IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW YOUNG,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47936

FILED

JUN 27 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of larceny from the person. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge. The district court adjudicated appellant Andrew Young a habitual criminal and sentenced him to serve a prison term of 5 to 20 years.

First, Young contends that the district court erred when it adjudicated him a habitual criminal. Young specifically claims that the district court failed to conduct a proper hearing, render appropriate findings, and have a jury determine whether he is a habitual criminal.

Our review of the record reveals that the district court conducted five separate sentencing hearings, during which Young challenged the nine certified felony convictions the State entered into evidence; the State supplemented the convictions with booking photographs, fingerprint cards, and a report by a fingerprint expert confirming that Young's fingerprints matched those from the

Pennsylvania convictions;[1] and the district court acknowledged that the State had a burden to prove Young's prior convictions beyond a reasonable doubt, found that the certified out-of-state court documents constituted judgments of conviction, and determined that it was appropriate to adjudicate Young under the small habitual criminal statute.

We conclude that implicit in the district court's determination was a finding that Young had suffered sufficient previous convictions to support his adjudication as a habitual criminal under NRS 207.010.[2] And we note that Young was not entitled to have a jury determine whether he was a habitual criminal.[3]

Second, Young contends that the district court erred when it denied his request for eight peremptory juror challenges. Young claims that because the prosecutor's notice that she intended to seek an enhanced punishment listed all three habitual criminal statutes,[4] he was faced with a maximum punishment of imprisonment for life and was therefore entitled to eight peremptory juror challenges. Young argues that the

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[1]See NRS 207.016(5) (providing that "a certified copy of a felony conviction is prima facie evidence of conviction of a prior felony"); Hollander v. State, 82 Nev. 345, 348-49, 418 P.2d 802, 804 (1966) (discussing circumstance under which a certified copy of the judgment of conviction should be supplemented with photographs, fingerprints, and other identifying data).

[2]See NRS 207.016(3)(a).

[3]See O'Neill v. State, 123 Nev. ___, 153 P.3d 38 (2007).

[4]NRS 207.010; NRS 207.012; NRS 207.014.

district court's denial of his request for the additional peremptory challenges violated his statutory, due process, and equal protection rights.

In Schneider v. State, we observed that "NRS 175.051 provides that if the 'offense charged' is punishable by death or life imprisonment the accused is entitled to eight peremptory jury challenges; if the offense charged is punishable for any other term, the accused is entitled to only four peremptory challenges,"[5] and we held that an "adjudication under the habitual criminal statute constitutes a status determination and not a separate offense."[6]

Here, the "offense charged" was larceny from the person, which is not punishable by death or life imprisonment.[7] Accordingly, the district court properly denied Young's request and, under the plain language of the statute, Young was not deprived of his statutory, due process, or equal protection rights.

Third, Young contends that the district court erred by failing to sustain his objection and strike the prosecutor's opening statement alleging that the Circus Circus midway area "is a great place for pickpockets to hang out because it's crazy in there." Young claims this

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[5]97 Nev. 573, 574, 635 P.2d 304, 304 (1981) (internal footnote omitted). Young argues that "[t]here is no rational basis for refusing alleged habitual offenders the same peremptory challenges granted other defendants facing life sentences." We disagree, and we decline Young's invitation to reconsider our holding in Schneider.

[6]Id. at 575, 635 P.2d at 305.

[7]See NRS 205.270(1).

comment created a negative inference, which he was unable to challenge because the prosecutor failed to provide any supporting evidence. Young further asserts that the comment violated his constitutional rights.[8]

"Generally, the prosecution has a duty to refrain from making statements in opening arguments that cannot be proved at trial."[9] However, such statements do constitute misconduct if they are not made in bad faith.[10] Here, the district court instructed the jury before opening statements that the opening statements of the attorneys are not evidence and Young has not alleged or demonstrated that the prosecutor acted in bad faith. Accordingly, we conclude the prosecutor's statement constituted a harmless error.

Fourth, Young contends that the district court erred by admitting an enhanced surveillance videotape into evidence without an adequate foundation as to whether it fairly and accurately depicted the purported subject matter. However, our review of the trial transcript

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[8]Young cites to Silva v. State, 113 Nev. 1365, 1373, 951 P.2d 591, 596 (1997) (holding that the defendant was denied his right to cross-examination under the Confrontation Clause when a purported accomplice refused to answer certain questions and his silence created an implication that the defendant was guilty, which was not subject to cross-examination and "added critical weight to the prosecution's case" (quoting Douglas v. Alabama, 380 U.S. 415, 420 (1965))).

[9]Rice v. State, 113 Nev. 1300, 1312, 949 P.2d 262, 270 (1997), abrogated on other grounds by Rosas v. State, 122 Nev. ___, 147 P.3d 1101 (2006).

[10]Id. at 1312-13, 949 P.2d at 270.

reveals that a security investigator employed by Circus Circus Hotel and Casino testified that he was familiar with the casino's surveillance system. He was asked to look for video footage of the incident that occurred on June 1, 2005, between 5:30 p.m. and 6:00 p.m. He was able to find the video footage by identifying both the area where the incident reportedly occurred and the camera that provided surveillance of that area and then watching the videotape collected by that camera. The videotape was date and time stamped, and it was recorded on a quadrant in which the video images from four different cameras appear on one screen and are recorded on one videotape. The security investigator isolated the quadrant that depicted coverage of the crime scene, enlarged the isolated quadrant so that it filled the entire screen, and copied it onto another videotape. Based on this testimony, and the fact that the original videotape was available for review, we conclude that an adequate foundation was laid for the admission of the enlarged copy of the surveillance videotape.[11] Young also claims that the prosecutor improperly argued that the videotape shows him taking the wallet out of the victim's backpack because there was no evidence supporting this interpretation of the videotape. We conclude that this claim is without merit.[12]

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[11]See NRS 52.015; NRS 52.025; NRS 52.245(1); NRS 52.247(2)-(3).

[12]See Klein v. State, 105 Nev. 880, 884, 784 P.2d 970, 973 (1989) (providing that it is permissible for the prosecutor to argue the evidence before the jury and to suggest reasonable inferences that jurors might draw from that evidence).

Fifth, Young contends that the district court erred by admitting hearsay testimony. Young cites to the following colloquy, which occurred during the prosecutor's redirect examination:

> MS. GOETTSCH [prosecutor]: You said you originally were dispatched to this area because of physical combat?
>
> THE WITNESS [Security Officer Pasalo]: Yes.
>
> MS. GOETTSCH: After you got to the scene and took statements from [the alleged victim] and the other people around, did you learn what caused the physical combat?
>
> MR. AVANTS [defense counsel]: Objection, hearsay.
>
> THE COURT: I'm sorry. What's the question?
>
> MS. GOETTSCH: My question was did you learn what caused the physical combat and that's a follow-up to his question where he was asking about statement did anybody say that there was [sic].
>
> THE COURT: Don't tell us what anybody said. Just say yes or no.
>
> THE WITNESS: Yes.
>
> MS. GOETTSCH: And what did you learn was the reason for physical combat?
>
> THE WITNESS: It's the petty [sic] larceny, the taking of the, snatching of the wallet.

Young claims that Security Officer Pasalo's opinion as to what caused the physical combat was based on hearsay information obtained from a

variety of unidentified witnesses at the scene. Even assuming that this testimony amounted to improper hearsay evidence,[13] we conclude that it was not testimonial hearsay[14] and that it was harmless beyond a reasonable doubt given the overwhelming evidence of Young's guilt and our firm belief that the verdict would have been the same absent the error.[15]

Sixth, Young contends that the district court erred by refusing to admit testimony that Security Officer Pasalo thought that he had committed petit larceny. Young claims that the district court's ruling deprived him of his federal and state constitutional right to present a defense. However, our review of the trial transcript reveals that the district court determined that the security officer's opinion as to what crime had been committed was irrelevant because the district attorney was the charging authority. The determination of whether evidence is relevant lies within the sound discretion of the district court.[16] We conclude that the district court did not abuse its discretion.

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[13]See Weber v. State, 121 Nev. 554, 576, 119 P.3d 107, 122-23 (2005), cert. denied, 126 S.Ct. 1433 (2006) ("hearsay is an out-of-court statement 'offered in evidence to prove the truth of the matter asserted,'" (quoting NRS 51.035)).

[14]See generally Crawford v. Washington, 541 U.S. 36 (2004); Harkins v. State, 122 Nev. ___, 143 P.3d 706 (2006).

[15]See Weber, 121 Nev. at 579, 119 P.3d at 124.

[16]Woods v. State, 101 Nev. 128, 136, 696 P.2d 464, 470 (1985); see also NRS 48.025(2) ("Evidence which is not relevant is not admissible.").

Seventh, Young contends that the district court erred by denying his proposed jury instruction on the defense theory of the case. Young's theory of the case was that he did not take the wallet from the victim's backpack. Young's proposed instruction stated, "In order to find the Defendant guilty of Larceny from the Person, you must determine that the Defendant took the wallet from the alleged victim's backpack."

The district court is ultimately responsible for ensuring that the jury is fully and correctly instructed.[17] If requested, the district court must provide instructions on the significance of findings that are relative to the defense's theory of the case.[18] "'If [a] proposed [defense] instruction is poorly drafted, a district court has an affirmative obligation to cooperate with the defendant to correct the proposed instruction or to incorporate the substance of such an instruction in one drafted by the court.'"[19] The defense is not entitled to instructions that are "misleading, inaccurate, or duplicitous."[20]

Here, even assuming that the district court erred by not giving Young's proffered instruction it is clear that the substance of Young's

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[17]Crawford v. State, 121 Nev. 744, 754-55, 121 P.3d 582, 589 (2005).

[18]Carter v. State, 121 Nev. 759, 767, 121 P.3d 592, 597 (2005); Crawford, 121 Nev. at 753-54, 121 P.3d at 588-89.

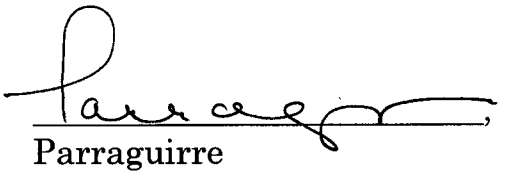
[19]Carter, 121 Nev. at 765, 121 P.3d at 596 (quoting Honeycutt v. State, 118 Nev. 660, 677-78, 56 P.3d 362, 373-74 (2002) (Rose, J., dissenting)).

[20]Carter, 121 Nev. at 765, 121 P.3d at 596; Crawford, 121 Nev. at 754, 121 P.3d at 589.

proffered instruction was adequately covered by another instruction,[21] and "that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of this case."[22]

Having considered Young's contentions and concluded that they are without merit or do not constitute reversible error, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
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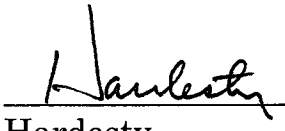

_____, J.
Hardesty

_____, J.
Saitta

cc: Hon. Michelle Leavitt, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

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[21]The district court instructed the jury that,

> Larceny from the person requires an actual taking from the person; a taking from his presence is not sufficient.
>
> The words "from the person" mean precisely that.

[22]Crawford, 121 Nev. at 756, 121 P.3d at 590.