

IN THE SUPREME COURT OF THE STATE OF NEVADA

ELMER BURKS, II,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 46582

FILED

JUN 12 2006

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of burglary, two counts of robbery, one count of open or gross lewdness, and one count of attempted sexual assault. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant Elmer Burks to serve multiple concurrent and consecutive prison terms, totaling 136 to 420 months. Burks presents three issues for our review.

First, Burks contends that insufficient evidence was adduced at trial to prove that he had the requisite intent to commit burglary. We disagree. The standard of review for a challenge to the sufficiency of the evidence is "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."¹ Here, the jury heard testimony that Burks attended a small gathering at the

¹McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

victims' apartment, where he expressed an interest in the female victim and in both victims' belongings. Later that evening, Burks returned to the apartment with an accomplice. He forced his way into the apartment and then he forced both victims into the bathroom. While in the bathroom, Burks attempted to sexually assault the female victim. Burks and his masked accomplice subsequently ransacked the apartment and left with the victims' belongings. From this testimony, we conclude that a rational juror could reasonably infer that Burks had the requisite intent to commit burglary.²

Second, Burks contends that the district court erred by denying his proposed burglary instruction.³ We disagree. The district court has broad discretion in settling jury instructions and its decisions

²See NRS 193.200; NRS 205.060(1); see also Moore v. State, 122 Nev. ___, ___, 126 P.3d 508, 513 (2006) (quoting Larsen v. State, 86 Nev. 451, 453, 470 P.2d 417, 418 (1970) ("As in any other case where the intent is material, the intent need not be proved by positive or direct evidence, but may be inferred from the conduct of the parties and the other facts and circumstances disclosed by the evidence.")).

³Burks's proposed instruction stated:

In this case, the elements of the crime of burglary are:

- 1) Mr. Burks did willfully and unlawfully;
- 2) enter apartment number 9 at 422 Claremont Street in Reno, Nevada;
- 3) with the intent at the time of that entry to commit petty or grand larceny, or robbery.

will not be disturbed absent an abuse of discretion or judicial error.⁴ We conclude that the instruction the district court gave on burglary was an accurate statement of Nevada law and, therefore, the district court did not abuse its discretion by denying Burks's proposed instruction.⁵

Third, Burks contends that the district court erred by failing to specifically credit each of his sentences for time served. We disagree. We have recently held that "credit for time served in presentence confinement may not be denied to a defendant by applying it to only one of multiple concurrent sentences."⁶ Here, Burks's judgment of conviction appropriately states, "The Defendant is given credit for two hundred forty-three (243) days time served."⁷ We conclude that this statement adequately informs the Department of Corrections that it must credit each of Burks's concurrent sentences with 243 days for time served. In the

⁴Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

⁵Instruction No. 19 provided,

The elements of the crime of Burglary are:

- 1) The defendant did willfully and unlawfully;
- 2) Enter a house, apartment or room;
- 3) With the intent to commit petty or grand larceny, assault or battery, or any felony.

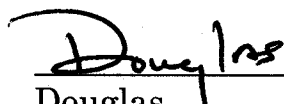
⁶Johnson v. State, 120 Nev. 296, 299, 89 P.3d 669, 671 (2004).


⁷See NRS 176.105(1)(d) (stating that "the judgment of conviction must set forth . . . [t]he exact amount of credit granted for time spent in confinement before conviction, if any.").

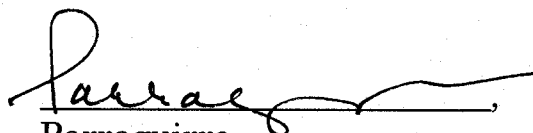
event that the Department of Corrections fails to properly apply this credit, Burks's remedy is a petition for a writ of habeas corpus.⁸

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

ORDER the judgment of the district court AFFIRMED.


_____, J.
Douglas


_____, J.
Becker


_____, J.
Parraguirre

cc: Hon. Steven P. Elliott, District Judge
Washoe County Public Defender
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

⁸NRS 34.724(2)(c); Pangallo v. State, 112 Nev. 1533, 930 P.2d 100 (1996).