IN THE SUPREME COURT OF THE STATE OF NEVADA

JEFFREY JAMES WHALEY,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45507

FILED

FEB 17 2006

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 possession of burglary tools. Eighth Judicial District Court, Clark County; Valorie Vega, Judge. The district court sentenced appellant Jeffrey James Whaley to serve 6 months in jail without the availability of house arrest.

First, Whaley contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Specifically, Whaley claims that "there is no evidence that [he] did anything illegal," and that while he did "possess tools which could conceivably serve as burglary tools," he merely did so in order to transport them from a storage facility to his mother's garage.

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.[1] In particular, we first note that Whaley concedes that he possessed the items in question. Further, Officer Arthur Gallegos testified at trial that while driving past the parking lot of an apartment complex,

[1]See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

he noticed an individual carrying a backpack, "hanging around some vehicles" and acting "a little suspicious." Officer Gallegos testified that when he entered the parking lot, Whaley saw him and "quickly ducked down behind the vehicle so I could not see him, or an attempt where I could not see him." Officer Gallegos summoned Whaley and noticed that Whaley "had some kind of steak knife, and another type of knife or spreading utensil in his front pocket." Officer Gallegos conducted a pat down search, and with Whaley's consent, searched his pockets and backpack.

In addition to the items noted above, Officer Gallegos discovered the following in Whaley's possession: a shaved-down pick, several small lead fishing weights, a keychain with two shaved-down keys, a keychain with 47 keys, a large pair of bolt cutters, a wrist-rocket sling-shot, a multi-purpose "buck" tool, 13 pairs of scissors, another pick, a solder dispenser with a crimped end, and a circuit tester with a straight pick. Detective Nate Chio of the Las Vegas Metropolitan Police Department, assigned to the Viper Auto Theft Task Force, testified as an expert for the State and described how the items found on Whaley were commonly used to break car windows, gain access to locked vehicles, and "punch" the ignition and start a vehicle. Evidence was also adduced at trial that Whaley did not live in the apartment complex, and did not work in a profession requiring the possession of such items.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Whaley committed the crime of possession of burglary tools.[2] It is for the jury to determine the

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[2]NRS 205.080(1) provides in part:

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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.[3] Moreover, we note that circumstantial evidence alone may sustain a conviction.[4] Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Whaley contends that the presumption created by NRS 205.080(2) – that possession of burglary tools is prima facie evidence of an intent to use the tools in the commission of a crime – is unconstitutional because it shifts the burden of proof with regard to intent.[5] Whaley claims that his right to due process and a fair trial was violated when the district court instructed the jury pursuant to NRS

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> Every person who . . . has in his possession . . . any . . . tool, false key . . . or implement adapted, designed or commonly used for the commission of burglary, . . . under circumstances evincing an intent to use or employ, or allow the same to be used or employed in the commission of a crime, . . . shall be guilty of a gross misdemeanor.

[3]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).

[4]See Buchanan v. State, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003).

[5]NRS 205.080(2) provides:

> The possession thereof except by a mechanic, artificer or tradesman at and in his established shop or place of business, open to public view, shall be prima facie evidence that such possession was had with intent to use or employ or allow the same to be used or employed in the commission of a crime.

205.080(2) without also instructing the jury "how to use or apply the presumption."[6] We disagree.

Initially, we note that Whaley filed a motion on the first day of trial to dismiss the charge based on the alleged unconstitutionality of NRS 205.080(2). There is no indication in the record, however, that Whaley subsequently objected to the jury instructions or offered instructions relating to the presumption. Further, Whaley has not offered any persuasive argument demonstrating that the rebuttable presumption created by NRS 205.080(2) is unconstitutional. And finally, harmless-error analysis requires us to determine whether it is clear beyond a reasonable doubt that absent an alleged error a rational jury would have found the defendant guilty.[7] "When the evidence of guilt is overwhelming, even a constitutional error can be comparatively insignificant."[8] As detailed above, the State presented overwhelming evidence that Whaley was guilty of possession of burglary tools, and therefore, we conclude that a different result would not have resulted at trial absent the alleged error. We also note that the jury was properly instructed about the presumption of innocence and the State's burden to prove "beyond a reasonable doubt every material element of the crime charged." Therefore, we conclude that any error by the district court was harmless beyond a reasonable doubt.[9]

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[6]See NRS 47.230(2)-(3) (sections governing the use of presumptions against an accused in criminal cases).

[7]Collman v. State, 116 Nev. 687, 722-23, 7 P.3d 426, 449 (2000).

[8]Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991); see also Chapman v. California, 386 U.S. 18, 22 (1967).

[9]See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); see also U.S. v.

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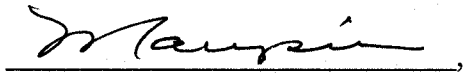
Having considered Whaley's contentions and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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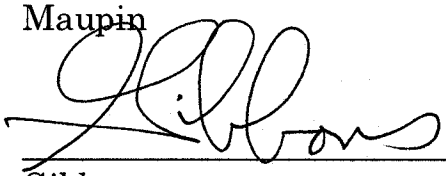

_____, J.
Gibbons

_____, J.
Hardesty

cc: Hon. Valorie Vega, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General George Chanos/Carson City
Clark County District Attorney David J. Roger
Clark County Clerk

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Vgeri, 51 F.3d 876, 882 (9th Cir. 1995) (holding that the State must show "that the error more probably than not was harmless").