

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT NEAL MICHAEL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48286 **FILED**

JUN 08 2007

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

ORDER AFFIRMING IN PART, REVERSING IN PART, AND
REMANDING

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count of malicious destruction of private property and one count of burglary. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. The district court sentenced appellant Robert Neal Michael to serve 12 months in jail for destruction of private property and 16 to 48 months in prison for burglary. The district court imposed the sentences to run concurrently.

Michael challenges the propriety of the district court's jury instruction on the charge of burglary. Michael claims that after the close of evidence, without notice, and over his objection, the district court impermissibly broadened the scope of the charging document by adding language regarding the offense of false pretenses to its jury instruction on burglary. Michael argues that by adding this language to the instruction, the district court allowed the State to seek a conviction on a theory that

was not alleged in the information and for which he did not receive adequate notice to prepare his defense.¹

The State concedes that it should have amended the information prior to trial. It contends, however, that its failure to amend the information was a harmless error. And it argues that Michael was not prejudiced because his defense would have remained the same: "[Michael] went to Wal-Mart to return previously purchased clothing for refund and to purchase additional items."

The record on appeal reveals that the State changed its theory of the case during the trial, Michael learned of the State's new theory of burglary with the intent to commit false pretenses for the first time after he had testified and evidence had closed, and Michael did not have an opportunity to respond to the new theory. Under these circumstances, we conclude that Michael's burglary conviction must be reversed.²

Michael also challenges the sufficiency of the evidence adduced at trial. He specifically claims that the State failed to prove that he entered the Wal-Mart with the intent to commit larceny and that he willfully or maliciously broke the debit card reader. "As in any other case where the intent is material, the intent need not be proved by positive or

¹Michael cites to Jennings v. State, 116 Nev. 488, 998 P.2d 557 (2000); State v. Dist. Ct., 116 Nev. 374, 997 P.2d 126 (2000); Alford v. State, 111 Nev. 1409, 906 P.2d 714 (1995); Barren v. State, 99 Nev. 661, 669 P.2d 725 (1983); Green v. State, 94 Nev. 176, 576 P.2d 1123 (1978).

²See Alford, 111 Nev. at 1415, 906 P.2d at 717.

direct evidence, but may be inferred from the conduct of the parties and the other facts and circumstances disclosed by the evidence."³

Here, the jury heard evidence that Michael entered Wal-Mart in his wheelchair with a large black trash bag on his lap. About 15 or 20 feet from the entrance, the store had a display of amplifiers. Michael went to the display, selected an amplifier, and placed it on top of his trash bag. He then went to the customer service area to return the clothes he had in the trash bag. The customer service representative rang up the amplifier as a return item. Michael did not tell her that he had not paid for the amplifier. Shortly thereafter, the assistant manager took over for the customer service representative and informed Michael that she could not accept some of the clothes as returns. Michael became upset, began swearing, and trapped the assistant manager in a corner with his wheelchair. When the assistant manager cancelled the transaction, Michael broke the debit card reader.

While this testimony best supports a burglary conviction based on a theory that Michael entered the Wal-Mart with the intent to commit false pretenses, we conclude that a rational juror could infer from Michael's conduct that he entered the Wal-Mart to commit larceny and that he willfully or maliciously broke the debit card reader.⁴ It is for the

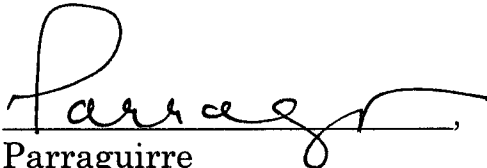
³Mathis v. State, 82 Nev. 402, 406, 419 P.2d 775, 777 (1966) (quoting State v. Thompson, 31 Nev. 209, 217, 101 P. 557, 560 (1909)); see also NRS 193.200 ("Intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused.").

⁴See NRS 205.060(1); NRS 206.310.


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.⁵

We have considered Michael's remaining contentions and concluded that they are without merit. Accordingly, we affirm Michael's conviction for malicious destruction of private property, reverse his conviction for burglary, and remand this matter to the district court for proceedings consistent with this order.

It is so ORDERED.


Parraguirre, J.


Hardesty, J.


Saitta, J.

cc: Hon. Donald M. Mosley, 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

⁵See 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).