IN THE SUPREME COURT OF THE STATE OF NEVADA

LAVELL ROBERSON, III,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51293

FILED

APR 08 2009

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of grand larceny and one count of burglary. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge. The district court adjudicated appellant Lavell Roberson a habitual criminal and sentenced him to serve 67 to 168 months in prison for each count.

First, Roberson contends that the district court erred by failing to sua sponte declare a mistrial after a witness made a reference to Roberson's criminal history.

Roberson does not cite to any authority in support of his argument on appeal that the district court should have sua sponte declared a mistrial. However, this court has previously held that a trial court is justified in denying a motion for mistrial based on an inadvertent reference to criminal activity when the reference was not "clearly and enduringly prejudicial" and was not solicited by the prosecutor, and evidence of guilt is convincing. See Allen v. State, 99 Nev. 485, 490-91,

665 P.2d 238, 241-42 (1983). Because an "improper reference to criminal history is a violation of due process since it affects the presumption of innocence[, this court] must determine whether the error was harmless beyond a reasonable doubt." Manning v. Warden, 99 Nev. 82, 87, 659 P.2d 847, 850 (1983); see also NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

In this case, Roberson's alibi witness, also his fiancé and codefendant, testified at trial that Roberson had not committed the crimes of which he was accused and that she was exclusively responsible. While responding to questions from the prosecutor regarding a letter that Roberson sent to her in which he wrote, "That's why you have to accept some of this or I'm in trouble," the witness volunteered the following: "[T]hat was said because of the fact that at the time when I had lied to the detective about the situation and everything I didn't know that he had had such a previous record--," whereupon the prosecutor interrupted her with an objection before continuing with another line of questioning. We conclude that any error was harmless beyond a reasonable doubt because the single spontaneous and fleeting comment was not solicited by the prosecutor, and defense counsel did not move for a mistrial or request an admonition to the jury. See Rice v. State, 108 Nev. 43, 44, 824 P.2d 281, 282 (1992). Moreover, convincing evidence of Roberson's guilt was presented at trial. Under these circumstances, we conclude that the district court did not err by failing to sua sponte declare a mistrial.

Second, Roberson contends that the district court erred by failing to give a "constitutionally adequate" jury instruction concerning the presumption of innocence. Specifically, Roberson argues that the

instruction should have stated that a defendant is presumed innocent "unless" the contrary is proved, because the "specific and anticipatory nature" of the word "'until' . . . nullifies the presumption of innocence" and shifts the burden of proof in violation of Roberson's due process right to a fair trial. Roberson concedes he did not object or request an alternatively worded instruction, but contends that the instruction given was constitutionally defective and amounted to reversible plain error. See NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."); see also Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) ("Generally, the failure to clearly object on the record to a jury instruction precludes appellate review."). We disagree.

When conducting a review for plain error, "the burden is on the defendant to show actual prejudice or a miscarriage of justice." Id. Roberson failed to show that the challenged jury instruction was contrary to Nevada law. This court explicitly rejected Roberson's argument in Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005). Here, as in Blake, the challenged instruction's presumption of innocence language tracked exactly the language of NRS 175.191, and reasonable doubt was defined in accordance with NRS 175.211. See id. Also consistent with Blake, the instruction's concluding sentence provided that, "'If you have a reasonable doubt as to the guilt of the Defendant, he is entitled to a verdict of not guilty.'" See id. "The instruction plainly contemplated that guilt might not be proven," and it properly explained the State's burden of proof. Id. Accordingly, we conclude that Roberson failed to demonstrate plain error.

Having considered Roberson's contentions and concluded they are without merit, we

ORDER the judgment of conviction AFFIRMED.

_______________, J.
Cherry

_______________, J.
Saitta

_______________, J.
Gibbons

cc: Eighth Judicial District Court Dept. 15, 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