IN THE SUPREME COURT OF THE STATE OF NEVADA

RAYMOND JAMES BEAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49151

FILED

SEP 27 2007

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 two counts of fraudulent use of a credit card, five counts of possession of a credit card without consent, one count of attempted burglary, and two counts of burglary. Second Judicial District Court, Washoe County; Steven P. Elliott, Judge. The district court sentenced appellant Raymond James Beal to concurrent and consecutive prison terms totaling 139 to 348 months.

Beal first contends that the district court erred by refusing his discovery request. Specifically, Beal contends that the district court erred in refusing to order the State to produce statistics for all reported burglaries in Washoe County in which "windows were smashed." Beal argues that "[t]here is a reasonable possibility that had the defense been permitted to show how many other burglaries involving smashed windows occurred around the time of the offenses which Mr. Beal was alleged to have committed, the jury would have been far less inclined to find guilt in the State's purely circumstantial case."

A criminal defendant has a constitutional right to discover evidence shown to be material to his defense.[1] "A defendant must advance some factual predicate which makes it reasonably likely the requested [evidence] will bear information material to his or her defense."[2] "We review the district court's resolution of discovery disputes for an abuse of discretion."[3]

We conclude that the record on appeal does not indicate that the requested discovery was material and Beal did not "advance some factual predicate" that would make it likely the evidence would result in information material to his defense. The evidence presented against Beal at trial demonstrated that he gained access to businesses through his wife's janitorial employment. Even if the State had presented evidence that Beal committed the burglaries by "smashing windows," it is merely speculative that the statistics requested were exculpatory or would have influenced the jury's verdict. Accordingly, the district court did not abuse its discretion in denying the discovery request on the basis that it was burdensome and irrelevant.

Next, Beal contends that the district court abused its discretion by failing to provide a remedy when the State's witness violated the rule of exclusion. Specifically, Beal contends that a witness testified that he heard another witness comment that he wished he had testified in

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[1]See generally Jaeger v. State, 113 Nev. 1275, 1280-81, 948 P.2d 1185, 1188-89 (1997) (citing Pennsylvania v. Ritchie, 480 U.S. 39, 59 (1986)); see also Brady v. Maryland, 373 U.S. 83 (1963).

[2]Sonner v. State, 112 Nev. 1328, 1340-41, 930 P.2d 707, 715 (quoting State v. Blackwell, 845 P.2d 1017, 1022 (Wash. 1993)).

[3]Means v. State, 120 Nev. 1001, 1007, 103 P.3d 25, 29 (2004).

more detail. Beal claims that the district court should have allowed further cross-examination of the witness who overheard the comments.

Pursuant to NRS 50.155(1), a district court shall order upon request that witnesses be "excluded so that they cannot hear the testimony of other witnesses." "The purpose of sequestration of witnesses is to prevent particular witnesses from shaping their testimony in light of other witnesses' testimony, and to detect falsehood by exposing inconsistencies."[4]

We conclude that the record does not indicate that there was a violation of NRS 50.155 because neither witness heard the other witness testify. One witness merely expressed general dissatisfaction with the specificity of his testimony. Further, there was no risk of improper influence because neither witness's testimony involved the same subject matter. Thus, the district court did not abuse its discretion in denying the defense request to further cross-examine the witness.

Last, Beal contends that the district court erred by instructing the jury on the presumption of fraudulent intent over Beal's objection. Specifically, Beal contends that the jury instruction allowed the jury to presume intent to fraudulently use a credit card if they found that Beal possessed more than one credit card issued in the name of another person, and that this instruction lessened the State's burden of proof.

The jury instruction at issue stated:

> If facts have been proven by the State beyond a reasonable doubt that the Defendant had in his possession or under his control two or more credit

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[4]Givens v. State, 99 Nev. 50, 55, 657 P.2d 97, 100 (1983), overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986).

> cards issued in the name of another person you may presume Defendant's knowledge that the credit cards had been stolen and his intent to circulate, use, sell or transfer the credit cards with the intent to defraud.
>
> However, you are not required to adopt the presumption and the existence of the presumed facts must be proven beyond a reasonable doubt before you may presume knowledge and/or intent.

We have previously held that:

> whenever the existence of a presumed fact against the accused is submitted to the jury, the district court must charge the jury that while the law permits the jury to regard the basic, or predicate, facts as sufficient evidence of the presumed fact, the law does not require the jury to do so.[5]

Additionally, where "the presumed fact establishes guilt or is an element of the offense charged, the trial court must instruct the jury that the existence of the presumed fact must . . . be proved beyond a reasonable doubt."[6]

In this case, the jury instruction contained a correct statement of law, and the jurors were properly instructed that they were not required to find the existence of the presumed fact against Beal. Further, the jurors were instructed that the existence of the presumed fact had to be proven beyond a reasonable doubt. Accordingly, the district court did not err in instructing the jury on the presumption of fraudulent intent.

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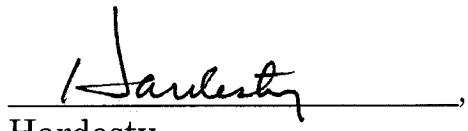
[5]Thompson v. State, 108 Nev. 749, 755, 838 P.2d 452, 456 (1992), overruled on other grounds by Collman v. State, 116 Nev. 687, 7 P.3d 426 (2000); see also Brackeen v. State, 104 Nev. 547, 763 P.2d 59 (1988).

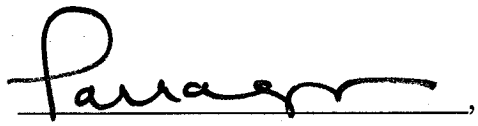
[6]Thompson, 108 Nev. at 755, 838 P.2d at 456.

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

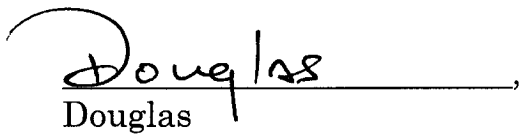
ORDER the judgment of conviction AFFIRMED.



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Steven P. Elliott, District Judge
Scott W. Edwards
Marc P. Picker
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk