

IN THE SUPREME COURT OF THE STATE OF NEVADA

MERRY ELLEN WEST A/K/A MERRY
ELLEN HINES A/K/A MERRY ELLEN
STEEN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52484

FILED

APR 16 2010

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

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of burglary, unauthorized signing of a credit or debit transaction, and possession of a credit or debit card without the cardholder's consent. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Appellant Merry Ellen West used a stolen Neiman Marcus account statement and driver's license to purchase \$1,762.81 in merchandise. Because West is a habitual offender, the district court enhanced her sentence to three concurrent sentences of ten years to life.

On appeal, West asserts four primary arguments: (1) the court erroneously instructed the jury, (2) the district court violated her Sixth Amendment right to a fair and impartial jury, (3) the district court improperly admitted evidence tending to prove her criminal intent, and (4) the prosecution improperly displayed her booking photo at trial.¹ Because these arguments lack merit, we affirm.

¹West raises five additional arguments: (1) the district court erred by refusing to allow West eight preemptory juror challenges, (2) the trial
continued on next page . . .

Jury instructions

West raises four jury instruction arguments. “The district court has broad discretion to settle jury instructions, and this court reviews the district court’s decision for an abuse of that discretion or judicial error.” Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” Id. (quoting Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)).

“If a defense theory of the case is supported by some evidence which, if believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes it from the jury’s consideration and constitutes reversible error.” Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). Therefore, “[a] defendant in a criminal case is entitled, upon request, to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it.” Id.; see also Honeycutt v. State, 118 Nev. 660, 669, 56 P.3d 362, 368 (2002), overruled in part on other grounds by Carter v. State, 121 Nev. 759, 121 P.3d 592 (2005).

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court erred by refusing to declare a mistrial after the prosecutor characterized the case as an “identity theft” case, (3) the district court’s habitual offender adjudication violated West’s due process and equal protection rights, (4) the prosecution failed to present sufficient evidence to sustain West’s convictions and (5) cumulative error warrants reversal. We have considered each of these arguments and conclude that they lack merit.

Duty to acquit upon a lack of proof of the charged crimes

First, West argues that the trial court erred by refusing to tender jury instructions reminding jurors of their duty to acquit upon a lack of proof of any element of the charged crimes. In Crawford, we stated that “specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request.” 121 Nev. at 753, 121 P.3d at 588. However, we further explained that a defendant is not entitled to duplicative, misleading, or inaccurate instructions. Id. at 754, 121 P.3d at 589.

Here, West’s proposed jury instructions merely duplicated jury instructions 9-13, 15 and 16. Because West is not entitled to duplicative instructions under Crawford, the district court did not abuse its discretion in rejecting her proposed instructions.

“Two reasonable interpretations” instruction

Second, West requested that the court instruct the jury that if the evidence is subject to two reasonable interpretations, one suggesting guilt and the other suggesting innocence, the jury has a duty to adopt the interpretation leading to innocence. We established in Hooper v. State that it is not error to refuse such an instruction when the jury has been properly instructed on reasonable doubt. 95 Nev. 924, 927, 604 P.2d 115, 117 (1979). Because jury instruction 9 properly instructed the jury on reasonable doubt, West’s claim of error fails.

Permissible inference instruction

Third, West argues that the district court violated her due process rights by instructing the jury that it could infer intent to defraud from the fact West was found in possession of two or more credit cards in another person’s name. This argument is foreclosed by NRS 205.690(3), as

construed in Marshall v. State, 95 Nev. 802, 803-804, 603 P.2d 283, 284 (1979). Because instruction 16 clearly stated that the jury could make the inference but was not required to do so, West's due process challenge to the instruction fails.

Presumption of innocence instruction

Fourth, West argues that the use of the word "until" instead of "unless" in jury instruction 9 improperly suggested that a guilty verdict was inevitable and that, by extension, that the prosecution had or would overcome the presumption of innocence. We rejected this argument in Blake v. State, 121 Nev. 779, 799, 121 P.3d 567, 580 (2005), noting that the instruction follows the language of NRS 175.191. Furthermore, instruction 9 negated the impermissible inference West says it suggests; it specifically admonishes that West was entitled to a not guilty verdict if the jury had a reasonable doubt as to her guilt.

Sixth Amendment right to a fair and impartial jury

West contends that the jury selection process, which draws venire members from DMV registration lists, excludes community members with a lower socioeconomic status. She further asserts that this selection process has a disparate impact on African Americans, Hispanics, and Asians. Williams v. State, 121 Nev. 934, 940, 125 P.3d 627, 631 (2005), articulates a three-part test for establishing a prima facie fair-cross-section violation:

(1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 940, 125 P.3d at 631 (quotations omitted).

Despite West's contention, she fails to cite any record evidence to support her claim of underrepresentation. Even assuming underrepresentation, West does not provide any proof that using DMV registration lists for the venire selection process systematically excludes certain groups. Therefore, West's Sixth Amendment argument fails under Williams.

Evidence of criminal intent

West next argues that the district court improperly admitted evidence of intent. Specifically, West contends that the district court erred in admitting evidence that: (1) the cardholder had been pick-pocketed during a visit to Vegas six weeks before, (2) West had given the officers who arrested her several aliases and (3) West swore at the arresting officers.

We review a district court's decision to admit or exclude evidence at trial for abuse of discretion, and will not reverse absent manifest error. Means v. State, 120 Nev. 1001, 1007-08, 103 P.3d 25, 29 (2004). In Nevada, all relevant evidence is admissible, see NRS 48.025(1), unless its "probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1). Relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Additionally, "[t]he State may present a full and accurate account of the crime, and such evidence is admissible even if it implicates the defendant in the commission of other uncharged acts. However, the 'complete story of the crime' doctrine must be construed narrowly." Bellon

v. State, 121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (interpreting NRS 48.035(3)).

Here, the district court properly determined that these items of evidence were relevant because they had a tendency to show West's intent and allowed the state to "present a full and accurate account of the crime." Id. West does not point to any specific facts in the record that demonstrate prejudice due to admission of this evidence. We therefore conclude that the district court acted within its discretion by admitting these items of evidence.

Booking photo

West finally argues that the prosecution's inadvertent display of her unadmitted booking photo was reversible error. In Browning v. State, we held that a booking photo has "no appreciable prejudicial effect [when] jurors had no reason to assume that it had been taken in any other case but the one for which [the defendant] was being tried." 120 Nev. 347, 358, 91 P.3d 39, 47 (2004). We review the denial of a motion for mistrial for abuse of discretion. Chartier v. State, 124 Nev. ___, ___, 191 P.3d 1182, 1188 (2008).

Here, the district court noted that West wore the same shirt in the photo as she was wearing in other admitted evidence and that the photo was not displayed in profile or with an identifying number. Because the jurors had no reason to assume the photo was unrelated to this case,

we conclude there was no prejudicial effect and the district court did not abuse its discretion in denying the motion for mistrial. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Michael Villani, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk