficient to convict Brown for exploitation of an older or vulnerable person[1]

When analyzing the sufficiency of the evidence in a criminal case, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Nolan v. State*, 122 Nev. 363, 377, 132 P.3d 564, 573 (2006) (quoting *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)).

The charging document alleged that Brown willfully exploited an older or vulnerable person. Reviewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of this crime beyond a reasonable doubt.

First, Watts-Young was an older or vulnerable person. *See* NRS 200.5092(6) (an "older person" is a person aged 60 or older); NRS 200.5092(8) (a "vulnerable person " is a person who "(a) [s]uffers from a condition of physical or mental incapacitation because of a developmental disability, organic brain damage or mental illness; or (b) [h]as one or more physical or mental limitations that restrict the ability of the person to perform the normal activities of daily living.").

Second, a juror could reasonably conclude that Brown willfully exploited Watts-Young. "Willful" means an act or omission that is

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[1]Although Brown's notice of appeal indicates that she challenges both the theft and exploitation convictions, Brown only argued insufficiency of the evidence as to the exploitation conviction, not the theft conviction. Accordingly, we consider only the sufficiency of the evidence as to the exploitation conviction.

intentional, deliberate, or with design. *State v. Second Jud. Dist. Ct.*, 136 Nev. 191, 196, 462 P.3d 671, 675 (2020). Exploitation occurs when a person, having the trust and confidence of an older or vulnerable person, or through use of a power of attorney:

> (a) Obtain[s] control, through deception, intimidation or undue influence, over the older person's or vulnerable person's money, assets or property with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his or her money, assets or property; or
>
> (b) Convert[s] money, assets or property of the older person or vulnerable person with the intention of permanently depriving the older person or vulnerable person of the ownership, use, benefit or possession of his or her money, assets or property.

NRS 200.5092(3). Undue influence "means the improper use of power or trust in a way that deprives a person of his or her free will and substitutes the objectives of another person. *Id.* Conversion is "a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." *Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 606, 5 P.3d 1043, 1048 (2000) (quoting *Wantz v. Redfield*, 74 Nev. 196, 198, 326 P.2d 413, 414 (1958)).

The State's evidence was sufficient for a juror to find willful exploitation under NRS 200.5092(3)(a) and (b). The evidence at trial showed that Brown gained Watts-Young's trust by positioning herself as a trusted advocate, and then deceived and pressured Watts-Young into signing a power of attorney document which Watts-Young did not understand. The State also provided sufficient evidence that Brown exploited this misunderstanding by using the deceptively-acquired power of attorney, and Watts-Young's permission, to transfer $63,000 from Watts-

Young's bank account to Brown and her husband. Moreover, because Brown did not use the majority of the funds for Watts-Young's benefit, and the outstanding funds were never returned to Watts-Young, Watts-Young was permanently deprived of her money.

Additionally, a juror could conclude that Brown legally failed to provide a house or a car to Watts-Young, as neither the home rental nor the Jeep were purchased in Watts-Young's name. Instead, the evidence at trial showed that Brown and Lawrence were listed as the financially liable parties on both the home lease and on the Jeep's registration documents, and legal title or responsibility was never turned over to Watts-Young. Accordingly, we hold that there was sufficient evidence to support Brown's conviction.[2] We therefore

ORDER the judgment of the district court AFFIRMED as to the guilt phase of the trial, REVERSED as to the sentencing phase of trial, and REMAND this matter to the district court for resentencing before a different judge.

Stiglich, J.

Cadish, J.

Lee, J.

[2]Brown also argues that cumulative error requires reversal. Cumulative error only arises where there is more than one error. *See Carroll v. State*, 132 Nev. 269, 287, 371 P.3d 1023, 1035 (2016). The only error was the district court's abuse of discretion at sentencing. Because there are no errors to accumulate, we reject Brown's argument.

cc: Hon. Erika L. Mendoza, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk