IN THE SUPREME COURT OF THE STATE OF NEVADA

CHANNING BERNARD GARDNER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44206

FILED

MAR 3 0 2005

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court adjudicated Channing Bernard Gardner as a habitual criminal and sentenced him to serve a prison term of 5 to 20 years.

Gardner first contends that his constitutional rights to due process and a fair trial were violated when the district court gave jury instruction number 11, providing:

> Every person who unlawfully breaks and enters or unlawfully enters any building may reasonably be inferred to have broken and entered it or entered it with the intent to commit a larceny and/or a felony therein, unless the unlawful breaking and entering is explained by evidence satisfactory to the jury to have been made without criminal intent. (Emphasis added.)

While acknowledging that the jury instruction restates the statutory presumption of criminal intent set forth in NRS 205.065, Gardner argues that it is unconstitutional because: (1) it shifts the burden of proving the intent element of burglary to the defendant; and (2) there is no rational connection between the fact proved and the ultimate fact presumed. We conclude that Gardner's contention lacks merit.

This court has repeatedly recognized that NRS 205.065 is constitutional.[1] In particular, this court has concluded that the statutory presumption is reasonable because "an inference of criminal intent logically flows from the fact of showing unlawful entry."[2] Additionally, this court has concluded that the statutory presumption does not shift the burden of proof because the inference is not mandatory, the defendant can rebut the presumption by producing some evidence contesting the presumed fact, and "[t]he ultimate burden of persuasion remains with the prosecution."[3] Accordingly, we conclude that the district court did not err in giving jury instruction number 11, and Gardner's constitutional rights were not violated.

Gardner next contends that there was insufficient evidence in support of his burglary conviction. In particular, Gardner contends that there was no evidence he entered the cellular phone store with the intent to steal because nothing was taken but the surveillance videotape. We conclude that Gardner's contention lacks merit.

Our review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[4] In particular, a retail employee testified that someone broke into the store at 1:20 a.m. by throwing a rock through the window. Once inside, the intruder broke the lock on the cash drawer, which was empty,

---

[1]See, e.g., Redeford v. State, 93 Nev. 649, 572 P.2d 219 (1977); Tucker v. State, 92 Nev. 486, 553 P.2d 951 (1976); White v. State, 83 Nev. 292, 429 P.2d 55 (1967).

[2]Redeford, 93 Nev. at 654, 572 P.2d at 221.

[3]Id. at 654, 572 P.2d at 222.

[4]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

and also pried open the door to the inventory room. The retail employee also testified that nothing was taken from the store except the surveillance videotape.

A Las Vegas police officer, who responded to the scene within minutes of the break-in, testified that he apprehended Gardner hiding behind the dumpster of the cellular phone store. Next to him was the surveillance videotape, which was admitted into evidence at trial. The surveillance tape showed a man with similar physical characteristics as Gardner. The jury could reasonably infer from the evidence presented that Gardner entered the cellular phone store with the intent to steal.[5] 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, substantial evidence supports the verdict.[6]

Having considered Gardner's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Maupin

_____, J.
Douglas

_____, J.
Parraguirre

---

[5]See NRS 205.060(1).

[6]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

cc: Hon. Stewart L. Bell, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Brian Sandoval/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk