

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 35761

STATE OF IDAHO,)	2011 Unpublished Opinion No. 447
)	
Plaintiff-Respondent,)	Filed: April 21, 2011
)	
v.)	Stephen W. Kenyon, Clerk
)	
RAMIRO R. RAMIREZ,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Fifth Judicial District, State of Idaho, Jerome County. Hon. John K. Butler, District Judge.

Order denying motion for mistrial; order revoking probation; and judgment of conviction, affirmed.

Molly J. Huskey, State Appellate Public Defender; Elizabeth Ann Allred, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Kenneth K. Jorgensen, Deputy Attorney General, Boise, for respondent.

GRATTON, Chief Judge

Ramiro R. Ramirez appeals from his judgment of conviction entered upon a jury verdict finding him guilty of burglary, Idaho Code § 18-1401. We affirm.

I.

FACTS AND PROCEDURAL BACKGROUND

The facts of this case are set forth in an unpublished opinion, *State v. Digiallonardo*, Docket No. 35755 (Ct. App. November 5, 2010) (unpublished), addressing the appeal of Garrett Digiallonardo, Ramirez’s co-defendant:

At approximately 10:30 p.m. on March 4, 2008, an assistant manager at Domino’s Pizza in Jerome, Carol Jones, and the lone other employee, Jamie Ceja, went behind the building for a cigarette break while in the process of closing the restaurant for the evening. Jones sat in the driver’s seat of her vehicle, parked just outside the back door, and Ceja sat in the backseat. The back door of the restaurant was open and Jones had her windows down.

After a short time, the women heard a car approach, two doors slam, and two men approach the restaurant. The men stopped to pull masks or bandanas over their faces before entering the back door. Jones testified that one of the men was wearing a gray hooded sweatshirt and was carrying a gun and the other was wearing dark clothing. She rolled up her car windows and instructed Ceja to call 911. Jones watched as the men entered the restaurant. The man in the gray sweatshirt went directly to the office. The other man went out of sight, but then ran out the back door toward the vehicle in which he came, without looking at the women. She then stated that the man with the weapon exited the building, stopped at the vehicle and she asked him, "What do you want?" He reached for the door handle, and Jones told him it was locked. The man said something to her, which she could not decipher because it was muffled, and then pointed the rifle at her face. Jones started her vehicle and began backing it up. The man ran toward his vehicle and the perpetrators left, with the women following them for a short distance and Ceja describing the incident to dispatch. The women returned to the store where they discovered that the men had not taken anything, including any of the approximately \$1,700 cash that was accessible or in plain sight at the time. Both employees told police the perpetrators were Hispanic, driving a silver Honda, one had a shotgun, and both had either bandanas or gorilla masks over their faces.

At approximately 10:47 p.m., an officer stopped a silver two-door Honda Civic traveling out of Jerome County into Twin Falls County. [Garrett] Digiallonardo was the driver and Ramiro Ramirez was in the passenger seat. After two officers arrived to assist, Digiallonardo and Ramirez were pulled from their vehicle at gunpoint, handcuffed, and placed in patrol cars. Subsequently, the Domino's employees were instructed to drive to the scene, where they viewed the men's vehicle and affirmed that while they had not seen their faces, Digiallonardo and Ramirez were similar in height and build to the men they had seen at Domino's. Jones also identified a gray hooded sweatshirt found in the vehicle as the same as that worn by one of the perpetrators.

Digiallonardo and Ramirez were charged with burglary, Idaho Code § 18-1401, aiding and abetting aggravated assault, I.C. §§ 18-901, 18-905, 18-204, and aiding and abetting attempted robbery enhanced by the use of a firearm, I.C. §§ 18-6501, 18-6502, 18-204, 19-2502. The men were tried in a joint trial, after which the jury acquitted them of the aiding and abetting charges, but found them guilty of burglary.

The district court imposed a sentence of ten years, with five years determinate, and retained jurisdiction. Ramirez filed a timely notice of appeal from the judgment of conviction.

At the conclusion of the period of retained jurisdiction, the district court suspended execution of the sentence and placed Ramirez on probation for a period of ten years. Approximately three months later, a motion to revoke probation was filed based upon allegations that Ramirez had violated his probation by absconding probation and being charged with

attempted murder and armed robbery. Thereafter, an addendum to the motion to revoke probation was filed alleging that Ramirez had also violated his probation by resisting and obstructing an officer. Ramirez ultimately admitted to violating his probation by being convicted of resisting and obstructing. The district court revoked probation and ordered execution of the original sentence.

II. ANALYSIS

A. Motion for Mistrial

Ramirez contends that the district court erred by not granting his motion for a mistrial which was made after a testifying officer referred to Idaho Rule of Evidence 404(b) evidence that had specifically been excluded by the district court. He claims that the nature of the inadmissible testimony was such that the curative instruction was insufficient and that no instruction would be sufficient to “dismiss the prejudicial effect from the minds of the jury.” The State argues that because Ramirez did not accept the court’s offer to further instruct the jury, he cannot now argue that the instruction given was insufficient. The State also asserts that even if an error occurred, any error was harmless.

In criminal cases, motions for mistrial are governed by Idaho Criminal Rule 29.1. A “mistrial may be declared upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives the defendant of a fair trial.” I.C.R. 29.1(a). Our standard for reviewing a district court’s denial of a motion for mistrial is well established:

[T]he question on appeal is not whether the trial judge reasonably exercised his discretion in light of circumstances existing when the mistrial motion was made. Rather, the question must be whether the event which precipitated the motion for mistrial represented reversible error when viewed in the context of the full record. Thus, where a motion for mistrial has been denied in a criminal case, the “abuse of discretion” standard is a misnomer. The standard, more accurately stated, is one of reversible error. Our focus is upon the continuing impact on the trial of the incident that triggered the mistrial motion. The trial judge’s refusal to declare a mistrial will be disturbed only if that incident, viewed retrospectively, constituted reversible error.

State v. Urquhart, 105 Idaho 92, 95, 665 P.2d 1102, 1105 (Ct. App. 1983). The error will be deemed harmless if the appellate court is able to declare, beyond a reasonable doubt, that there

was no reasonable possibility that the event complained of contributed to the conviction. *State v. Morgan*, 144 Idaho 861, 863-864, 172 P.3d 1136, 1138-1139 (Ct. App. 2007).

Here, the State filed a notice of intent to use possible I.R.E. 404(b) evidence--specifically, that it intended to elicit testimony regarding the theft of a .410 shotgun from a residence the day before the incident at Domino's Pizza. Officers had discovered that Digiallonardo had been inside the residence three to six months earlier and had likely seen the shotgun. The State sought to introduce evidence that the shotgun had been stolen from an individual that had been in contact with Digiallonardo on the date of the alleged robbery, and said that Digiallonardo was on his way to pick up Ramirez. The State admitted, however, that it had no evidence that Digiallonardo had been at the residence the day of the theft or that he had ever possessed the stolen shotgun, or any reason to believe that the .410 shotgun shells found in Digiallonardo's vehicle had been stolen from the residence. The court concluded the evidence was inadmissible, stating that irrespective of whether the evidence was admissible under I.R.E. 404(b), the evidence was not relevant given the tenuous connection between Ramirez and Digiallonardo and the stolen shotgun, and the shotgun and the Domino's incident.

However, while the prosecutor at trial was examining one of the officers as to his investigation of the case, after they had discussed the officer's photographs of the footprints and tire tracks at the scene, the following exchange occurred:

[Prosecutor:] With respect to your investigation of this case, did you do anything in addition?

[Officer:] Once I had learned that the shotgun shells were .410 shotgun shells there, I did check with a local store, Wal-Mart, to see if they had sold any recently, perhaps who they had sold them to. I wasn't able to determine that anywhere sold to anyone involved in this case within the week prior to the incident. *I also assisted in trying to locate a stolen shotgun that was reported stolen from Jerome County the night before --*

At this point, both Ramirez and Digiallonardo objected and the State indicated that it had no objection to the testimony being stricken. The district court instructed the jury that it "will disregard that last comment regarding the stolen shotgun." The jury was excused and both co-defendants argued that the district court should declare a mistrial due to the State having elicited testimony regarding the stolen shotgun, notwithstanding the district court's ruling that such evidence was inadmissible. The State admitted that it had failed to instruct the officer not to

testify regarding the stolen shotgun and the defendants contended that due to the reference, the jury would presume the shotgun theft involved a .410 shotgun. The district court denied the defendants' motion for a mistrial, noting there had been no reference to a specific theft--only a general comment made as to a stolen shotgun. The court proposed a further curative instruction to the jury, but the defendants declined, believing it would only emphasize the testimony and would fail to cure the error.

Following their convictions, Ramirez and Digiallonardo again argued for a mistrial on the basis that the officer's testimony regarding the stolen shotgun deprived them of the right to a fair trial. The district court found that while the officer's reference to the shotgun was "clearly . . . an error or legal defect within the proceedings," such error was harmless where the jury had been instructed to disregard the statement, where, in the court's view, the shotgun reference was only relevant to the assault and robbery charges, both of which Ramirez and Digiallonardo had been acquitted, and there was "other sufficient evidence" including:

[t]he description of the defendants' vehicle, the description of the defendants' clothing, the description of the footprints of the distinctive marks of the defendants' shoes which were found in the vicinity, but where the defendants' vehicle was parked at the time of the incident.

In *State v. Grantham*, 146 Idaho 490, 198 P.3d 128 (Ct. App. 2008), this Court reviewed a lower court's denial of a motion for mistrial where the court gave a curative instruction following the motion. The Court announced the standard set forth in *Urquhart*, identified the appellant's contention on appeal, including the fact that the appellant argued that the curative instruction was insufficient, and then stated:

The admission of improper evidence does not automatically require the declaration of a mistrial. *State v. Hill*, 140 Idaho 625, 631, 97 P.3d 1014, 1020 (Ct. App. 2004); *State v. Rose*, 125 Idaho 266, 269, 869 P.2d 583, 586 (Ct. App. 1994). Where improper testimony is inadvertently introduced into a trial and the trial court promptly instructs the jury to disregard such evidence, it is ordinarily presumed that the jury obeyed the court's instruction entirely. *Hill*, 140 Idaho at 631, 97 P.3d at 1020. We normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be devastating to the defendant. *Id.*; see also *Greer v. Miller*, 483 U.S. 756, 766 n.8, 107 S.Ct. 3102, 3109 n.8, 97 L.Ed.2d 618, 630 n.8 (1987). An error is harmless, rather than reversible, when the reviewing court can find beyond a reasonable doubt that the jury would have reached the same result without the admission of

the challenged evidence. *State v. Barcella*, 135 Idaho 191, 197, 16 P.3d 288, 294 (Ct. App. 2000).

Grantham, 146 Idaho at 498, 198 P.3d at 136. *Grantham* makes clear that where a trial court gives a curative instruction, the appellate court may consider that factor in its review of whether, in the context of the full record, the alleged error is reversible.

Ramirez argues that the reference to the stolen shotgun, which was made in violation of the district court's order, was "so overly prejudicial," even considering the court's instruction to the jury to disregard the evidence, that it may have contributed to the jury verdict. Having reviewed the error in the context of the full record, we conclude that this is not a case where the jury would be unable to follow the court's instruction to disregard the officer's reference to a stolen shotgun, or where the evidence would be devastating to Ramirez. The reference was a relatively short, inadvertent statement that did not appear to be intentionally elicited by the prosecutor and the jury was promptly instructed to disregard the statement--which was reinforced by the court's preliminary and final instructions to the jury. The statement was general and did not specifically link Ramirez or Digiallonardo to the theft of the shotgun--nor did it link the perpetrator of the incident to the theft. Moreover, as noted by the district court, the reference to the stolen shotgun related, if at all, to the charges for which Ramirez and Digiallonardo were acquitted. Given the relatively generic nature of the evidence, it did not influence the jury to a degree that it could not be cured by the given instruction. We agree with the district court that when viewed within the context of the full record, there was no reasonable possibility that the officer's reference contributed to Ramirez's conviction. Therefore, we conclude that the district court did not err in denying Ramirez's motion for a mistrial.

B. Excessive Sentence

Ramirez contends that his sentence was excessive. He acknowledges that his sentence is within the statutory limits. However, he contends that it is excessive under any view of the facts. An appellate review of a sentence is based on an abuse of discretion standard. *State v. Burdett*, 134 Idaho 271, 276, 1 P.3d 299, 304 (Ct. App. 2000). Where a sentence is not illegal, the appellant has the burden to show that it is unreasonable, and thus a clear abuse of discretion. *State v. Brown*, 121 Idaho 385, 393, 825 P.2d 482, 490 (1992). A sentence may represent such an abuse of discretion if it is shown to be unreasonable upon the facts of the case. *State v. Nice*, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982). A sentence of confinement is reasonable if it

appears at the time of sentencing that confinement is necessary “to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation or retribution applicable to a given case.” *State v. Toohill*, 103 Idaho 565, 568, 650 P.2d 707, 710 (Ct. App. 1982). Where an appellant contends that the sentencing court imposed an excessively harsh sentence, we conduct an independent review of the record, having regard for the nature of the offense, the character of the offender, and the protection of the public interest. *State v. Reinke*, 103 Idaho 771, 772, 653 P.2d 1183, 1184 (Ct. App. 1982). When reviewing the length of a sentence, we consider the defendant’s entire sentence. *State v. Oliver*, 144 Idaho 722, 726, 170 P.3d 387, 391 (2007).

Ramirez asserts that the district court abused its discretion when it failed to properly consider the mitigating factors in his case, specifically his admitted substance abuse problem, desire for treatment, friend and family support, taking accountability for his actions, and status as a first-time felony offender. The court did not abuse its discretion. The court noted that it must consider the four goals of sentencing and that, given the nature of the underlying offense, and the facts and circumstances of the case, “protection of society . . . is the primary concern that this court should have.” The court also acknowledged that it had information in the PSI, as well as the substance abuse evaluation, from which to consider rehabilitation.

However, the court noted that in reviewing all of the information, Ramirez’s conduct, i.e., twelve prior misdemeanor or juvenile convictions involving some violence and some inappropriate sexual behavior, had now elevated to his first felony offense. The court also noted that Ramirez had been afforded probation on his prior offenses, that he was on probation when he committed the instant offense, and that the probation had not accomplished its “intended purpose . . . which is rehabilitation.” The court concluded that it must take into account Ramirez’s “escalating behavior” which led to the burglary conviction. The court specifically acknowledged that Ramirez had a “significant substance abuse history” and that he wanted help to get treatment, but that probation would be inappropriate in light of the fact that he had not “previously followed through or followed through with what was expected . . . on probation.” Ultimately, the district court indicated that its primary concern was the protection of society.

The district court appropriately considered the goals of sentencing, including various mitigating factors. Applying the foregoing standards and having reviewed the record in this case, we conclude that Ramirez has failed to demonstrate that the court abused its discretion.

C. Revocation of Probation

Ramirez argues that the district court abused its discretion by revoking his probation. He asserts that because he was willing to seek treatment and live in a halfway house, the goals of his rehabilitation and the protection of society could best be served by his continued probation, long-term treatment, and placement in a halfway house.

It is within the trial court's discretion to revoke probation if any of the terms and conditions of the probation have been violated. I.C. §§ 19-2603, 20-222; *State v. Beckett*, 122 Idaho 324, 325, 834 P.2d 326, 327 (Ct. App. 1992); *State v. Adams*, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989); *State v. Hass*, 114 Idaho 554, 558, 758 P.2d 713, 717 (Ct. App. 1988). In determining whether to revoke probation, a court must examine whether the probation is achieving the goal of rehabilitation and consistent with the protection of society. *State v. Upton*, 127 Idaho 274, 275, 899 P.2d 984, 985 (Ct. App. 1995); *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *Hass*, 114 Idaho at 558, 758 P.2d at 717. The court may, after a probation violation has been established, order that the suspended sentence be executed or, in the alternative, the court is authorized under Idaho Criminal Rule 35 to reduce the sentence. *Beckett*, 122 Idaho at 325, 834 P.2d at 327; *State v. Marks*, 116 Idaho 976, 977, 783 P.2d 315, 316 (Ct. App. 1989). A decision to revoke probation will be disturbed on appeal only upon a showing that the trial court abused its discretion. *Beckett*, 122 Idaho at 325, 834 P.2d at 327.

On appeal, Ramirez quotes his statement to the court in the probation violation disposition hearing, wherein he expressed his desire to enroll in a halfway house and attend treatment. He asserts that his statement supports the conclusion that the goal of his rehabilitation would have been met with his continued probation and treatment. The district court, however, noted that Ramirez had been afforded an opportunity to enroll in a halfway house, but that he had absconded from that program. The court recalled Ramirez's own words in the PSI report prepared for sentencing, wherein Ramirez indicated that he planned to change his "attitude, thoughts, beliefs, and to think positively and use the wisdom that [he] learned." The district court also noted that Ramirez stated, "All I want is a second chance to prove myself to other people and myself and that I can make it in the community." The court concluded, "I granted you that second chance when I afforded you the rider. Your behavior hasn't changed since the rider, your behavior hasn't changed since you were on probation; and if anything, your behavior has worsened." Significantly, the court determined, "the problem I see is that I can't take you at

your word, because your words thus far are not supported by your actions.” Ramirez does not challenge any of the court’s findings on appeal. Rather, he contends that the court should have allowed him to remain on probation because he recognized his need for treatment and, if given the opportunity to complete this treatment, he would resolve his substance abuse issues. The district court was not required to take Ramirez at his word and, indeed, did not. The court concluded that it would be “irresponsible” to place Ramirez back into the community and, thus, revoked probation. We conclude that the district court did not abuse its discretion.

III.

CONCLUSION

The district court did not err in denying Ramirez’s motion for a mistrial. The district court did not abuse its discretion in sentencing Ramirez or in revoking his probation. Accordingly, Ramirez’s judgment of conviction and sentence are affirmed.

Judge GUTIERREZ and Judge MELANSON **CONCUR.**