IN THE SUPREME COURT OF THE STATE OF NEVADA

JEREMY JAMES SWANSON,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 52749

FILED

JAN 08 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 one count each of attempted grand larceny and malicious destruction of private property. Eighth Judicial District Court, Clark County; Valorie Vega, Judge.

Appellant Jeremy James Swanson claims that the district court erred by denying his motion to suppress pre-arrest statements. A district court's decision to admit or suppress evidence based on an alleged Fifth Amendment violation involves mixed questions of fact and law. Rosky v. State, 121 Nev. 184, 190, 111 P.3d 690, 694 (2005). On appeal, a district court's factual findings supporting its ruling on whether an in-custody interrogation occurred are reviewed for clear error, but its ultimate determination of whether a person was in-custody and thus entitled to a warning on the right against self-incrimination is reviewed de novo. Casteel v. State, 122 Nev. 356, 361, 131 P.3d 1, 4 (2006).

The record does not support Swanson's assertion that his freedom was restrained in a manner similar to formal arrest when he was questioned by police. See State v. Taylor, 114 Nev. 1071, 1081, 968 P.2d 315, 323 (1998) (a person is in-custody when a formal arrest occurs or

when the person's freedom of movement has been restrained to the degree associated with a formal arrest, such that a reasonable person would not feel free to leave); see also Miranda v. Arizona, 384 U.S. 436, 478-79 (1966). Swanson was questioned in the park in front of the patrol car, after he moved to that spot upon police request. Although the police officers' testimony indicated that they likely would not have let Swanson leave the scene during the investigation, they also testified that Swanson was not restrained and was specifically told that he was not under arrest. And while the officers falsely told Swanson that another suspect at the scene had admitted to a crime, such statements have been determined to be "not the functional equivalent of questioning," as they do not "call for nor elicit an incriminating response." Shedelbower v. Estelle, 885 F.2d 570, 573 (9th Cir. 1989). Officer testimony also supported that the only piece of property removed from Swanson's pocket was immediately returned to him. Accordingly, under the totality of the circumstances, Alward v. State, 112 Nev. 141, 154-55, 912 P.2d 243, 252 (1996), overruled on other grounds by Rosky, 121 Nev. 184, 111 P.3d 690, and giving deference to the district court's credibility determinations, State v. Rincon, 122 Nev. 1170, 1177, 147 P.3d 233, 238 (2006), we conclude that the court did not err in denying the suppression motion.

Swanson also claims that insufficient evidence supports his attempted grand larceny conviction because the State did not prove that he attempted to take property worth more than $250. This claim lacks merit because there was sufficient evidence to establish Swanson's guilt beyond a reasonable doubt as determined by a rational trier of fact when viewed in the light most favorable to the State. See McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992); Jackson v. Virginia, 443 U.S. 307,

319 (1979). At trial, a City of Henderson electrician testified that 11 connectors, valued at $10 each, and approximately 940 feet of copper wire, valued at 50 cents per foot, were missing from an electrical box at the Henderson park where Swanson was stopped by police. From this evidence, a rational jury could infer that Swanson attempted to take wire and connectors that belonged to the city of Henderson and that the value of those items was at least $250. See NRS 193.330(1); NRS 205.220(1)(a); NRS 205.251; NRS 205.0831. It is for the jury to determine the weight and credibility to give to conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also McNair, 108 Nev. at 56, 825 P.2d at 573.

Having considered Swanson's contentions and concluded that they lack merit, we

ORDER the judgment of conviction AFFIRMED.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Pickering

cc: Hon. Valorie Vega, District Judge
Robert E. Glennen III
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk