

IN THE SUPREME COURT OF THE STATE OF NEVADA

DESHON HEREFORD,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52664

**FILED**

**MAY 07 2010**

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 two counts each of conspiracy to commit a crime and burglary while in the possession of a deadly weapon and three counts of robbery with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

Sufficiency of the evidence

Appellant Deshon Hereford contends that insufficient evidence was adduced to support the jury's verdict. This claim lacks merit because the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. \_\_\_, \_\_\_, 192 P.3d 721, 727 (2008). Trial testimony indicated that Hereford and an accomplice stole the cash registers at a Circle K and a Green Valley Grocery on the same night. Hereford took the cash registers while the accomplice threatened the victims with a deadly weapon. Two of the victims identified Hereford out of a photographic lineup and all three identified him at trial. Hereford's fingerprints were recovered from the crime scenes and his confession was

admitted at trial. Surveillance videos of the robberies were also admitted at trial. It was 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. See NRS 193.165(1); NRS 199.480; NRS 200.380(1); NRS 205.060(1), (4); Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).<sup>1</sup>

Motion to suppress confession

Hereford contends that the district court erred by not conducting an evidentiary hearing and denying his motion to suppress his confession. Unlike the scenarios confronted by this court in Somee v. State, 124 Nev. 434, 443, 187 P.3d 152, 158 (2008) and State v. Ruscetta, 123 Nev. 299, 304, 163 P.3d 451, 454-55 (2007), Hereford has failed to demonstrate that he was entitled to an evidentiary hearing because there exists no factual dispute to resolve. Further, we are unable to meaningfully conduct a de novo review of the district court's determination because Hereford did not include a transcript of the challenged interrogation in the record submitted on appeal. See Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005) (we review the district court's factual findings for clear error and its ultimate determination regarding voluntariness de novo); Thomas v. State, 120 Nev. 37, 43 & n.4, 83 P.3d 818, 822 & n.4 (2004) ("Appellant has the ultimate responsibility

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<sup>1</sup>In a related argument, Hereford claims "the investigation failed to uncover potentially exculpatory evidence." Hereford's contention lacks merit. See Randolph v. State, 117 Nev. 970, 987, 36 P.3d 424, 435 (2001) ("In a criminal investigation, police officers generally have no duty to collect all potential evidence.").

to provide this court with ‘portions of the record essential to determination of issues raised in appellant’s appeal.’” (quoting NRAP 30(b)(3)); Greene v. State, 96 Nev. 555, 558, 612 P.2d 686, 688 (1980) (“The burden to make a proper appellate record rests on appellant.”). Therefore, we conclude that Hereford has failed to demonstrate that his contention has merit.

Fingerprint evidence/expert testimony

Hereford contends that the district court erred by denying his motion to exclude fingerprint evidence and the State’s expert witness’ testimony because the print fragments were “unreliable, irrelevant, and lacked proper foundation.” We will not reverse a district court’s decision regarding the admission of expert testimony absent an abuse of discretion. Grey v. State, 124 Nev. 110, 120 n.17, 178 P.3d 154, 161 n.17 (2008); see also NRS 50.275 (expert’s testimony may be admitted if “scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue”); Townsend v. State, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987). We conclude that the district court did not abuse its discretion by allowing the State’s expert witness to testify that print fragments found at the two crime scenes belonged to Hereford. Hereford failed to demonstrate that the methodology used to recover the prints was unreliable or that identification of the prints was irrelevant. Further, defense counsel had an opportunity to cross-examine the State’s expert about the methodology and attack its credibility. See Singleton v. State, 90 Nev. 216, 219, 522 P.2d 1221, 1222-23 (1974) (holding that cross-examination casting doubt on source relied upon by expert was proper).

### Booking photograph

Hereford contends that the district court erred by allowing the State to use his booking photograph along with the caption, "Guilty as Charged," during its opening statement. The photograph was not admitted as evidence and the jury was instructed, prior to deliberations, to consider only the testimony of witnesses, exhibits, and facts admitted or agreed to by counsel. Considered in context, we conclude that the error, if any, was harmless beyond a reasonable doubt in light of the overwhelming evidence of Hereford's guilt. See NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."); McClellan v. State, 124 Nev. 263, 269-70, 182 P.3d 106, 111 (2008); see also Browning v. State, 120 Nev. 347, 358, 91 P.3d 39, 47 (2004) (finding that admission of mug shot "had no appreciable prejudicial effect since jurors had no reason to assume that it had been taken in any other case but the one for which [defendant] was being tried").

### Prior bad act

Hereford contends that the district court erred by failing to give a limiting instruction after sustaining his objection to a reference to an alleged prior bad act by a State witness. Hereford claims that he was denied the "protections" of a hearing pursuant to Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985) and that the testimony violated NRS 48.045(2). We disagree. The prosecutor was seeking relevant information from one of the investigating officers about the two burglaries Hereford was charged with. Even assuming, without concluding, that the officer's testimony could be construed to implicate Hereford in a third burglary, the district court sustained his objection and instructed the prosecutor to ask a more specific question which, when asked, confirmed that he was only

suspected of and charged with involvement in the two. Further, the jury was instructed prior to deliberations to “disregard any evidence to which an objection was sustained by the court.” See Allred v. State, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) (stating that this court presumes that a jury follows the orders and instructions of the district court), clarified on other grounds by Knipes v. State, 124 Nev. \_\_\_, \_\_\_, 192 P.3d 1178, 1183-84 (2008). Therefore, we conclude that the district court did not err.

#### Jury instructions

First, Hereford contends that the district court erred by rejecting his proposed jury instructions on larceny, eyewitness identification, expert testimony, and the voluntariness of a confession. “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); see also Jackson v. State, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001) (“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.”). Hereford has failed to demonstrate that the district court erred by rejecting his proposed instructions and our review of the record on appeal reveals that the district court did not abuse its discretion. Therefore, we conclude that Hereford’s contention is without merit.

Second, Hereford contends that the district court erred by improperly instructing the jury on the “use” of a deadly weapon (instructions 10, 16, and 18) and aiding and abetting (instruction 6). Hereford did not object to instructions 10, 16, and 18, and he has failed to demonstrate reversible plain error entitling him to relief. 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.”); Green v. State, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (when conducting plain error review, “the burden is on the defendant to show actual prejudice or a miscarriage of justice”). And although Hereford objected to instruction 6, he conceded below that when read in conjunction with instruction 7, the necessary language regarding the element of intent was provided. Further, the jury was instructed “to consider all the instructions as a whole and regard each in light of all the others.” See Allred, 120 Nev. at 415, 92 P.3d at 1250. Therefore, we conclude that the district court did not err. See Crawford, 121 Nev. at 748, 121 P.3d at 585; see also Sharma v. State, 118 Nev. 648, 655, 56 P.3d 868, 872 (2002).

#### Prosecutorial misconduct

Hereford contends that the prosecutor committed three instances of misconduct during his rebuttal closing argument. Hereford claims the prosecutor disparaged the defense. See Riley v. State, 107 Nev. 205, 213, 808 P.2d 551, 556 (1991). The district court overruled Hereford’s objection, stating that the prosecutor’s statement was “somewhat of a fair comment.” We agree and conclude that, considered in context, the prosecutor’s comment was not improper. See Knight v. State, 116 Nev. 140, 144-45, 993 P.3d 67, 71 (2000) (“A prosecutor’s comments should be viewed in context, and ‘a criminal conviction is not to be lightly overturned on the basis of a prosecutor’s comments standing alone.’” (quoting United States v. Young, 470 U.S. 1, 11 (1985))).

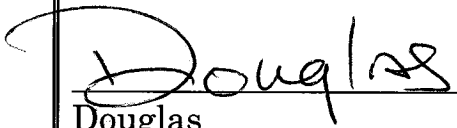
Hereford contends that the prosecutor committed misconduct by misstating the scientific evidence and improperly attributing to him a threatening statement made by his accomplice to one of the victims. Hereford failed to object to the challenged comments and he has failed to


satisfy his burden and demonstrate that he was prejudiced in any way amounting to reversible plain error. See NRS 178.602; Valdez v. State, 124 Nev. \_\_\_, \_\_\_, 196 P.3d 465, 477 (2008).

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

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Hardesty

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Pickering

cc: Eighth Judicial District Court Dept. 15, District Judge  
Clark County Public Defender  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk