IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN DAVID MIZZONI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46126

FILED

JUL 28 2006

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
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; Jennifer Togliatti, Judge. The district court sentenced appellant John David Mizzoni to serve a prison term of 24-120 months and ordered him to pay $35.26 in restitution.

First, Mizzoni contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt. Mizzoni essentially admits to larceny – carrying away two large jugs of Tide laundry detergent without paying for them – however, he claims that the State failed to prove that he entered the Food 4 Less store with the intent to steal, as required by statute.[1] We disagree.

A review of the record on appeal reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier

[1]NRS 205.060(1) states, in part, that burglary consists of entry into a building "with the intent to commit grand or petit larceny."

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of fact.[2] In particular, we note that testimony adduced at trial indicated that Mizzoni did not park his truck in a "normal" place for shopping. Instead, Mizzoni parked his truck "on the other side of a wall, just barely sticking out," in a red fire zone. In his closing argument, the prosecutor stated that Mizzoni's intent to commit a larceny could be inferred from the fact that "he parked at a convenient location for him to go into the store, grab something quick, and then leave."

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Mizzoni committed the crime of burglary. 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, 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.

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[2]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)).

[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); see also Grant v. State, 117 Nev. 427, 435, 24 P.3d 761, 766 (2001) (holding that "[i]ntent need not be proven by direct evidence but can be inferred from conduct and circumstantial evidence").

Second, Mizzoni contends that juror bias, and the district court's failure to investigate, deprived him of a fair trial and constituted reversible error. After the verdict was reached, Mizzoni filed a motion for a new trial, claiming that during deliberations, the jurors discussed his failure to testify. In support of his motion, Mizzoni attached a juror's affidavit. Mizzoni, however, voluntarily withdrew his motion for a new trial. At his sentencing hearing, defense counsel argued against habitual criminal adjudication, and asked the district court to take into consideration the fact that Mizzoni wished to withdraw his motion for a new trial because "he did not want to waste the State's or this Court's time and resources."

This court has stated that "[w]here a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."[5] In the instant case, Mizzoni voluntarily withdrew his motion for a new trial, the State was never afforded the opportunity, or was required, to respond to the motion, and the district court never had reason to consider its merit and fashion a ruling. Therefore, we conclude that Mizzoni has effectively waived the issue and not preserved it for review on appeal.

Third, Mizzoni contends that the district court violated his right to due process and equal protection by denying him eight peremptory challenges. Specifically, Mizzoni claims that he was entitled to eight

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[5]See McKenna v. State, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998).

peremptories because the State sought habitual criminal adjudication, and therefore, was facing the possibility of life imprisonment.[6] Mizzoni asks this court to revisit the holding in Schneider v. State.[7] We decline to do so.

In Schneider, this court stated that the offense charged, not the possibility of habitual criminal adjudication, determines the number of peremptory challenges allowed in a criminal proceeding.[8] In the instant case, as in Schneider, Mizzoni was charged with burglary, an offense not punishable by death or life in prison. Therefore, we conclude that the district court did not err by denying Mizzoni eight peremptory challenges.

Fourth Mizzoni contends that the district court erred by allowing the State to use its additional peremptory challenge on a regular juror, instead of an alternate juror, in violation of NRS 175.061(5). In support of his argument, Mizzoni cites only to the jury list. Mizzoni's contention is devoid of any factual specificity demonstrating that he is entitled to any relief.[9] We also note that Mizzoni failed to object to the

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[6]See NRS 175.051(1) ("If the offense charged is punishable by death or by imprisonment for life, each side is entitled to eight peremptory challenges."); see also NRS 207.010.

[7]97 Nev. 573, 635 P.2d 304 (1981).

[8]Id. at 574-75, 635 P.2d at 304-05 ("adjudication under the habitual criminal statute constitutes a status determination and not a separate offense").

[9]See Hargrove v. State, 100 Nev. 498, 686 P.2d 222 (1984).

manner in which the State used its peremptory challenges.[10] And even assuming, without deciding, that the district court did not strictly comply with the procedures set forth in NRS 175.061, we further conclude that Mizzoni fails to demonstrate that he was prejudiced by any alleged error.

Finally, citing to Buchanan v. State for support, Mizzoni contends that the district court erred by refusing to give his proposed jury instruction on circumstantial evidence.[11] We disagree. "The district court has broad discretion to settle jury instructions, and this court reviews the district court's decision for an abuse of that discretion or judicial error."[12] The district court may refuse to give a proposed jury instruction if the content is substantially covered by other jury instructions.[13] Here, the instruction offered by Mizzoni was substantially covered by other jury instructions. Moreover, this court has stated that it is not error to refuse to give an instruction similar to that offered by Mizzoni where, as here, the district court properly instructed the jury on the standard for

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[10]See Rippo v. State, 113 Nev. 1239, 1259, 946 P.2d 1017, 1030 (1997) (holding that the failure to raise an objection with the district court generally precludes appellate consideration of an issue).

[11]119 Nev. at 217, 69 P.3d at 705. Mizzoni offered the following, rejected instruction: "You are instructed that circumstantial evidence alone can sustain a criminal conviction. However, to be sufficient, all the circumstances taken together must exclude to a moral certainty every hypothesis but the single one of guilt."

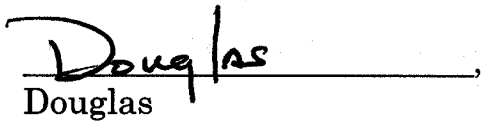
[12]Crawford v. State, 121 Nev. ___, ___, 121 P.3d 582, 585 (2005).

[13]See Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002).

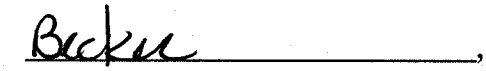
reasonable doubt.[14] Therefore, we conclude that the district court did not err.

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

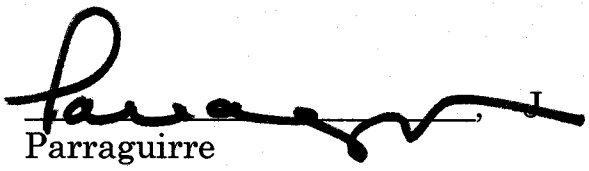
ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas



_____, J.
Becker



_____, J.
Parraguirre

cc: Hon. Jennifer Togliatti, 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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[14]See Bails v. State, 92 Nev. 95, 96-98, 545 P.2d 1155, 1155-56 (1976) (citing Holland v. United States, 348 U.S. 121 (1954)); see also Mason, 118 Nev. at 559, 51 P.3d at 524 (reaffirming the holding in Bails).