IN THE SUPREME COURT OF THE STATE OF NEVADA

TYRONE LEE WILLIAMS, A/K/A TROY L. MURE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49570

FILED

MAY 08 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, entered pursuant to a jury verdict, of one count each of burglary and conspiracy to commit larceny. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. The district court sentenced appellant Tyrone Lee Williams to serve a prison term of 48 to 120 months for the burglary and a concurrent jail term of 12 months for the conspiracy.

First, Williams contends that insufficient evidence was presented at trial to support his convictions. Williams specifically claims that no evidence was adduced that he or his codefendant stole any merchandise. Williams further asserts that "since their actions, while arguably unusual, were not obviously attributable to criminal conduct . . . there existed no proof beyond a reasonable doubt that [he] intended to do anything more than examine the items in the clam shells more carefully before purchasing them." Our review of the record on appeal, however,

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reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.[1]

Here, the jury heard testimony from a Target Store Loss Prevention Officer that he observed Williams and Kimberly Ward talking in the parking lot on closed circuit TV. When Williams and Ward entered the store, they each took a shopping cart. Williams placed a small DVD player and, later, some cologne in his cart. Williams used a box cutter-type knife to cut open the "clam shell" package that held the cologne and then placed the opened package back on the shelf. Ward took the opened package from the shelf. She later removed the cologne from the package, placed the cologne in one of her pockets, and placed the empty package on a shelf in the computer department.

Williams and Ward moved to another aisle, where Williams cut open the DVD player box while Ward covered his hands with her hands. Williams placed the opened DVD player box back in his cart and moved to the electronics department. Williams and Ward selected a modulator and a converter. Williams cut into the "clam shell" containing the modulator and placed both the modulator and the converter into his cart. Ward left Williams and proceeded to exit the store. However, she returned and told Williams that there were police cars outside and that it looked like they were being watched. Williams went to the stationery department and dumped everything that he had cut open into a filing cabinet. Thereafter, Williams was apprehended by the police. In addition

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

to this testimony, the jury was shown surveillance video footage depicting Williams' activities in the parking lot and inside the store.

Based on this evidence, we conclude that a rational juror could reasonably infer that Williams committed the offenses of burglary and conspiracy to commit larceny.[2] 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, substantial evidence supports the verdict.[3]

Second, Williams contends that the district court erred by announcing in the presence of the jury that a witness's testimony was admissible as a coconspirator declaration.[4] Williams specifically points to the following colloquy:

> MR. SPEED (Defense Counsel): Objection, Judge. Hearsay.
>
> MS. DIGIACOMO (Prosecutor): It's a coconspirator statement.
>
> MR. SPEED: Has the Court ruled that they're coconspirators[?]
>
> THE COURT: Overruled. Go on.
>
> MS. DIGIACOMO: What did you hear her tell the defendant?
>
> WITNESS: She told the defendant that there were police cars outside.

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[2]See NRS 199.480; NRS 205.060(1); NRS 205.220.

[3]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

[4]See NRS 51.035(3)(e) (coconspirator statement exception to the hearsay rule).

MR. SPEED: Objection, Judge. That's hearsay.

THE COURT: That's not hearsay. It's a coconspirator.

MR. SPEED: Judge, our case law says that the State has to show slight evidence that there was a conspiracy taking place here.

THE COURT: You know what counsel.

MR. SPEED: The only thing that they've shown is that the two of them entered Target together.

THE COURT: You're overruled. It seem like they were – never mind. Go on.

"Ordinarily, the comments of the court in overruling objections to the admission of evidence do not constitute error."[5] "The fact that the comment is not addressed to the jury, nor intended for the jury, greatly reduces its asserted prejudicial effect. . . . [I]f it amounts to no more than a comment to counsel assigning a reason for a ruling and does not purport to invade the jury's right to pass on the facts, and is not unfair or prejudicial, there is no error."[6]

Here, the district court's comments were addressed to counsel, not the jury, and explained the reason for the court's ruling. It does not appear that the comments were unfair or prejudicial. Moreover, at the start of trial, the district court instructed the jury that "[n]o statement, ruling, remark or facial expression which I may make during the course of

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[5]Radkus v. State, 90 Nev. 406, 409, 528 P.2d 697, 698-99 (1974).

[6]Id. at 409, 528 P.2d at 699 (quoting State v. Fitch, 65 Nev. 668, 685, 200 P.2d 991, 1000 (1948), overruled on other grounds by Graves v. State, 82 Nev. 137, 413 P.2d 503 (1966)).

the trial is intended to indicate my opinion as to what the facts are. You are to determine the facts and this determination you alone must decide upon the believability of the evidence and its weight and value." Under these circumstances, we conclude that the district court did not err.

Third, Williams contends that the district court abused its discretion by admitting bad acts evidence. Williams asserts that providing false information to police officers and possessing false identification are crimes and therefore evidence that he provided a police officer with false identification was evidence of uncharged bad acts. Williams argues that (1) this evidence was inadmissible absent a pretrial Petrocelli hearing,[7] (2) the res gestae doctrine did not apply because the witnesses could describe the charged criminal transaction without referring to the uncharged bad acts,[8] and (3) the district court should have instructed the jury as to the limited purpose of the bad acts evidence.[9]

Our review of the record on appeal reveals that Williams did not object to testimony regarding a fake identification card, a fake Social Security card, and a player's club card. However, during a sidebar conference outside the presence of the court reporter and jury, Williams objected to the admission of the three cards into evidence. The district court sustained the objection as it pertained to the player's club card, but admitted the fake identification card and fake Social Security card into

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[7]Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), modified on other grounds by Sonner v. State, 112 Nev. 1328, 930 P.2d 707 (1996).

[8]See NRS 48.035(3).

[9]See Tavares v. State, 117 Nev. 725, 30 P.3d 1128 (2001).

evidence. We conclude that any error in admitting the fake cards into evidence was harmless given the overwhelming evidence of Williams' guilt.[10]

Fourth, Williams contends that the district court improperly instructed the jury on the crime of conspiracy. Williams claims that Instruction No. 6 erroneously informed the jury that a conspiracy can exist in the absence of an express agreement and can be inferred from "all circumstances tending to show a common agreement," and that Instruction No. 8 was erroneous under Bolden v. State.[11] Williams did not object to these jury instructions. Failure to object to an instruction generally precludes appellate review.[12] However, this court has discretion to consider an error if it was plain and affected the appellant's substantial rights.[13] We conclude that no such error occurred here. Instruction No. 6 accurately reflects Nevada law,[14] and even assuming that Instruction No. 8 was given in error, the error was harmless because Williams was not

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[10]See Rhymes v. State, 121 Nev. 17, 24, 107 P.3d 1278, 1282 (2005) (the failure to give a limiting instruction is subject to harmless-error analysis); Rowland v. State, 118 Nev. 31, 43, 39 P.3d 114, 121-22 (2002) (erroneous admission of prejudicial evidence subject to harmless-error analysis).

[11]121 Nev. 908, 124 P.3d 191 (2005).

[12]Cordova v. State, 116 Nev. 664, 666, 6 P.3d 481, 482 (2000).

[13]NRS 178.602.

[14]See Gardner v. State, 116 Nev. 770, 780, 6 P.3d 1013, 1020 (2000), overruled on other grounds by Sharma v. State, 118 Nev. 648, 56 P.3d 868 (2002).

charged with committing a specific intent crime on a theory of vicarious coconspirator liability.[15]

Fifth, Williams contends that he was denied his due process right to a fair trial as the result of prosecutorial misconduct. Williams claims that the prosecutor disparaged defense counsel, referred to inadmissible evidence, and interjected her opinion as to the strength of the State's case. However, the district court sustained Williams' objection to the prosecutor's statement that "defense counsel is misleading this witness and the jury," thereby curing the statement's prejudicial effect. And Williams did not object to the prosecutor's question regarding a player's club card or her rebuttal statement that "[t]he State met its burden clearly." As a general rule, the failure to object to prosecutorial misconduct precludes appellate review absent plain error.[16] We have considered the prosecutor's statements in context, and we conclude that they do "not rise to the level of improper argument that would justify overturning [Williams'] conviction."[17]

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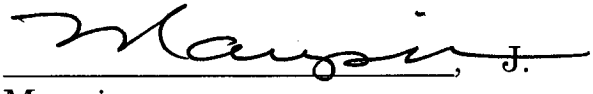
[15]See Bolden, 121 Nev. at 922, 124 P.3d at 200 (holding "that a defendant may not be held criminally liable for the specific intent crime committed by a coconspirator simply because that crime was a natural and probable consequence of the object of the conspiracy").

[16]Williams v. State, 103 Nev. 106, 110-11, 734 P.2d 700, 703 (1987).

[17]See Greene v. State, 113 Nev. 157, 169-70, 931 P.2d 54, 62 (1997), ("the relevant inquiry is whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process"), modified on other grounds by Byford v. State, 116 Nev. 215, 994 P.2d 700 (2000); see generally Rowland v. State, 118 Nev. 31, 38-40, 39 P.3d 114, 118-19 (2002).

Having considered Williams' contentions and concluded that he is not entitled to relief, we

ORDER the judgment of conviction AFFIRMED.



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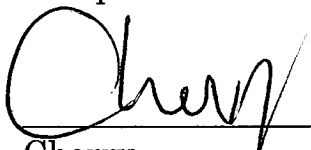

_____, J.
Cherry

_____, J.
Saitta

cc: Hon. Lee A. Gates, 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