IN THE SUPREME COURT OF THE STATE OF NEVADA

DOUGLAS R. HOFFMAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 50964

FILED

APR 08 2009

TRACIE K. LINDEMAN
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 seven counts of felony malicious destruction of trees on the land of another (value over $5,000) and three counts of gross misdemeanor malicious destruction of trees on the land of another (value $250 to $4,999.99). Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. Appellant Douglas R. Hoffman was sentenced to serve seven five-year terms in the Nevada State Prison for the felony counts and three one-year terms for the gross misdemeanor counts, all to be served concurrently.

Hoffman raises seven claims on appeal. He claims that (1) there was insufficient evidence to support his convictions, (2) the district court erred in precluding the admission of a photograph of graffiti, (3) the prosecutor engaged in improper witness vouching, (4) the prosecutor commented on his right to remain silent, (5) the district court erred in admitting inadmissible hearsay evidence, (6) the district court erred in

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admitting evidence that was more prejudicial than probative, and (7) cumulative error warrants reversal of his convictions.

First, Hoffman claims that there was insufficient evidence to convict him of all ten counts of malicious destruction of trees. Specifically, he argues that because there were no eyewitnesses to the crimes charged as counts 1 through 9, there was no evidence that he committed the charged acts. With respect to the remaining count, he argues that there was insufficient evidence to prove that he was responsible for all 82 trees that were cut down on the day alleged in that count. Hoffman also asserts that the State failed to prove that he was in the State of Nevada on the dates that the crimes were committed.

The standard of review for sufficiency of the evidence is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)). "This court will not disturb a jury verdict where there is substantial evidence to support it, and circumstantial evidence alone may support a conviction." Hernandez v. State, 118 Nev. 513, 531, 50 P.3d 1100, 1112 (2002).

The evidence presented at trial showed that 546 trees with a total value of approximately $246,085 were cut down in the Sun City Anthem neighborhood of Henderson, Nevada between October 2004 and November 2005. During the first 12 months of the vandalism, the only trees that were cut down were on Sun City Anthem Drive in an area

behind Hoffman's house on Colvin Run; the trees blocked Hoffman's view of the Las Vegas Strip. In October and November of 2005, the cutting spread to other areas of the neighborhood.

Between 1:00 and 2:00 a.m. on November 6, 2005, a retired law enforcement officer named William Edwards, who lived in the neighborhood, discovered Hoffman about three miles from his house near some freshly cut trees. In the dark, Williams saw Hoffman holding a tree with one hand and making a "sawing motion" with the other hand. Williams confronted Hoffman and discovered a saw with fresh sawdust and wood fibers under Hoffman's jacket. Hoffman claimed he had just been out for a walk and found it on the ground. He was taken to a nearby fire station, and while there, a police officer observed Hoffman throwing some gardening gloves into a trashcan. Hoffman told the officer that the gloves no longer kept his hands warm and he wanted to get rid of them. A subsequent search of Hoffman's house uncovered a letter from Hoffman to the developer, Pulte Homes, complaining about the landscaping. In the letter Hoffman claimed that a Pulte employee had told him "[i]f you want something done . . . you'll have to do it yourself."

Hoffman's wife testified that they stayed in Henderson at least once a month. The evidence also showed that the trees were young and small, requiring only seconds to at most a minute or two to cut each one. The trees were often cut only partway through, rendering the damage hidden until the wind blew the trees over. And the widespread tree cutting ceased when Hoffman was arrested.

Based on this evidence, we conclude that a rational trier of fact could have found that Hoffman was guilty of the ten charged counts of malicious destruction of trees on the land of another beyond a reasonable doubt.

Second, Hoffman claims that the district court erred in precluding the defense from introducing a photograph of graffiti on a wall stating, "Free Hoffman" and "Pulte is the true criminal." Hoffman argues that because the photograph was taken after his arrest it was evidence that another person had committed the crimes with which he was charged, and therefore the district court erred in excluding it. We disagree.

"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." Libby v. State, 115 Nev. 45, 52, 975 P.2d 833, 837 (1999). Here, the district court gave three reasons for its decision to exclude the photograph: (1) the photograph was hearsay and there was no way to know who had written the statement or cross-examine that person; (2) the statement did not identify any alternative suspect; and (3) the district court did not want to open the door to a parade of witnesses who might have a disagreement with the developer, Pulte Homes. After reviewing the record, we cannot conclude that the district court's ruling was manifestly wrong. Even if the evidence was not hearsay and was relevant, we conclude that the probative value of evidence of general unhappiness with Pulte Homes was substantially outweighed by the danger of confusion of the issues and of misleading the jury. See NRS

48.035(1). Therefore, we conclude that the district court did not err in precluding the photograph.

Third, Hoffman claims that the prosecutor improperly vouched for a witness when it questioned an investigating officer about the progress of the investigation. Hoffman did not raise this objection at trial, and therefore his claim is reviewed for plain error affecting his substantial rights. See Archanian v. State, 122 Nev. 1019, 1031, 145 P.3d 1008, 1017 (2006).

Hoffman's claim is patently without merit. Improper witness "vouching occurs when the prosecution places 'the prestige of the government behind the witness' by providing 'personal assurances of [the] witness's veracity.'" Browning v. State, 120 Nev. 347, 359, 91 P.3d 39, 48 (2004) (quoting U.S. v. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992)) (alteration in original). In this case, the prosecutor asked an investigating detective if, during the investigation, he had formed an opinion about where he thought the potential suspect resided and whether he thought that a red pick-up truck was involved in the crime. Neither of these questions amounted to a personal assurance of the witness's veracity. Therefore, Hoffman fails to demonstrate plain error.

Fourth, Hoffman claims that the prosecution commented on his right to remain silent. Hoffman did not raise this objection at trial, and therefore his claim is reviewed for plain error affecting his substantial rights. See Archa nian, 122 Nev. at 1031, 145 P.3d at 1017. During closing argument the prosecutor stated, "You heard testimony about the way those trees were cut down. The fact of the matter is no one but the

person that cut them can tell us exactly what [way] those trees were sawed into." We conclude that this was not a comment on Hoffman's right to remain silent, and therefore Hoffman fails to demonstrate plain error.

Fifth, Hoffman claims that the district court erred in permitting the State to introduce inadmissible hearsay. Hoffman did not object to this testimony at trial, and therefore his claim is reviewed for plain error affecting his substantial rights. See id. At trial, an investigating detective testified regarding an out of court statement made by Hoffman's wife. However, Hoffman's wife testified at trial regarding her prior statement, and she was subject to cross-examination by the defense. Therefore, even assuming error, Hoffman fails to demonstrate that his substantial rights were affected.

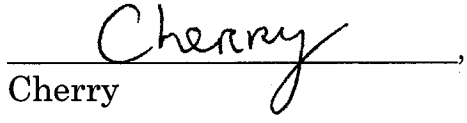
Sixth, Hoffman claims that the district court erred in admitting evidence that was more prejudicial than probative. Specifically, Hoffman complains about the admission of testimony describing the necessity of replacing the cut trees and the cost of that replacement, as well as Pulte Homes' frustration with having trees that had been replaced cut down a second time. Hoffman did not object to the testimony on this ground at trial, and therefore his claim is reviewed for plain error affecting his substantial rights. See id.

The cost of replacing the trees was an element of the offense. See NRS 206.015; NRS 193.155. Therefore, it was not error to admit that evidence. And we conclude that the brief testimony of a Pulte employee that the repeated tree cutting was frustrating does not rise to the level of plain error.

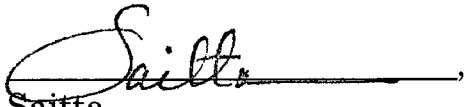
Finally, Hoffman claims that cumulative error warrants reversal of his convictions. We conclude that any error in this case, considered either individually or cumulatively, does not warrant reversal.

Having considered Hoffman's claims and concluded that they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Cherry



_____, J.
Saitta

_____, J.
Gibbons

cc: Hon. Donald M. Mosley, District Judge
Christopher R. Oram
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk