IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY PHILLIP ZAMORA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50205

FILED

SEP 11 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from an amended judgment of conviction, entered pursuant to a jury verdict, of two counts of unlawfully using the personal identifying information of another and two counts of fraudulent use of a credit card. Third Judicial District Court, Churchill County; Robert E. Estes, Judge. The district court sentenced appellant Gregory Phillip Zamora to various consecutive and concurrent prison terms, suspended execution of the sentence, placed Zamora on probation, and ordered Zamora to pay $30,549.89 in restitution.

First, Zamora contends that there was insufficient evidence to support his convictions for unlawfully using the personal identifying information of another and fraudulent use of a credit card. Zamora specifically claims that the State failed to prove that he had the requisite criminal intent.

"[I]t is the function of the jury, not the appellate court, to weigh the evidence and pass upon the credibility of the witness."[1] Accordingly, the standard of review for a challenge to the sufficiency of the

[1]Walker v. State, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975).

evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational [juror] could have found the essential elements of the crime beyond a reasonable doubt.'"[2] Circumstantial evidence is enough to support a conviction.[3]

Here, the jury heard testimony that Zamora drafted a check and signed the victim's name, without her authorization, to obtain $1,100 from her home equity line of credit, which he then deposited in a business account. Zamora signed the victim's name, without her authorization, on the paperwork necessary to finance the purchase of a Mercedes Benz car. And Zamora used the victim's credit card, on two separate occasions, without her authorization, to obtain $15,000, which was credited to "Sonny Zamora's Steakhouse."

Based on this testimony, we conclude that a rational juror could find that Zamora had the requisite intent and committed the crimes of unlawfully using the personal identifying information of another and fraudulent use of a credit card.[4] The jury's verdict will not be disturbed where, as here, it is supported by substantial evidence.[5]

Second, Zamora contends that district court erred by failing to disqualify two prospective jurors who were seen talking with the victim's cousin. Zamora claims that he was forced to use a peremptory challenge

---

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

[3]Lisle v. State, 113 Nev. 679, 691-92, 941 P.2d 459, 467-68 (1997).

[4]See NRS 205.463(1); NRS 205.760(1).

[5]See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981).

to excuse one of the prospective jurors and that he did not have enough peremptory challenges to excuse the other prospective juror.

NRS 175.036(1) states that "[e]ither side may challenge an individual juror for disqualification or for any cause or favor which would prevent him as a juror from adjudicating the facts fairly." District courts have broad discretion in deciding whether to remove prospective jurors for cause.[6] A district court's determination that a juror is fair and impartial will be upheld if it is supported by substantial evidence.[7] A party challenging a district court's decision to deny a challenge for cause must demonstrate prejudice.[8] We have previously observed that "[i]f the impaneled jury is impartial, the defendant cannot prove prejudice."[9]

Here, after the jury venire was passed for cause, the district court learned that two prospective jurors were seen talking with the victim's cousin. The district court interviewed both prospective jurors and found that they "did not discuss the case with anyone." Thereafter, Zamora used a peremptory challenge to excuse one of the two prospective jurors, did not request any additional peremptory challenges, and stipulated that the jury was properly seated. Under these circumstances, we conclude that Zamora has not demonstrated prejudice.

Third, citing to the trial transcript, Zamora contends that the district court erred by prohibiting his "impeachment of the alleged victim

---

[6]Leonard v. State, 117 Nev. 53, 67, 17 P.3d 397, 406 (2001).

[7]Walker v. State, 113 Nev. 853, 866-67, 944 P.2d 762, 771 (1997).

[8]Thompson v. State, 102 Nev. 348, 350, 721 P.2d 1290, 1291 (1986).

[9]Wesley v. State, 112 Nev. 503, 511, 916 P.2d 793, 799 (1996).

on many occasions." Zamora claims that "[t]he bias in issue there is more than important, it is key to the fact that [the victim] filed the charges and obtained a restraining order all at once to gain control of the home, car and personal property."

When an alleged error is predicated on a ruling that excluded evidence, "the substance of the evidence [must be] made known to the judge by offer or [must be] apparent from the context within which the questions were asked."[10] Accordingly, we will disregard a claim that the trial court erred by prohibiting a defense inquiry on cross-examination when the defense counsel has failed to make an offer of proof and, as a result, we have "no way of determining whether appellant's substantial rights were prejudiced by the trial court's refusal to allow the witness to respond."[11]

Our review of the trial transcript reveals that Zamora did not inform the district court why the victim's responses to his cross-examination were relevant nor did he make any offers of proof to facilitate our review. Under these circumstances, Zamora has failed to demonstrate that the district court abused its discretion by excluding this evidence.[12]

Fourth, Zamora contends that the district court erred by failing to properly instruct the jury. Zamora states that the jury sent two

---

[10]NRS 47.040(1)(b).

[11]Van Valkenberg v. State, 95 Nev. 317, 318, 594 P.2d 707, 708 (1979).

[12]See Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999) ("A district court's decision to admit or exclude evidence rests within its sound discretion and will not be disturbed unless it is manifestly wrong.").

notes to the district court after it began deliberations. One note requested the "definitions" section for NRS chapter 205, and the other note requested the definition of "defraud." Zamora claims that these notes indicate that "the jury was confused as to the burden required on the intent element."[13]

Zamora failed to include copies of the district court's jury instructions in his appendix and the district court's reading of the instructions to the jury was omitted from the trial transcript;[14] however, we note that Zamora did not object to any of the instructions that were presented to the jury and that he stipulated that the instructions were correctly read to the jury. Further, the record on appeal indicates that the district court responded to the jury's request for additional information by providing the definition of "defraud" from Black's Law Dictionary. Thereafter, without making any additional requests for information, the jury reached its verdicts. Under these circumstances, Zamora has not demonstrated that the district court improperly instructed the jury or that the jury was confused.

Fifth, Zamora contends that the prosecutor engaged in misconduct during his rebuttal argument when he twice told the jury that the State was not required to prove "intent to harm" and "confused the jury by making reference to 'intent to defraud' as being an element of

---

[13]Zamora also improperly cites to a newspaper article regarding a statement allegedly made by one of the jurors after the verdict had been rendered. The juror's alleged statement is inadmissible for any purpose and we refuse to consider it on appeal. See NRS 50.065(2)(b).

[14]See NRAP 30(b)(2)(iv); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) ("The burden to make a proper appellate record rests on appellant.").

counts V, VI, and VII [the fraudulent use of a credit card counts] only." Zamora did not contemporaneously object to the prosecutor's alleged misconduct at trial, and he has not demonstrated that the prosecutor's comments were patently prejudicial.[15]

Sixth, Zamora contends that the district court erred in calculating the restitution award. Zamora specifically claims that (1) the money drawn from the equity line of credit was subsequently repaid with money drawn from a business account, (2) the victim did not lose any money as a result of the Mercedes Benz transaction, and (3) the credit card company did not hold the victim accountable for the loss on her credit card.

"Restitution under NRS 176.033(1)(c) is a sentencing determination. On appeal, this court generally will not disturb a district court's sentencing determination so long as it does not rest upon impalpable or highly suspect evidence."[16] The district court must rely on reliable and accurate information in calculating restitution.[17]

Here, the district court conducted a restitution hearing during which it heard testimony from the victim, her attorney, and Zamora and admitted exhibits into evidence. At the close of evidence, the district court directed the parties to brief their closing arguments using the exhibits

---

[15]Riker v. State, 111 Nev. 1316, 1328, 905 P.2d 706, 713 (1995) (holding that when appellant fails to object below, this court reviews alleged prosecutorial misconduct only if it constitutes plain error, i.e., if it is shown to be patently prejudicial).

[16]Martinez v. State, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999).

[17]Id. at 13, 974 P.2d at 135.

that were admitted. The State subsequently filed a brief in support of restitution and Zamora filed a brief in opposition.

Thereafter, the district court ordered Zamora to pay $1,100 as part of his restitution after determining that the amount unlawfully taken from the victim's home equity line of credit was not in dispute and the fact that Zamora deposited the money into an account that he used to pay the personal living expenses he shared with the victim was not relevant. The district court ordered Zamora to pay $16,000 as part of his restitution after determining that was the value of the victim's Lexus, which Zamora traded as part of his unlawful Mercedes Benz transaction. The district court noted that it was of no consequence that Zamora allowed the victim to drive the new Mercedes Benz and that some of the proceeds of the Lexus trade were used to pay shared personal living expenses. Finally, the district court ordered Zamora to pay $13,449.89 as part of his restitution after determining that this was the amount that the credit card company lost when it credited the victim's account for Zamora's fraudulent charges. The district court found that the credit card company was in the same position as the insurance company in Martinez v. State,[18] and ordered the $13,449.89 to be paid directly to the victim.

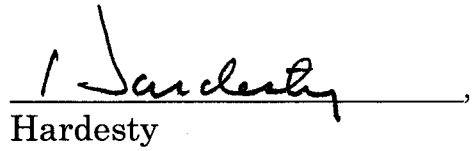
Based on our review of the record on appeal, we conclude that the district court relied upon evidence that was reasonably reliable and accurate and did not err in calculating the restitution award.

---

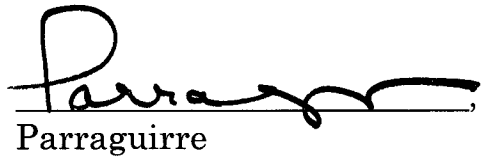
[18]See 115 Nev. at 12, 974 P.2d at 135 (providing that "restitution of medical expenses, while inappropriate when payment is ordered to be made to an insurer, is not inappropriate when the payment, regardless of reimbursement, is ordered to be made to the victim").

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

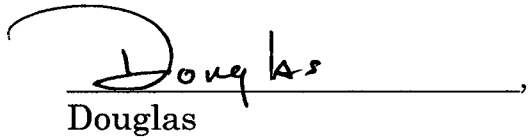
ORDER the amended judgment of conviction AFFIRMED.[19]



_____, J.
Hardesty



_____, J.
Parraguirre



_____, J.
Douglas

cc: Hon. Robert E. Estes, District Judge
Martin G. Crowley
Jacob N. Sommer
Attorney General Catherine Cortez Masto/Carson City
Churchill County District Attorney
Churchill County Clerk

---

[19]Zamora's counsel filed the fast track statement in a single spaced format. NRAP 32(b) states that "[m]otions, petitions for rehearing, and other papers shall be produced in the same manner as prescribed by subdivision (a)" of NRAP 32. (Emphasis added.) Subsection (a) clearly states that "[e]xcept for quotations and footnotes, the lines shall be double-spaced." The "other papers" reference pertains to all documents filed with the court, including fast track documents. Counsel is admonished for failing to comply with NRAP 32. We caution counsel that similar violations in the future may result in sanctions.